

# Business and Regulatory Impact Assessment

<p style="text-align: center;"><b><u>Title of Proposal</u></b></p> <p>Leases (Automatic Continuation etc.) (Scotland) Bill</p>
<p style="text-align: center;"><b><u>Purpose and intended effect</u></b></p>
<p><b>Background</b></p> <p>Leases of land or buildings (heritable property) are an important and long-standing part of Scotland's society and economy. Heritable property may be let for a variety of different purposes. The standard types of lease which commonly arise in Scotland today include residential, agricultural, crofting, allotment and commercial leases. Historically, leases of all kinds were largely governed by market forces, their terms being freely negotiated between landlords and tenants. Since the late nineteenth century, however, this picture has been substantially altered in the residential and agricultural spheres through the introduction of regulatory measures. Legislation, including the Housing (Scotland) Acts and the Agricultural Holdings (Scotland) Acts, has ensured that developments in residential and agricultural activity have been reflected in the law.</p> <p>By contrast, leases in the commercial sphere remain largely shaped by the pressures of supply and demand. Commercial leases play an essential role across all sectors of the Scottish economy, including retail, finance, manufacturing, distribution, tourism, hospitality and fishery. Huge numbers of businesses rely on let premises in the performance of at least some part of their operation. To give some indication of scale, of the properties in respect of which non-domestic (business) rates are charged, around 44% are occupied by tenants. The rateable value of those let properties amounts to just over £2.8bn, or around 39% of the total rateable value of NDR premises in Scotland (figures as at April 2021, obtained from the Local Government and Analytical Services Division of the Directorate for Local Government and Communities). Clearly, the relationship between landlord and tenant is crucial to commercial life in this country. It is vitally important that the law governing that relationship functions effectively.</p> <p>The current project proposes reform to the law governing how commercial leases may be brought to an end. The Scottish Law Commission's <a href="#">Tenth Programme of Law Reform</a> (published in January 2018) states that:</p> <p style="padding-left: 40px;">"We have been advised by consultees that uncertainties in the current law lead to increased costs and act as a disincentive to investment particularly in the commercial leasing sector."</p> <p style="text-align: right;">(para 2.12)</p> <p>In our <a href="#">Discussion Paper on Aspects of Leases: Termination</a> (published in May 2018), we set out the economic background to the commercial leasing market in Scotland in 2016/17. Because of events which were then only partly understood (namely Brexit), or indeed entirely unforeseen (namely the COVID-19 pandemic), market conditions have since changed considerably. Nevertheless, the data provided in our Discussion Paper remains worthy of note:</p> <p style="padding-left: 40px;">"The Registers of Scotland 10 year Property Market Report shows that in the 10 years to 2016/2017 there were more than 35,000 transactions of commercial property valued</p>

at more than £29 billion. In 2016/2017 the value of commercial property sales was £3.3 billion. Investment transactions totalled £2.8 billion in 2017. Between 2016 and 2017 transactions increased by 39% in Scotland compared to 27% for the UK as a whole. The Fraser of Allander Institute produced an analysis of the commercial property sector from construction and real estate activities which indicated that the sector contributes almost £4.8 billion to Scottish GVA. Such activity, according to the Institute, helps support around 49,000 jobs directly, and a further 43,000 through spill over effects, in Scotland.”

(para 1.4; footnotes omitted)

While the uncertainty precipitated by Brexit and Covid-19 has undoubtedly had a negative impact on the value of investment into commercially let property, the continued importance of the sector to the Scottish economy has been noted:

“Investment in Scottish commercial property fell about 42% to £1.2 billion in 2020 — from £2.074 billion in 2019 — as lockdown measures and economic uncertainty curbed deal-making, but Scotland proved its resilience as the most popular UK destination for overseas investment outside the London area.”

(<https://scottishfinancialreview.com/2021/01/21/scots-commercial-property-deals-fell-42-to-1-2bn/>)

The importance of the sector was underlined by the protective measures taken by the Scottish Government in the midst of the pandemic. The Coronavirus (Scotland) Act 2020 extended the period of time given to tenants to clear monetary debts to their landlords before they could be evicted prematurely for non-payment from 2 to 14 weeks.

