

23 May 2018



Dear Consultee

**DISCUSSION PAPER ON ASPECTS OF LEASES: TERMINATION  
(DISCUSSION PAPER No 165)**

We invite comment on the above mentioned Discussion Paper which has been published today. The paper is available on our website at <https://www.scotlawcom.gov.uk/law-reform/consultations/>, together with a news release.

The Discussion Paper focuses mainly on commercial leases and addresses various different challenges all relating to the termination of such leases. Representations have been made to us over a number of years that the law governing the termination of leases is problematic; the fact that commercial property not only contributes a significant amount to Scotland's economy but also provides a great deal of direct and indirect employment means that it would be highly beneficial to promote improvements.

The Paper seeks consultees' views on a number of topics:

- **Tacit relocation**  
Although this doctrine forms part of a number of legal systems (and derives from Roman law), it operates in a unique way in Scotland. In particular it can catch some tenants out, especially small ones who do not have ready access to legal advice, and leave them vulnerable to having to meet their lease obligations for an unexpected additional year.
- **Notices to quit**  
This topic has close links with tacit relocation, but also extends wider. The current legal requirements are unclear and therefore do not meet the needs of modern business practice. We ask for views on that and also a range of other matters, including whether a standard form of notice to quit would be advantageous.
- **Apportionment of rent**  
A recent Supreme Court decision has highlighted an issue regarding recovery of rent which has been over paid. We consider the applicability of this decision to Scotland and whether reform of the Apportionment Act 1870 would be desirable.
- **The Tenancy of Shops (Scotland) Act 1949**  
The main question here is whether the Act, which is almost 70 years old and was designed to deal with the situation in the aftermath of World War II, remains relevant or should be repealed.
- **Irritancy**  
The Commission considered this topic about 15 years ago in our Report on Irritancy in Leases of Land (SLC No 191, 2003). The Report has not been implemented and, given the time that



has elapsed, we think that a fresh consultation is justified. We therefore seek views on whether reform is desirable.

- *Confusio*

*Confusio* operates when the interests of the creditor and of the debtor in respect of an obligation (including one which can give rise to real rights) become exercisable by the same person. The application of this doctrine is not limited to commercial leases; it applies to all types of lease. We have been told by practitioners that it can give rise to a number of problems in practice, not least because of a lack of clarity and consensus as to its operation. We therefore ask whether a clear statement of the law on *confusio* and leases would be beneficial.

Consultation is critical in all our law reform projects to ensure that the final recommendations contained in our report would, if implemented, result in law which is just, principled, responsive and easy to understand. We would therefore be grateful to receive your views on any or all of the proposals in this Discussion Paper; they will be fully considered and analysed in the course of reaching our final conclusions. Even if you agree with our proposals but do not wish to make any further comments, a brief note to that effect would be most helpful as an indication that our proposals are on the right lines.

Where possible, we would prefer the electronic submission of comments. For example, you can use the downloadable electronic response form for this Discussion Paper on our website at <http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/2010-present/>. The MS Word form has a questionnaire format which allows you to comment - briefly or at length - on any of the paper's proposals which interest you. The form can be downloaded and emailed to us at [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk), as can comments composed in other electronic formats. Alternatively, you may prefer to send your comments on the Discussion Paper by using the general comments form to be found on the website Contact us page (<http://www.scotlawcom.gov.uk/contact-us>). Please note that the consultation process for this project will conclude on **14 September 2018**; accordingly, we would be grateful if comments were submitted by then.

**PLEASE NOTE THAT** information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may also (i) publish responses on our website (either in full or in some other way such as re formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

More information about the work of the Commission can be found on our website at <https://www.scotlawcom.gov.uk/>. Finally, should you wish to offer any comments on the way in which we conduct our consultation exercises, we would be pleased to hear from you.

Yours faithfully

**MALCOLM McMILLAN**  
Chief Executive