

**RESPONSE FORM**

**DISCUSSION PAPER ON ASPECTS OF LEASES: TERMINATION**

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk). Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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# Summary of Proposals

1. Do consultees consider that tacit relocation should be dis-applied in relation to commercial leases?

(Paragraph 2.49)

## Comments on Proposal 1

Yes.

Scots law should be based on contractual terms. Tacit relocation seems to fly in the face of that.

Tacit relocating creates complexity, uncertainty and ultimately expense. It requires notices to be served and there is risk involved for the parties that elect to serve notices themselves without legal advice and legal profession in ensuring that notices are correct. It therefore generally requires that parties to a lease have taken legal advice; in the vast majority of leases are entered into by tenants (in particular) without the benefit of legal advice.

2. If tacit relocation is dis-applied from commercial leases, should the parties to a commercial lease have the right to opt in to tacit relocation?

(Paragraph 2.49)

## Comments on Proposal 2

Yes- provided that the “opt-in” forms part of the lease itself and is clearly expressed. If parties to a commercial lease want to provide a mechanism for the lease continuing they should expressly say so in their contract.

3. In the event that consultees consider that tacit relocation should be dis-applied from commercial leases, do consultees consider that a statutory scheme should be put in place to regulate what happens at the end of a fixed term lease if the parties have failed to opt into the current doctrine of tacit relocation but act as though the lease is continuing?

(Paragraph 2.50)

## Comments on Proposal 3

In the event that tacit relocation is not “opted-in” and (per the parties’ actions) the lease appears to be continuing then we do agree that there should be a default to clarify the position but would suggest that e.g. landlords are required to narrate that default position in the lease (although this very much appears to be tacit relocation by another route. Our main concern is that parties are not currently generally aware of tacit relocation and provided

there is awareness- i.e. by being narrated in the lease- then most concerns should be addressed).

4. Should parties to a commercial lease have the right to contract out of tacit relocation?

(Paragraph 2.52)

**Comments on Proposal 4**

Yes, there is no reason why parties should not be able to opt-out of tacit relocation.

5. If parties to a commercial lease contract out of tacit relocation, and make no provision for what happens at the end of the lease, do consultees consider that tacit relocation should revive as the default situation if the parties act as if the lease was continuing after the termination date?

(Paragraph 2.52)

**Comments on Proposal 5**

Yes- as at answer 3 above.

6. Do consultees agree that the provisions of the 1907 Act should no longer regulate the giving of notice to quit in relation to the termination of commercial leases?

(Paragraph 3.30)

**Comments on Proposal 6**

Yes. The 1907 Act is confusing and arguably no longer fit for purpose.

7. Should notices to quit for commercial leases always be in writing?

(Paragraph 4.4)

**Comments on Proposal 7**

Yes, to include email communication. This removes any confusion from 'he said she said' when it comes to 'giving notice' orally.

8. Should the content of the notice be the same for both landlords and tenants?

(Paragraph 4.5)

**Comments on Proposal 8**

Yes – if it were different for either party this would unnecessarily cause confusion.

9. Do consultees wish to have a prescribed standard form of notice?

(Paragraph 4.7)

**Comments on Proposal 9**

A prescribed form or at least a list of essential requirements of a notice would be helpful; with a “substantially equivalent” proviso in the case of minor discrepancies from e.g. the prescribed form and list.

10. Would consultees prefer that statute should specify the essential requirements of a valid notice to quit rather than prescribing a standard form?

(Paragraph 4.7)

**Comments on Proposal 10**

Either would be helpful – as above. We do consider that great care needs to be taken around the framing of the 'essential requirements'. Trivial errors of a kind which would not confuse the reasonable recipient should not invalidate a notice (as is the position under the common law at present). Otherwise these essential requirements will inevitably become very fertile ground for litigation.

11. Do consultees agree that any notice given should contain the following:

- (a) the name and address of the party giving the notice;
- (b) a description of the leased property;
- (c) the date upon which the tenancy comes to an end; and
- (d) wording to the effect that the party giving the notice intends to bring the commercial lease to an end?

(Paragraph 4.8)

**Comments on Proposal 11**

Yes, though in respect of (a) it should be the party with the rights under the lease not the agent physically giving the notice and; (d) we would suggest that ‘intends’ causes confusion and that ‘is bringing’ or words to that effect are more appropriate.

12. Do consultees consider that one of the essential requirements should be a reference to the commercial lease itself?

(Paragraph 4.8)

**Comments on Proposal 12**

Yes.

