FACULTY OF ADVOCATES

Response from the Faculty of Advocates

to the

Consultation on Leases (Automatic Continuation etc.) (Scotland) Bill

1. Part 1 of the Bill defines the leases to which the legislation will apply, excluding certain residential and agricultural leases from the Bill's scope. What are your views on the definitions as set out in Part 1 of the Bill?

In principle, we have no difficulty with a targeted reform to the law as it applies to commercial leases — a reform of the law, limited to commercial leases, which permitted contracting out of tacit relocation in certain circumstances could not be objected to on principle. We are, however, concerned by the very broad scope of the Bill. It does not seek to make a targeted reform, but to replace the existing common law with a statutory code dealing with all aspects of the termination and continuation of leases. Whether or not to codify the law on tacit relocation is a matter of principle, on which we cannot comment; that having been said, if the Parliament decides to codify the law, we do not think that it should be restricted to the leases set out in Part 1 of the Bill.

The assumption which underlies the approach of the Bill appears to be that, because many of the leases excluded from the proposed reform are governed by their own statutory provisions, tacit relocation does not apply to them: that assumption is incorrect. Tacit relocation, as it presently exists, applies to the vast majority of leases in Scotland — including those which are governed in whole or in part by their own legislative regime. To give only one example, agricultural tenancies governed by the Agricultural Holdings (Scotland) Act 1991 ('1991 Act tenancies') rely on tacit relocation to create security of tenure: section 22 of the 1991 Act restricts the ability of the landlord to serve a notice to quit, which allows tacit relocation to keep the lease in existence for another year. Tacit relocation similarly maintains the majority of residential leases in existence (with the exception of those PRTs which do not have an end-date stated in the lease).

The effect of this Bill would be to create two parallel regimes — statutory automatic continuation, which would apply to most (but not all) commercial leases, and common law tacit relocation, which would apply to everything else. Those regimes would not, as a result of the changes proposed in this Bill, be identical; indeed, they are likely to drift further

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apart over time. Differing rules regarding service of notices, deadlines, and the length of any continuation of the lease, would inevitably trip up even the most careful of practitioners. Which regime applied to any individual lease would not necessarily be a straightforward task to determine; that is particularly so, given the ability of leases to slip in and out of the existing legislative regimes when circumstances change.

The existence of two parallel regimes for the continuation of leases at their ish strikes us as undesirable. It is pregnant with potential for litigation, and in any event adds unnecessarily to the complexity of an already complex area of law. If tacit relocation is to be replaced by a statutory code, we consider that that code should apply to all leases currently affected by tacit relocation.

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Tacit relocation (which the Bill redefines as "automatic continuation") – need for reform

In line with the conclusions of the Scottish Law Commission's Report on Aspects of Leases: Termination, the Bill's Policy Memorandum states that, "the current law on tacit relocation is uncertain; inaccessible; and outdated" and is in need of reform.

2. Do you consider that the law on tacit relocation needs reforming? If so, for what reasons?

We would agree that aspects of the law on tacit relocation would benefit from reform. As the law currently stands in relation to relevant leases, either party may serve a valid notice to quit relatively close to lease expiry (40 clear days). This is considered inadequate notice for either party to organise their commercial affairs.

We question the need for a thoroughgoing reform of the law on tacit relocation, though. It is a well-developed and relatively well-understood area of law. We note that whilst the Bill aims to codify much of the existing approach, the new statutory code will be broadly similar to existing practice.

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Tacit relocation – options for reform

When the Scottish Law Commission consulted on reforming "tacit relocation", it proposed two main options, with option 2 now appearing in the Bill:

- *Under **option 1** tacit relocation would be disapplied from commercial leases (with the potential option of allowing the parties to contract in to the doctrine).*
- *Under **option 2** the law would be clarified and it would be made clear that the parties to a commercial lease have the right to contract out of tacit relocation.*

3. What are your views on each option? Is the approach taken by the Bill the best way to reform the law?

There are obviously arguments for and against both options. However, it is clear that if the law is to be reformed one of them must be adopted. On balance, we believe option 2 is preferable.

"Tacit relocation" is a long-standing principle of Scots law which will continue to apply to existing commercial leases and to other forms of leases e.g., agricultural, as mentioned in our answer to Question 1. It will be less confusing if there is consistency across the board, that the principle, albeit in its statutory form, will apply to new commercial leases with parties having the right to opt out.

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Tacit relocation – statutory code

Sections 2 to 7 of the Bill make provision for a statutory code to replace the common law rules on tacit relocation by which a lease continues automatically beyond its termination date. The code applies by default unless the parties contract out of it or give valid notice to terminate the lease prior to its end date.

4. What are your views on the statutory code in the Bill which replaces tacit relocation?

Section 5(1): is to apply if the tenant remains in possession after the lease has come to an end. If the criteria in section 5(1) are met, section 5(2) provides that the lease is to be treated as if it had continued after its termination date.

If the expired lease contained opt out provisions as provided for in section 4, it is not clear whether, as provided for in section 5(3), that would be "other circumstances which indicate that, on the termination date, both parties intended the tenant's continued possession to be on a basis other than continuation of the lease after that date". Clarity should be provided on the status of a "tenant's" continuing occupation of premises following the expiry of a lease which contained opt out provisions.

