

DISCUSSION PAPER ON ASPECTS OF LEASES: TENANCY OF SHOPS (SCOTLAND) ACT 1949

EXECUTIVE SUMMARY



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Introduction

1.1 The Scottish Law Commission is an independent statutory body whose role is to recommend reforms to improve, simplify and update the law of Scotland. The Commission is currently conducting a review of aspects of the law relating to leases of retail, food and drink hospitality, hair and beauty, and wholesale premises. As part of this review, on 30 April 2024 the Commission published a Discussion Paper on the Tenancy of Shops (Scotland) Act 1949 (“the 1949 Act”). It sets out the present law and puts forward various reform proposals for comment and criticism.

1.2 The Discussion Paper should be of interest to all those in the Scottish retail, food and drink, hospitality, hair and beauty, and wholesale sectors who have leases of commercial premises. The Commission wishes to obtain the views of those directly involved in such leases, including tenants and landlords. **Responses to the Discussion Paper should be submitted by 31 July 2024.**

1.3 Details of how to respond are set out in the Discussion Paper and on the Aspects of Leases – Tenancy of Shops project page on the Scottish Law Commission website: <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/proprietary-aspect-of-leases/>.

What rights do retail, food and drink, hospitality, hair and beauty, and wholesale tenants have when their lease ends?

1.4 The current law in this area is in the 1949 Act. Under it, a “shop” includes: premises for carrying on a retail business; premises for the sale of alcohol; hairdressing and barbering premises; wholesale premises; and warehouses.

1.5 Typically if the parties are unable to reach agreement on renewal of the lease, the tenant receives notice to quit from the landlord. To be effective the notice must be received at least 40 clear days before the end of the lease. Once the notice is received, the Act allows the tenant of a shop to apply to the sheriff court for a one-year renewal of the lease. The landlord can oppose the application. If “it is reasonable in all the circumstances” the court will renew the lease on terms which it considers reasonable. Otherwise, the expiry date continues to apply. The successful tenant can seek further renewals of one year from each anniversary of the original expiry date.

Background to review

1.6 The 1949 Act originates from the post-war years of the late 1940s. Originally, it was intended to be a temporary measure to provide relief for small shopkeepers who were unable to find alternative premises owing to the shortage of retail premises at that time. The Act was made permanent in 1964, against the background of urban development and modernisation, and a concern that rents might be unaffordable for shopkeepers. The landscape of the High Street and shopping patterns in general have changed vastly since the 1960s. For that reason alone, the Act requires to be revisited. In addition, we have been told by lawyers and by

tenants' and landlords' representatives that use of the Act is now rare and that, even if the Act is used, there are various difficulties with it.

1.7 We looked at the 1949 Act in both our *Discussion Paper on Aspects of Leases: Termination* (Discussion Paper No 165, 2018)¹ and our *Report on Aspects of Leases: Termination* (Scot Law Com No 260, 2022).² However, there was no clear consensus as to the way forward.

1.8 As a result, the Commission embarked on this comprehensive review of the 1949 Act and the future law that should apply at the end of leases of premises to retail, food and drink, hair and beauty, and other relevant business tenants.

Problems with the current law

1.9 The 1949 Act has been criticised for various reasons, including the following:

- the Act is no longer necessary given current market conditions;
- there is no need for the law on the expiry of shop leases to differ from that for offices and industrial units;
- the Act does not set out its aims and so is unclear as to its purpose;
- the “reasonableness” test the court has to apply in deciding whether to renew a lease is vague and, as a result, lawyers have difficulty advising clients on the likely outcome of renewal applications;
- making the application to the court can be costly and delay clarification on whether renewal will be available, with parties being unable to plan confidently for the future;
- the threat of applying to the court unduly favours sitting tenants that are national or multi-national retailers in renewal negotiations with their landlords, prejudicing the landlords' ability to let the premises to other tenants;
- it is unclear whether certain types of non-retail premises are a “shop” under the Act.

Our Discussion Paper explores these and other criticisms.