#### Tacit relocation

All leases come to an end sooner or later. In Scotland, however, most leases do not come to an end merely because they have reached their agreed expiry date. Instead, our common law applies the doctrine of “tacit relocation” to extend the lease into the future. This doctrine originates from Roman law and is reflected, albeit in differing forms, in many Western legal systems. The underlying rationale is that a tenant who relies upon a property for their livelihood should not be obliged to vacate it unless they are specifically warned by their landlord to do so, and with sufficient notice to allow them to find fresh premises. By the same token, it has come to be reasoned that a landlord who has neither warned a tenant to leave nor received notice of the tenant’s intention to move on should be entitled to assume that the tenant intends to remain and that no new tenant is required. Thus, where neither party gives the required warning (a “notice to quit” in the case of a landlord, or a “notice of intention to quit” in the case of a tenant) and both remain silent (“tacit”), the lease continues (“relocates”) for a further period. This process repeats until either party gives notice in sufficient time before the replacement expiry date.

Further, even where one of the parties has timeously given notice, if the tenant does not vacate and the landlord fails to take reasonable steps to remove them then tacit relocation comes into effect. In this case, the lease is retrospectively extended from its expiry date as if no warning had been given.

It has been made clear to us by consultees that the existing law by which commercial leases are terminated is not fit for modern purposes. In important respects, the current law is:

- (a) uncertain;
- (b) insufficiently accessible; and
- (c) outdated.

In what follows, we will expand upon each of these criticisms, with reference to specific examples.

**(a) The existing law (both at common law and in statute) is uncertain.**

- (i) There is considerable uncertainty as to whether the parties to a lease are permitted to exclude the operation of tacit relocation (in other words, to agree that notice need not be given to bring the lease to an end) or to alter the terms in which notice must be given (e.g. the extent of the warning required). While many leases expressly provide that notice need not be given, the uncertain state of the law means that in practice notice is generally given regardless. However, any tenant who does not (or cannot afford to) take legal advice may not appreciate that this is the case, and that if they neither give nor receive notice then the landlord might yet – despite any contradictory term in the lease – insist on the lease extending.
- (ii) This uncertainty is only exacerbated by the notice provisions contained in the Sheriff Courts (Scotland) Act 1907, the key statute in this area. Remarkably, the drafting of these provisions was criticised almost immediately after they came into force. In one leading textbook, it was stated that:

“It is no unfair criticism to say that these sections [ss 34 to 37 of the 1907 Act] bear evidence of hasty legislation, looking to the state of the law at the time they were enacted, and that the subsequent Agricultural Holdings Act, as to the subjects to which it applies, only added to the perplexity.”

(J Rankine, *A Treatise on the Law of Leases in Scotland* 3<sup>rd</sup> edn (Edinburgh, 1916) at 571)

Much more recently, commenting on section 34 of the 1907 Act, Professors Gretton and Reid have written:

“Countless examples could be given of the poor condition of the statute book, but this is as good an example as any. One of the problems is that the section has not been updated. But even in 1907 it was a disgrace. Why is a provision about the law of leases to be found in a statute about the Sheriff Courts? More fundamentally, what does the section mean? To what extent is it about warrants to remove (which is how it starts off) and to what extent is it about length of notice and tacit relocation? We could carry on in this vein for some time.”

(G L Gretton and K G C Reid, *Conveyancing 2014* (Edinburgh, 2015) at 36-37)

The relationship between the termination provisions in the Act and those at common law remains sufficiently unclear that even now, more than a century after the 1907 Act came into force, a recent example can be cited of parties resorting to litigation at the Court of Session over the length of a warning: *M7 Real Estate v Amazon UK Services Ltd* [2019] CSOH 73.

Such uncertainty costs parties to commercial leases both time and money, and in many cases the financial toll is doubtless passed on to consumers.

