Consultation on Aspects of Leases – Tenancy of Shops (Scotland) Act 1949

Response by the Centre for Scots Law at the University of Aberdeen

This response was prepared by Dr Euan West, Professor Donna McKenzie Skene and Dr Alisdair MacPherson.

Preliminary Note:

Partly because of our preferences as regards the four options set out on page 93 of the Discussion Paper, and partly because of our broad agreement with many of the proposals as to the finer details of the proposed reforms, we did not think it was necessary for us to answer all of the questions.

It is worth giving our answer to question 81 of the DP at the outset of our response. Of the options mentioned on page 93, our preference is for Option A (replacement of the Act with the mandatory notice-to-quit scheme detailed in Chapter 5 of the DP) and our least-preferred option is Option D (retention of the 1949 Act in its current form). There was some uncertainty among the working group as to whether B (repealing the 1949 Act without amendment) was preferable to C (reform of the Act in line with the proposals in Chapter 6), but we can see the appeal of favouring Option C over Option B. That caveat regarding the relative appeal of Options B and C to one side, our tentative preferences (in descending order) are as follows:

(1) Option A (best option)
(2) Option C (second-best option)
(3) Option B (third-best option)
(4) Option D (worst option).

Part of our reason for favouring replacement of the 1949 Act with a mandatory notice-to-quit scheme (Option A) over reforming the 1949 Act (Option C) relates to the complex and detailed nature of the proposals set out in Chapter 6, which require a high degree of legal engineering. Further, our reason for deeming option D to be the least optimal option relates to the anachronistic nature of the 1949 Act. Conversely, repeal of the 1949 Act without anything to come in its place would at least have the virtue of simplicity (Option B).

1. Do you have experience or knowledge of the 1949 Act assisting negotiations concerning renewal on behalf of a tenant, including a national or international retailer, whose business was not threatened with closure owing to the end of the

lease? If so, what, if any, was the effect of the Act on the negotiations and their outcome?

(Paragraph 3.78)

One member of the working group preparing this consultation response did have some relevant practical experience with a case involving an attempt to utilise the extension provision in the 1949 Act.

We are aware that some tenants will seek to use the Act as a last resort if they wish to remain in occupation of the premises for a period of time after the normal end date of a lease.

2. Should an unamended 1949 Act remain part of the law? If so, why?

(Paragraph 3.82)

No, for the reasons given in the DP.

3. Is there presently a shortage of premises to let for listed businesses? If so, for which type of business? Do you expect this to change in the coming years (and if so, why)?

(Paragraph 4.5)

We are not sure.

4. What are your views on rent levels for such premises? Do you expect these levels to change in the coming years (and if so, why)?

(Paragraph 4.5)

We are not sure.

5. Do you consider that listed businesses are more vulnerable than other commercial tenants to closure or devaluation at the end of a lease owing to the loss of goodwill in the locality of the premises from which they trade?

(Paragraph 4.10)

We are not sure.

In any case, it is worth questioning to what extent businesses can still be said to depend on local goodwill.

6. Do the interests of a listed business at the end of a lease merit special provision additional to, or in place of, the recommendations relating to notice to quit in the Commission's 2022 Report? If so, which type of business merits it and why?

(Paragraph 4.13)

No.

7. Do the listed businesses provide essential services that would merit special provision at the end of a lease? If so, which type of businesses merit it and why?

(Paragraph 4.14)

It is conceivable that they do, but we are not sure.

8. Do any of these other reasons advanced in 1963 for special provision for listed businesses continue to apply? If so, why?

(Paragraph 4.16)

We don't know.

9. Have you used the 1949 Act in court, or had it used against you? If so, what was the outcome?

(Paragraph 4.23)

One member of the group has been involved in a case mentioned in the DP. The tenant in that case was unsuccessful.

10. Have you used the 1949 Act to assist lease negotiations, or had it used against you? If so, what was the outcome?

(Paragraph 4.23)

No.

11. Are you otherwise aware of the 1949 Act being used either as part of negotiations to renew a lease or in court? What effect did this have on the outcome? (Paragraph 4.23)

No.

12. Should the 1949 Act be repealed without any statutory reform or replacement?

(Paragraph 4.27)

There was some uncertainty within the group as to whether reform without replacement would be a preferable option but, on balance, we think that either a notice scheme or a reformed 1949 Act would be preferable to repeal of the 1949 Act with nothing to replace it. See also our earlier comments above.

13. If the 1949 Act were repealed without any statutory reform or replacement, what economic impact, if any, would there be?