13. Do consultees consider that any other content is essential?

(Paragraph 4.8)

**Comments on Proposal 13**

No.

14. Do consultees agree that if the notice is given by an agent, the notice should contain the name and address of the agent and the name and address of the party on whose behalf it is given?

(Paragraph 4.9)

**Comments on Proposal 14**

See answer to 11.

15. Do consultees consider that the commonly used period of notice of 40 days is a sufficient period of notice and should remain the minimum default period of notice?

(paragraph 4.21)

**Comments on Proposal 15**

40 days is not sufficient but it is hard to say what might be as it will depend on the terms and length of the lease itself. Certainly no less than 40 days – perhaps 2/3 months should be a minimum; with some of our membership suggesting a strong preference for 12 weeks.

16. If consultees do not consider a period of 40 days' notice to be sufficient, then what do consultees consider would be an appropriate period of notice for commercial leases?

(Paragraph 4.21)

**Comments on Proposal 16**

2/3 months (12 weeks) see answer to 15.

17. Do consultees consider that any prescribed minimum period of notice to quit for a commercial lease should apply irrespective of the form of any court proceedings which may be adopted?

(Paragraph 4.21)

**Comments on Proposal 17**

Yes.

18. Do consultees agree that every period in a notice to quit for commercial leases should be calculated by reference only to the period intervening between the date of the giving of the notice and the date on which it is to take effect?

(Paragraph 4.22)

**Comments on Proposal 18**

Yes.

19. Do consultees consider that it is necessary to have a statutory statement to the effect that any notice period will be construed as a period of clear days?

(Paragraph 4.23)

**Comments on Proposal 19**

Yes a clear statement should be made.

20. In the context of the rules for giving notice, do consultees consider that it is appropriate to differentiate between leases of one year or more and those of less than one year?

(Paragraph 4.26)

**Comments on Proposal 20**

Yes. Some of our membership considered that 1 month's notice would be appropriate;

others considered that no notice period at all would be required.

21. Would consultees prefer the differentiation to be at a different juncture, for example at the end of two or even three years?

(paragraph 4.26)

**Comments on Proposal 21**

No.

22. Do consultees consider that the same rules should apply irrespective of the extent of the property concerned?

(Paragraph 4.27)

**Comments on Proposal 22**

Yes.

23. Do consultees favour notices to quit which would apply to all commercial leases irrespective of the size and type of property and irrespective of the duration of the lease?

(Paragraph 4.28)

**Comments on Proposal 23**

Yes (though less notice for a lease of less than one year).

24. If there are to be provisions which apply equally to all commercial leases:

(a) what would be the preferred minimum default period for notice?

(b) for leases with a duration of less than the default period, do consultees consider that the period of notice should be one half of the length of the lease or some other fraction thereof?

(Paragraph 4.28)

**Comments on Proposal 24**

- (a) See answer 15 & 20.  
(b) 1 month.

25. Do consultees consider that in cases where a date of termination is unknown, but the date of entry is known, there should be a statutory presumption to the effect that the lease is implied to be for a year, or do consultees consider that the existing common law presumption is sufficient?

(Paragraph 4.29)

**Comments on Proposal 25**

A statutory presumption of one year is sufficient.

26. Do consultees consider that in cases where the date of entry is unknown there should be a statutory presumption of 28 May as the date of entry, or some other date?

(Paragraph 4.29)

**Comments on Proposal 26**

28 May seems appropriate.

27. Do consultees consider that notices exercising an option to break a lease before its natural termination should be required to conform to the same default rules as notices to quit?

(Paragraph 4.30)

**Comments on Proposal 27**

Views on this are divided; part of our membership consider that the same default rules should apply for all whilst others consider it should be up to the parties contracting to set their own terms for break notices.

28. Do consultees consider it necessary for there to be a statutory statement to the effect that a notice to quit may only be withdrawn with the consent of both parties?

(Paragraph 4.31)

**Comments on Proposal 28**

Yes, a notice to quit should be capable of being withdrawn and it should only be competent with the written consent of both parties.



29. Do consultees consider that parties should be entitled to contract out of the provisions to agree a longer period of notice?

(Paragraph 4.35)

**Comments on Proposal 29**

Yes.

30. Do consultees agree that parties should be able to contract out of the provisions to agree a shorter period of notice?