**(b) The existing law is insufficiently accessible.**

- (i) The inaccessibility of the current law begins with the expression “tacit relocation” itself. Few understand “relocation” by its literal meaning of “re-letting”. Even fewer will appreciate that the doctrine entails no re-letting as such, but instead merely an extension of an existing lease. Moreover, the adjective “tacit” suggests that absolute silence is required, when in fact a late or even formally deficient notice will result in the continuation of the lease.
- (ii) Furthermore, the legal rules are difficult to find. Some are buried in court decisions, themselves scattered over hundreds of years, some in seventeenth-, eighteenth- and nineteenth-century texts, and others in statutes enacted in 1886 and 1907 respectively. Extracting clear principles to govern modern situations is a time-consuming and challenging exercise. While modern textbooks and law firm websites offer some guidance, none provides a definitive source for practitioners and courts, and for lay tenants and landlords in particular, there remains considerable difficulty in knowing what the law is and where to find it.

**(c) The existing law is outdated by comparison with that of other jurisdictions.**

In the Canadian province of Quebec (whose legal system is similar to Scotland’s), the most recent statement of the corresponding law is from 1991. In France, the law is largely contained in the Commercial Code of 2000, while in the Netherlands it is found in the Civil Code of 1992. The law of England and Wales is in an Act from 1954. No such modern statement of the law in Scotland has been forthcoming.

It is perhaps little surprise, then, that the existing rules are unfit for modern commercial practice. For example, [as highlighted by Boots in response to our Discussion Paper](#), the current statutory minimum period for the giving of notice to terminate a lease (40 days) is wholly inadequate to allow most businesses to relocate to fresh premises:

“Often, even 6 months is not a sufficient period but in our view an extension of the 40 days’ notice period to 6 months would go some way to reflecting the commercial reality of closing and/or relocating a store.”

### **Objective**

As explained in the preceding text, the existing rules governing the termination of commercial leases are (a) uncertain, (b) insufficiently accessible, and (c) outdated. The rules are scattered across a miscellany of mostly antiquated and largely obscure sources, and in some cases are regarded even by legal practitioners as unclear. Moreover, while other jurisdictions have taken steps to modernise their own equivalent regimes, Scots law has lagged behind, and in important respects can no longer be considered fit for the realities of modern commercial practice. Taken together, these three factors are a substantial impediment on the financial and operational efficiency of Scottish businesses. Given the importance of the commercial leasing sector to the Scottish economy, this is clearly an unsatisfactory state of affairs.

Our proposed Bill seeks to resolve these difficulties. It conveniently gathers the legal rules together in one place, providing a “one-stop shop” for practitioners and lay parties alike. Moreover, it does so using modern, accessible language. The term “tacit relocation” will be replaced by the more accurate and self-explanatory “automatic continuation”, while “termination date” is preferred to “ish” (the old Scots term for the expiry date of a lease). Finally, the Bill either clarifies or reforms the existing law in areas where it is beset by

uncertainty or inadequacy. Electronic service of landlords' and tenants' notices will be enabled.

In all of these respects, the law of Scotland with regard to the termination of commercial leases will be brought into the twenty-first century, and will more readily meet the everyday needs of Scottish businesses. Improvements to the law's comprehensibility are only likely to reduce transaction costs (including the need to take expensive legal advice), facilitating greater efficiency for firms across all sectors.

### Rationale for Government intervention

The only practicable means by which to both address the problems and achieve the objectives set out above is the introduction of legislation. This would codify the law of tacit relocation, with suitable reforms, and create a new scheme for notices (of intention) to quit. It would also allow for the repeal or disapplication of other outdated and problematic legislation, including the notice provisions of the Sheriff Courts (Scotland) Act 1907.

Furthermore, legislation provides a vehicle for other, more minor, amendments to the law. In addition to those changes just mentioned, we are proposing to improve the law of irritancy (a remedy which allows a landlord to terminate a lease prematurely following a material breach of contract by the tenant), and to provide clarity as to the treatment of advance rent payments which cover a period falling after a lease has been terminated. Finally, we make recommendations intended to enable the ready termination of a lease where the other party is abroad or has disappeared without leaving a contact address.

### Consultation

#### Within Government

The project is part of the Scottish Law Commission's Tenth 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](#) on Aspects of Leases: Termination (May 2018) and the consultation paper on as draft Leases (Automatic Continuation etc) (Scotland) Bill (December 2021) were sent to colleagues in the Civil Law Reform Unit of the Scottish Government.