(Paragraph 4.27)

We do not know.

14. Should legislation replacing or reforming the 1949 Act apply to leases of one or more of the following:

Given our preference for not amending 1949 Act (see the preliminary note to our response) we have not given detailed consideration to the issues raised by this question. The views expressed below are tentative.

(a) premises for the sale of goods to visitors by retail;

Yes, but possibly the legislation should apply to small businesses only.

(b) premises for retail-style hire, repair, cleaning, or treatment of personal items or household articles;

Yes.

(c) hot food takeaway premises;

Yes.

(d) cafes, snack bars, and restaurants;

Yes.

(e) pubs;

We are not sure.

(f) hairdressing salons and barber shops;

Yes.

(g) beauty-treatment salons, including nail bars and tattoo studios;

Yes.

(h) warehouses;

No, for the reasons given in the DP.

(i) wholesale premises;

No, for the reasons given in the DP.

(j) retail auction premises;

and if not, why not?

(Paragraph 4.35)

No, for the reasons given in the DP.

15. Do you agree that, where there is a mixed use of the let premises, a use qualifying for special treatment under the reformed or replacement legislation must be the main activity carried on there (or one of the main activities), and not merely ancillary or incidental to some other use which does not qualify?

(Paragraph 4.36)

Yes, if applicable.

16. Should legislation replacing or reforming the 1949 Act be restricted to lets of buildings or permanent units within them?

(Paragraph 4.37)

Yes, if applicable.

17. Would a scheme providing for mandatory notice to quit for leases of six months or longer be an appropriate replacement for the 1949 Act? If not, what should be the minimum term of lease to which the scheme should apply and why?

(Paragraph 5.19)

While we think a mandatory notice-to-quit scheme would be appropriate, perhaps it would be preferable for the minimum term of lease to which the scheme applied to be one year.

18. Would the following minimum mandatory period of notice to quit be appropriate:

(a) six months for leases of one year or more?

Six months may be viewed as an excessively long notice period for leases of only one year. We don't have strong views on what would be more reasonable if a single notice period is to be chosen, but, e.g., a three-month mandatory notice period for all leases might be more appropriate than one of six months.

We can see the argument for having gradations of notice periods according to the length of the lease (with e.g. a three-month notice period for very short leases and a six-month notice period otherwise) but, again, we express no firm views as to the precise lengths of those notice periods.

(b) three months for leases of six months or more and less than one year?

And if not, what periods would be more appropriate?

(Paragraph 5.19)

19. Should the default periods of automatic continuation mentioned in paragraph 5.11 above be made mandatory? (Please feel free to answer differently for different lengths of lease.) And if not, what periods of mandatory continuation would be more appropriate?

(Paragraph 5.19)

This proposal seems reasonable, subject to the default notice periods applying only to leases of a year or longer.

20. Should there be any consequential changes in the rules for a tenant's notice of intention to quit? If so, what should those changes be? (Paragraph 5.19)

No.

21. Should the tenant have an option to break the lease during its period of automatic continuation on giving three months' notice? Do you have any other observations on such a break option? (Paragraph 5.19)

While there is a risk of allowing a tenant on whom an option to break the lease had been conferred to 'have their cake and eat it', on balance we conclude that such an option would be reasonable. A tenant in such circumstances would be expressing an intention in the context of something that applied automatically, so it is perhaps inapt to view this as treating the tenant favourably to such an extent that it should be disallowed. We also think that this break option would align well with a notice period of, say, three months (see our answer to question 18, above).

22. Do you have any other observations on the scheme? What, if any, economic impact would adoption of the scheme have?

(Paragraph 5.19)

No.

General Comment on Chapter Six of the DP

For this chapter of the DP, we have not answered all questions in detail. Our key points regarding the questions in this chapter are as follows:

(1) As stated at the beginning of our response, our preferred option of those listed on page 93 of the DP is Option A (replacing the 1949 Act with a mandatory notice-to-quit scheme). Option C (reform of the 1949 Act) is arguably the next-best option.
(2) Although Option C is not our preferred option, if it is the option subsequently preferred by the SLC and, ultimately, the Scottish Parliament, we think that the proposals outlined in Chapter Six as to *how* the 1949 ought to be reformed are reasonable. Unless stated otherwise, we can be taken to be in broad agreement with them.

23. Should it be incompetent to contract out of the application of a reformed 1949 Act? (Paragraph 6.7)

It should not be possible to contract out of the 1949 Act because this would defeat its raison d'être.