(Paragraph 4.35)

**Comments on Proposal 30**

Whilst there may be a public interest in a minimum period, the interests of freedom of contract would suggest that contracting out should be possible. We consider that freedom of contract (and the public interest in that) should prevail.

31. Do consultees consider that any contracting out of the provisions to agree a shorter period should only be permitted after the commencement of the lease and after the tenant has taken possession of the leased property?

(Paragraph 4.35)

**Comments on Proposal 31**

Yes but it cannot be allowed that parties enter into an agreement whereby they are compelled to agree to vary the notice terms one the lease has started to circumvent the statutory protections.

32. Do consultees agree that contracting out agreements should always be in writing?

(Paragraph 4.35)

**Comments on Proposal 32**

Yes to include email.

33. Are consultees aware of any problems with service of notices in commercial leases in situations with multiple tenants or multiple landlords that might require the provision of specific legal rules?

(Paragraph 4.37)

**Comments on Proposal 33**

N/A

34. Are consultees aware of concerns with service of notices on sub-tenants that might require the provision of specific legal rules?

(Paragraph 4.38)

**Comments on Proposal 34**

N/A

35. Do consultees consider that the service of notices to quit should be governed by the 2010 Act?

(paragraph 4.39)

**Comments on Proposal 35**

Yes.

36. Do consultees consider that notices should be capable of being served in any other ways?

(Paragraph 4.39)

**Comments on Proposal 36**

Yes to include sheriff officer.

37. Do consultees agree that, unless provided for in the terms of the lease, Scots law does not provide for the recovery of rent paid in advance in circumstances where the lease is terminated early?

(Paragraph 5.26)

**Comments on Proposal 37**

The law here is unclear and clarification would certainly be welcomed. The association is of the view that a tenant can, depending on the wording of a lease, apportion to the termination date (e.g. in circumstances where there is an unconditional tenant break and it is clear to both parties at the quarter date immediately proceeding the break that the lease will terminate during the quarter (as per Lord Neuberger in his obiter comments (at para 35) in

Marks & Spencer v BNP Parabis)).

We do agree that reform is needed in this area to clarify that a tenant need only pay rent for the duration of a lease.

38. Do consultees think that an amendment to the 1870 Act to address the situation identified above would be desirable?

(Paragraph 5.29)

**Comments on Proposal 38**

Yes. Rent paid in advance should be capable of recovery if the lease is terminated early. The 1870 should be amended accordingly.

39. If consultees think that an amendment would be desirable, do consultees have views on whether it would be desirable for the law of Scotland in this respect to differ from the rest of the United Kingdom?

(Paragraph 5.29)

**Comments on Proposal 39**

The position should be that a tenant is only liable for rent during the lease period.

40. Should the Tenancy of Shops (Scotland) Act 1949 be repealed?

(Paragraph 6.28)

**Comments on Proposal 40**

Yes it is not functioning in the way in which it was intended/ or generally being used by the class of tenants for which it was intended (i.e. small, independent retailers and not large, national entities).

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

**Comments on Proposal 41**

Yes.

42. If it does, what aspects of the law do consultees consider to be in need of reform?

(Paragraph 7.27)

**Comments on Proposal 42**

Clarity and reform is required in relation to a number of areas including:

- (a) The period of unpaid rent in relation legal irritancy is too long;
- (b) The effect of irritancy on accrued rights should be as suggested in the 2003 report (otherwise irritancy can result in an unfair benefit to the tenant);
- (c) The effect of irritancy on lease-end specific obligations (e.g. stripping out etc) should be considered as, again, a tenant's default can result in a benefit to the tenant.

43. Do consultees agree that a clear statement of the law in respect of *confusio* and leases is required?

(Paragraph 8.61)

**Comments on Proposal 43**

Yes this would be sensible.

44. If consultees agree that a clear statement of the law is required, do consultees consider that a positive action showing the intent of the parties, such as registration of a minute, should be required before the interest of landlord and tenant are consolidated?

(Paragraph 8.61)

**Comments on Proposal 44**

Yes

45. Are there any other aspects relating to the termination of commercial leases in Scotland, as discussed in this Paper, to which consultees would wish to draw our attention?

**Comments on Proposal 45**

No.

46. Do consultees have any comments on the possible economic impact of any of the changes discussed in this paper?

**Comments on Proposal 46**

The simpler leases & termination of them are for the parties contracting the less likely the parties are to get into disputes and expensive litigations.

**General Comments**

N/A

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.