#### Public Consultation

Our proposed Bill has been heavily informed by public consultation. In May 2018, we published an extensive [Discussion Paper](#), the responses to which were integral to the formulation of our policy. More recently, in December 2021, we published a [draft Bill](#). In this case, the views of consultees helped us to refine both our policy and the draft provisions implementing it. In addition to these two broad consultative efforts, several targeted events have been staged, ensuring that key stakeholders have had ample opportunity to provide input.

#### Discussion Paper on Aspects of Leases: Termination

Upon publication, our Discussion Paper was circulated to individuals and organisations identified by the Commission as having a potential interest in the topic. It was also published on our website and promoted on Twitter, and was therefore freely available to the general public.

The Discussion Paper sought views on 46 questions. The consultation remained open until September 2018, and 39 responses were received from a wide range of individuals and organisations. These included practitioners, academics and representative groups. The responses are published on our website at <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/proprietary-aspect-of-leases/>.

In addition, the Scottish Law Commission project team met with a number of law firms and other organisations to discuss the project during the consultation period. This gave rise to fuller discussion of the various issues and often a wider range of comments than featured in formal responses. Those comments, where appropriate, have been taken into account in policy formulation. A total of 22 events were held, with approximately 825 attendees.

In early 2020, a review of policy was undertaken. As part of this review, two additional targeted consultations were carried out on particular topics.

- **Codification of tacit relocation:** in September and October 2020, we invited 36 of those who responded to our Discussion Paper (members of our Advisory Group being excluded) to submit views on a proposal to codify the law of tacit relocation with suitable reforms. The 20 responses received were virtually all in favour of codification, which we are duly proposing.
- **The Tenancy of Shops (Scotland) Act 1949:** in August and September 2020, we invited the views of 10 representatives of small retailers and 10 representatives of larger retailers as to whether the 1949 Act should be repealed, reformed or left as it is. We received a total of 8 responses. While there was opposition to repeal, there was no consensus as to whether the Act should be reformed or simply left as it is. Given this lack of consensus, we are proposing no changes in respect of the 1949 Act at this stage.

#### Draft Leases (Automatic Continuation etc.) (Scotland) Bill

In December 2021, we published a [draft Leases \(Automatic Consultation etc.\) \(Scotland\) Bill](#) for consultation, together with a [consultation document](#) and [explanatory notes](#). Upon publication, these were circulated to a range of individuals and organisations identified as having a potential interest in the topic, including all of those who had responded to our original Discussion Paper. Like the Discussion Paper, the Bill consultation was also published on our website and promoted on Twitter, and was therefore freely available to the general public.

The consultation document sought views on nine questions. Comments were welcomed by late January 2022, and 25 responses were received from a wide range of practitioners, academics and representative groups. The responses are available on the Commission's website at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk).

#### **Business**

The SLC has also worked with an expert Advisory Group from the outset of the project, comprised of academics, chartered surveyors and members of the legal profession. After an initial meeting in 2017, a further 5 meetings were held in 2020. The input of the Advisory Group has helped to define the scope of the project and has assisted with policy formulation.

## Options

### Option 1: do not introduce a Bill reforming the law on termination of commercial leases

Under this option the current law would be left in place. Given that the current law is found in the common law (a mixture of legal writings and *ad hoc* case law precedents) and piecemeal statutory provisions, there is no non-legislative way in which meaningful reform could be carried out.

### Option 2: introduce a Bill reforming the law on termination of commercial leases, including the Tenancy of Shops (Scotland) Act 1949 and the doctrine of *confusio*

This was the approach foreshadowed in our Discussion Paper. It would mirror option 4 below (introduction of our draft Bill), but would include additional measures of reform relating to the Tenancy of Shops (Scotland) Act 1949 and the doctrine of *confusio*. Those relating to *confusio* would extend beyond commercial leases and encompass all agricultural and residential leases, already governed by special legislation.