24. Should the existing discretion to grant an application when reasonable in all the circumstances be replaced by a test which requires the sheriff to grant an application if, and only if, the tenant satisfies certain objective criteria? If so, what should be the test? (Paragraph 6.10)

No.

25. Do you agree that inclusion of a statutory statement of objects would be useful in: (a) increasing the predictability of the 1949 Act for parties; and (b) assisting the court in deciding applications under the Act?

(Paragraph 6.16)

Yes.

26. If you favour a statutory statement of objects, do you agree with the inclusion of the objects listed in paragraph 6.20, or similarly expressed objects? If you only agree with one or two of them, which are they?

(Paragraph 6.20)

Yes.

27. Do you think any other objects should be included in the statutory statement?

(Paragraph 6.22)

The SLC should consider whether there ought to be a specific reference to businesses that are in rescue-oriented insolvency processes. We offer no concluded views on the matter, but think that it merits consideration.

(We have no answers to questions 28-42).

43. Do you agree that the mandatory ground in section 1(3)(b) of the 1949 Act should be amended in order to cover modern insolvency situations? (Paragraph 6.43)

We agree that the ground should be updated, but would welcome more clarity as to what a so-called insolvency situation would encompass for the purposes of a reformed 1949 Act. Would the notion of an insolvency situation refer to the inability to pay one's debts and/or to insolvency processes?

We would also note that there is an issue regarding the inclusion of certain insolvency processes such as administration. Given the emphasis on rescue (as part of a wider 'rescue culture') in administration and its relevance to other procedures and mechanisms too, it may be unfair and inappropriate to automatically exclude the possibility of renewal under the 1949 Act in relation to those processes. It is worth noting that, in the context of a tenant subject to administration, a landlord would be prevented from irritating the lease, without the consent of the administrator or the permission of the court (see Insolvency Act 1986, Sch B1, para 43(5)). Including a process such as administration within the mandatory ground relating to insolvency under an amended version of the 1949 Act (or even including inability to pay debts where a company is in administration) would potentially undermine the primary purpose of administration, i.e. rescue of the company as a going concern. Consequently, a more flexible provision may be more suitable in such circumstances. This matter should be considered further.

Although the concern under the 1949 Act will often be with corporate insolvency, sight should not be lost of the relevance of *personal* (or non-corporate) insolvency processes as regards certain tenants, including sole traders and partnerships.

(We have not answered questions 44-50).

51. Should a reformed 1949 Act have a gateway test which ensures that only small business tenants are eligible to seek renewal of their leases? (Paragraph 6.68)

Arguably, the introduction of a statutory statement of objects (question 26 of the DP) would obviate the need for a gateway test regarding small businesses, given that, in practice, the objects proposed would often have the effect of filtering out larger businesses anyway. Although we are in broad agreement with the proposals set out in Chapter Six (subject to the caveat that Option C is not our preferred option), the proposed gateway for small businesses is one example of how the proposals to reform the 1949 Act may lead to legislation that is overly complex and over-engineered.

(We have not answered questions 52-72).

73. Should the court:

(a) retain the power to find an unsuccessful party liable for the court-related expenses of the successful party; or

(b) have no such power unless the unsuccessful party's claim had elements of fraud, was pursued with manifest unreasonableness, or involved an abuse of process? (Paragraph 6.89)

We are tentatively in favour of proposal (a).

74. If the power to find an unsuccessful partly liable for the court-related expenses of the successful party is to be retained, should the amount of liability be capped? If so, what should be:

(a) the appropriate form of cap (that is, monetary limit or percentage limit); and

(b) the appropriate limit of capped liability (under whichever form of cap)?

(Paragraph 6.89)

On balance, we are not persuaded by the arguments for having a cap.

75. Should the parties have the ability in advance of any application to agree to exclude appeal against the decision on the application? (Paragraph 6.90)

No. We are uncomfortable with the possibility of excluding a right to appeal, especially given the potential imbalance between small businesses and their landlords.

76. Should the parties' ability to appeal the decision on the application require the permission (leave) of the court? (Paragraph 6.90)

Yes. This will prevent unmeritorious cases being appealed.

(We have not answered questions 77-80).

81. Having considered the points raised in this Discussion Paper in relation to them, please advise which of the four potential outcomes (A, B, C or, D) is your preferred option and explain why. If, however, you feel favourably towards more than one, please could you rank them and explain your reasoning behind the ranking. (Paragraph 7.6)

For our answer to this question, please see the preliminary note to our consultation response.