Issues for consideration

1.10 The Discussion Paper is divided into eight chapters. Following the introductory chapter, Chapter 2 explores the interesting historical background behind the 1949 Act. Chapter 3 outlines how the 1949 Act operates in practice, identifies and discusses issues with it, and asks whether it should be retained in its unamended form. Proposals to address the issues are fully discussed in Chapters 4 to 6; questions inviting consultees' views are asked throughout each of these chapters. Chapter 7 summarises the Paper and presents the options

¹ Available at: https://www.scotlawcom.gov.uk/files/4215/2699/8107/Discussion_Paper_on_Aspects_of_Leases_-_Termination_DP_No_165.pdf.

² Available at: https://www.scotlawcom.gov.uk/files/2616/6539/5049/Report_on_Aspects_of_Leases_-_Termination_Report_No_260.pdf.

for replacement, repeal, reformation, or retention of the 1949 Act in a flow chart. Chapter 8 lists all the questions posed in the previous Chapters.

1.11 The main issues considered in Chapters 4 to 6 are summarised below.

Chapter 4 – Separate Legal Regime for Retail, Food and Drink, Hair and Beauty Tenants?

1.12 Chapter 4 considers the question of whether in principle special legal rules should apply to leases of retail and other premises which are currently covered by the 1949 Act. It looks at the arguments in favour of special provision and the counter-arguments in favour of a single set of legal rules for all commercial premises. Finally, assuming special rules be thought necessary for leases for certain types of business, it canvasses what those types of business should be.

Chapter 5 – Notice-Based Option

1.13 Chapter 5 assumes that special rules for retail and certain other premises remain desirable. It puts forward the option of replacing the 1949 Act with a non-court-based scheme of a six-month mandatory notice to quit. The aim of this would be to ensure that a tenant of such premises has a reasonable period of time to find suitable alternative premises. The Chapter explores various aspects of the scheme, such as: the period of notice; the continuation of the lease if notice is not given on time; and an option given to the tenant to end the continuation early if, for example, they have already found suitable alternative premises.

Chapter 6 – Reforming the 1949 Act?

1.14 As an alternative to the scheme in Chapter 5, Chapter 6 presents a package of proposals for reforming the 1949 Act in order to remedy the issues with it that were identified and discussed in Chapter 3. The proposals are wide-ranging and cover various aspects of the Act. This comprehensive coverage is necessary as the correct combination of reform measures will only become clear once consultation responses clarify stakeholders' views on the current issues and the purpose of a reformed 1949 Act.

1.15 Recognising the lack of clarity within the Act as to its aims, the Chapter proposes the innovation of a “statutory statement of objects”. This would inform sheriffs on when renewal is or is not reasonable. In addition, a list of “disregards” is proposed in order to direct sheriffs as to which factors (such as the public interest) should not be taken in account in determining reasonableness. It is also proposed to clarify the circumstances, such as non-payment of rent, where the landlord's interests are so important as to require mandatory refusal of the application.

1.16 In order to realise the Act's original intention in protecting small retailers, the Chapter proposes a “gateway test”, which would seek to restrict the Act's application to “small tenants” by providing that applications may only be made by tenants whose businesses operate below certain thresholds with respect to annual turnover, net assets, and number of employees.

1.17 Finally, the Chapter proposes a number of refinements as to how applications should be made and also concerning certain aspects of court procedure. These include obliging tenants to make a formal proposal for mediation to the landlord as a pre-condition to any entitlement to make an application under the reformed Act.

Consultation period

1.18 The Commission is keen to hear from everyone with an interest in the issues raised in the Discussion Paper. Comments on all or some of the questions raised can be made until **31 July 2024**, and they will help shape the recommendations to be made in our subsequent Report. A response form can be found on our Discussion Papers & Consultative Memoranda page at: [Scottish Law Commission :: Current consultations \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk/current-consultations).

1.19 Further information can be obtained by contacting the project manager, Julie Bain, using the following contact details. Address: Scottish Law Commission, Parliament House, 11 Parliament Square, Edinburgh, EH1 1RQ. Telephone: 0131 244 6654. Email: info@scotlawcom.gov.uk.