### Option 3: introduce a Bill limited to repealing or disapplying the provisions in the Sheriff Courts (Scotland) Act 1907 which relate to notices (of intention) to quit for commercial leases

This option would repeal or disapply the relevant provisions in the Sheriff Courts (Scotland) Act 1907 – thereby removing the most problematic aspect of the current law – but go no further. The common law of tacit relocation would be left in place.

### Option 4: introduce the Leases (Automatic Continuation etc.) (Scotland) Bill

Option 4 reaches a compromise between options 2 and 3. Our draft Bill proposes to codify the rules of tacit relocation, but does not make provision concerning *confusio* or the Tenancy of Shops (Scotland) Act 1949.

## Sectors and groups affected

Each of the four options outlined would directly affect all parties to commercial leases. For present purposes, this category encompasses all leases which are not already subject to a bespoke statutory regime for termination. Thus, with one exception (option 2, which would entail reforming the law of *confusio* more generally), parties to statutorily regulated residential, agricultural, crofting and allotment leases would not be directly affected.

Parties to commercial leases include a wide array of individuals and businesses. These vary greatly in the size of their operation, their level of resources and their line of work. The owner of a local convenience store is likely to rely on let premises, as is a national or multinational retailer. Less obvious commercial purposes for which land might be let include forestry, fishery, arable and pastoral farming, shooting sports and holiday accommodation.

A range of persons having a role in relation to commercial leases would also be affected by any reforms (or lack thereof). These include the advisers of parties to commercial leases who are engaged in transactions and/or litigation, be they solicitors (including solicitors in England), paralegals, advocates, surveyors or letting agents, as well as dispute resolvers such as judges, sheriffs and arbitrators. Their professional or trade bodies 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.

Under option 4 (introduction of our draft Bill), secured lenders to long-term commercial tenants would be affected, since we are proposing for these parties an improved set of rights.

Business representative groups ought to at least be aware of any changes to the legal framework governing commercial leases, even if their work is not directly affected. These include the Federation of Small Businesses and the Scottish Retail Consortium.

We have concluded that the Bill would not impact upon any person by virtue of their particular religion, belief, age, sexual orientation, gender, race or ethnicity.

## **Benefits**

### **Option 1**

The only identifiable benefit of the “do nothing” approach is that the *status quo* would be maintained. All parties – whether aware of the existing law or not – would simply continue to operate as before. There would be no implementation costs and no period of adaptation, with the attendant expense of retraining practitioners.

### **Option 2**

This option would provide the most comprehensive answer to the deficiencies in the existing law. In addition to bringing all of the benefits which we anticipate would result from the introduction of our draft Bill (option 4 below), option 2 would modernise and clarify the law in relation to the Tenancy of Shops (Scotland) Act 1949 and the doctrine of *confusio*.

### **Option 3**

This option would address the current uncertainty as to the applicability of the notice provisions contained in the 1907 Act to commercial leases. Given that these provisions have long been subject to widespread criticism from the legal community, their repeal or disapplication could be expected to attract broad support.

### **Option 4**

Introduction of our draft Bill would, to a significant extent, remedy the three principal deficiencies we have identified in the existing law. These are that the existing law is, in important respects, (a) uncertain, (b) insufficiently accessible, and (c) outdated. At the same time, our proposed scheme avoids making recommendations in areas where further consultation is required.

#### *Greater certainty*

Our draft Bill would cure much of the uncertainty which pervades the existing law (including with regard to the 1907 Act) through the introduction of clear, modern statutory provisions. Parties to a commercial lease would be given a far greater understanding of how it will operate, and conclusive answers to important questions such as whether they may validly contract out of the need to give notice. Fewer disputes ought to arise, reducing the need for recourse to court proceedings.

Similarly, the draft Bill provides for a presumed date of entry and duration of a lease to cover situations in which it has been lost or was never committed to writing. It also proposes to establish a statutory summary court procedure to allow a party to obtain declarator as to the date of entry. Measures such as these ought to help avoid the need for lengthy, costly court proceedings.

#### *Greater accessibility*

Codifying and renaming the law of tacit relocation would raise its profile and promote its understanding among both legal professionals and lay persons. For the first time, all of the legal rules in this area would be brought together in one place, making it easier for all

interested parties to grasp how a commercial lease may be terminated and the consequences of failing to give notice.

#### *Modernisation*

In several respects, our draft Bill would bring the law in line with the realities of modern commercial practice. For instance, responses to our Discussion Paper indicate that parties in Scotland would benefit from having the flexibility to contract out of the need to give notice in order to prevent a lease from extending beyond its expiry date. In England and Wales, parties are permitted to opt out of this requirement, though the procedure is complex. In many other modern legal systems (e.g. Germany), notice need not be given at all unless parties specifically opt to require this.

Additionally, the draft Bill provides for a longer statutory default minimum notice period, affording parties a more appropriate period of time in which to find fresh premises or a new tenant. It also widens the available methods for service of pre-irritancy warning notices.

### **Costs**

#### Option 1

As noted under “Benefits” above, the “do nothing” approach would incur no immediate implementation costs, and would avoid the expenditure associated with retraining practitioners. This is, however, short-sighted. It disregards the deficiencies in the existing law (set out in detail under “Background” above) and the systemic costs its retention would perpetuate. The uncertain, inaccessible and outdated nature of the current rules leads to increased costs and acts as a disincentive to investment. Moreover, these difficulties are likely disproportionately to affect parties with lesser resources, for whom the means to obtain professional advice may not be available.

#### Option 2

In consulting both our Advisory Group and a sample of those most likely to be affected, it has become clear to us that further work is necessary to come up with effective law reform proposals in relation to the Tenancy of Shops (Scotland) Act 1949 and the doctrine of *confusio* which would command a consensus. Due to constraints on time and resources, it has not been possible to carry out this work within the scope of the current project. The inclusion of recommendations for which widespread support cannot be evidenced would be detrimental to the draft Bill’s credibility as a law reform measure, and might ultimately result in an unsatisfactory legislative framework.

Given that option 2 proposes the most extensive programme of reform, its implementation would likely give rise to the lengthiest period of adaptation for those directly affected, and incur the most substantial retraining costs for practitioners.

#### Option 3

Simply repealing the relevant provisions in the Sheriff Courts (Scotland) Act 1907 (or disapplying those provisions in relation to commercial leases) would fail to address the problems of uncertainty, inaccessibility and antiquation which afflict the law more broadly, since (even if legislation was to set out new styles of notice) it would leave the common law of tacit relocation in place. To address these problems only in part would be a missed opportunity, when a far more comprehensive programme of reform is required.

Of the options for reform under consideration, option 3 offers the least benefit, and might in fact create further difficulties. Were the notice provisions in the 1907 Act to be repealed, with no new law enacted, it is not clear that the common law which the 1907 Act replaced

would necessarily revive. In the event that it did not, the resulting legal vacuum would make for a clearly unsatisfactory position.

Implementation of option 3 would give rise to a period of adaptation for those directly affected and incur some retraining costs for practitioners (though given the much more limited nature of the proposed reforms, any implementation costs could be expected to be significantly less burdensome than those attaching to options 2 and 4).

#### Option 4

The introduction of our draft Bill would give rise to a period of adaptation for those directly affected, and incur some retraining costs for practitioners. Given, however, that parties to commercial leases themselves could be expected to find and understand the new law more easily, it is likely that any implementation costs would be at least partly offset by reduced spending on professional advice.

#### **Scottish Firms Impact Test**

No Scottish Firms Impact Test was carried out.

#### **Competition Assessment**

We do not anticipate that the Bill, if implemented, would have any impact on competition within Scotland. To the extent that its provisions are likely to benefit parties to commercial leases, as well as a range of third parties (including legal practitioners, agents and commercial mortgage lenders), none of these ought to benefit disproportionately.

#### **Consumer Assessment**

We do not anticipate that the Bill, if passed, would have any impact on consumers within Scotland. Tenants or lessors of certain student lettings, holiday lettings or shooting or fishing rights are consumers whose leases are covered by the Bill. The Bill does not alter their rights or abilities to enforce such rights under those leases. Through codification of those rights the Bill clarifies them e.g. by making it clear that consumers can leave or cease to exercise such rights without requiring to give notice to the landlord or lessor. The provisions of the Bill should have no effect on consumer goods or services.

#### **Test run of business forms**

The Bill does not propose to introduce any new business forms.

#### **Digital Impact Test**

Under our draft Bill, parties to commercial leases are permitted to give notice by sending an electronic message to an electronic address or other electronic “post-box” such as a social media account. The permissibility of electronic service should depend upon the consent of the other party to the lease, whether express or implied (from their conduct). This is a departure from the broader position under section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, which demands that the prior agreement of the recipient is obtained in writing before a document may be served electronically. Our proposal aligns

instead with a number of leading modern codes from across the Commonwealth and the United States of America. Importantly, “electronic address” is broadly defined as “any address or number used for the purposes of sending or receiving documents or information by electronic means”, with e-mail addresses and fax numbers supplied merely as non-exhaustive examples. In this way, the Bill’s treatment of electronic communications is future-proofed, with allowance made for the development of new and as-yet-unforeseen modes of transmitting information.

### **Legal Aid Impact Test**

Whilst any new law may be such that parties seeking to rely on it require professional advice (as is the case with any existing law), we do not anticipate that our proposed reforms would result in any additional demand for legal aid. Indeed, by introducing a clearer and more readily accessible set of rules to govern the termination of commercial leases, implementation of our draft Bill could be expected to *reduce* the need for reliance upon legal advice and assistance or civil legal aid for any individual affected by a termination of a lease covered by the Bill, thus potentially alleviating pressure on the legal aid budget. Notably, our Bill proposes to establish a new summary sheriff court procedure to enable the obtaining of a declarator as to the date of entry under a lease (for the purpose of determining its termination date) without the need for lengthy, costly proceedings.

### **Enforcement, sanctions and monitoring**

The Bill does not require public enforcement and imposes no sanctions. Any disputes concerning the provisions of the Bill would be resolved by litigation or other dispute resolution processes between the affected parties. In the circumstances, no ongoing public monitoring of the provisions is necessary.

### **Implementation and delivery plan**

If passed by the Scottish Parliament, the Bill as drafted would come into force six months after Royal Assent.

### **Post-implementation review**

The Scottish Law Commission, in accordance with its duty under section 3(1) of the Law Commissions Act 1965, will endeavour to stay informed of the Bill’s reception by the legal sector and the wider business community. We anticipate 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.

## Summary and recommendation

### **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	Maintains status quo: no implementation costs; no period of adaptation; no cost of retraining practitioners.	Fails to address deficiencies in existing law which lead to increased costs and act as a disincentive to investment.
2	Offers most comprehensive answer to deficiencies in existing law.	Lack of consensus for reform in relation to Tenancy of Shops (Scotland) Act 1949 and <i>confusio</i> detrimental to credibility of Bill.  Longest period of adaptation for those directly affected; most substantial retraining costs for practitioners.
3	Addresses uncertainty arising under Sheriff Courts (Scotland) Act 1907; broad support from legal community likely.	Fails to address deficiencies in existing law which lead to increased costs and act as a disincentive to investment.  Potential legal vacuum upon repeal of 1907 Act.  Implementation costs; period of adaptation; cost of retraining practitioners.
4	Remedies three principal deficiencies in existing law.  (a) Greater certainty: introduces clear statutory provisions; gives parties greater understanding of how commercial leases operate; fewer disputes ought to arise; reduced need for recourse to costly legal advice and lengthy court proceedings.  (b) Greater accessibility: brings relevant legal rules together in one place; raises profile of law;	Implementation costs; period of adaptation; cost of retraining practitioners.

	<p>promotes understanding among both legal professionals and lay persons.</p> <p>(c) Modernisation: modern terminology; law brought in line with realities of modern commercial practice; greater flexibility (e.g. to contract out of automatic continuation); affords parties more appropriate period to find fresh premises; widens available methods for serving irritancy-related notices.</p> <p>Avoids making recommendations in areas requiring further consultation.</p> <p>Implementation costs likely to be at least partly offset by reduced spending on professional advice.</p>	
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#### Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:**

**Lady Paton, Chair, Scottish Law Commission**

**Date: 28 September 2022**