Section 5(1)(b)(i): the phrase "within a reasonable period" which is used in this provision is loaded with ambiguity. We assume the period is to be assessed in a subjective way. If that is correct, we suggest the wording should refer to "such period as is reasonable in all of the circumstances" or similar.

Section 7(2)(ii): we believe parties should be able to agree any shorter period they consider appropriate. We can see no principled reason to prevent parties from agreeing periods of continuation shorter than 28 days, if that happens to suit the circumstances. It is possible to agree shorter periods than 28 days at common law, and parties do occasionally make use of that possibility.

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Tacit relocation – notices to quit and notices of intention to quit

Sections 8 to 18 of the Bill make provision for a new statutory code to replace the existing rules on giving notice that a lease is to come to an end. This includes different rules for notice given by tenants and notice given by landlords.

5. What are your views on these sections of the Bill and the approach they take to giving notice?

By way of general comment, we consider the notice provisions contained within the Bill to be somewhat cumbersome, and potentially problematic. There is well-developed and authoritative case law concerning the validity of written notices which applies to all commercial contracts, including leases. We do not fully understand why it is considered desirable to either codify or depart from that, in statute, for only one category of commercial contract.

We agree that a notice to quit should be given in writing as per section 8(1). We are also of the view that the rule should apply to notices of intention to quit (section 10(1).

Beyond that we have a general reservation about prescribing the form and content of the notices, the way in which they should be given and the day on which notice is to be taken to be received. The rules on the form and content of notices apply to various areas of the law. For example, notices may have to be given under a share purchase agreement. When faced with determining questions on the validity of notices under leases, the courts have been able to draw upon earlier cases in that area and under contract – see for example, *Gateway Assets Limited v CV Panels [2018] CSOH 48*. There is obviously value in that since it achieves consistency across the law and a pool of judicial determinations which may be relied upon. In our experience, in practice the common law principles particularly in light of *Mannai Investment Co Limited v Eagle Star Life Assurance [1997] AC 749* and the way in which they have been subsequently applied by the courts see for example *Hoe International Limited v Andersen 2017 SC 313*, are well understood and followed. We do not consider there to be a requirement for, or any benefit in imposing, a statutory code which applies only to Notices to Quit and Notices of Intention to Quit.

If there is to be a statutory code, we do not see why there should be different sets of rules for Notices to Quit (section 8) and Notices of Intention to Quit being given by the tenant. We assume a different approach has been taken to the types of notice because of a perception the tenant will usually be in a weaker bargaining position. Whilst that perception will usually be accurate when dealing with residential tenancies, it will often be inaccurate when dealing with commercial leases. There are many instances where the bargaining position of the parties is equally balanced (e.g. an institutional investor landlord and a high street retailer tenant). Equally, there are many instances where the landlord is

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an individual or a small private company with a weaker bargaining position and the tenant is a high street retailer with a stronger bargaining position.

Apart from the fact we fail to see the justification for different regimes, having one set of rules for landlords and another set for tenants is likely to lead to confusion. If there are to be rules on the form and content of notices, it would be better to have one set which apply in both instances.

If there is to be a statutory code such as that set out in section 8, it appears to us that section 8(5) is a backward step. What if the termination date under the lease is 17 February but:

- the notice to quit erroneously shows the date as 16 February rather than the actual date which is 17 February. In that scenario, the notice would not be saved by section 8(5)(a); or alternatively,

- there is a typographic error in the termination date - for example, the date is shown as 27 February rather than 17 February. The notice in that scenario would not be protected by section 8(5)(b).

As matters currently stand, applying *Mannai* principles, a notice in either case may well be held to have been effective. That seems an equitable result in the circumstances since a notice in both instances would have made it clear to the recipient the lease was not to continue. Indeed, the facts in *Mannai* were closely similar to scenario (a). The effect of the proposal in section 8(5) is therefore to reverse a long-standing and consistently followed decision of the House of Lords.

Section 11(3) which deals with implied consent being given and withdrawn in respect of the serving of notice by electronic means, is fraught with potential for argument. It would be better if consent could only be given or withdrawn expressly.

In our view, the Bill does not provide a statutory framework for service of valid notices that can readily be understood and applied by parties to commercial leases. There is a significant risk that service of notices, as prescribed by the Bill, will lead to more disputes and litigation than at present under the common law.

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Tacit relocation – Leases excluded from the rules in schedule 1

A number of types of commercial lease are presently excluded from tacit relocation, and will end on their termination dates. These are: a lease granted for the lifetime of the tenant; a student let; a holiday let; a lease granted with the authority of the court, the Accountant of Court, or the Accountant in Bankruptcy; a short-term grazing or mowing lease; and a lease (of less than a year) of a right to fish or hunt where there is a close season.

6. What is your view on schedule 1 of the Bill which excludes certain leases from the new rules on automatic continuation?

Inasmuch as schedule 1 reflects the common law, we have no comment to make. Leases which are not currently subject to tacit relocation should not become subject to automatic continuation — the exclusion of tacit relocation in each case is long-standing, and justified on principle.

It is worth observing, however, that the current basis for the exclusion of certain leases from tacit relocation is based on the presumed intention of the parties, on the basis of custom and practice. Holiday lets are expected to be short-term, and the parties therefore cannot be presumed to intend a continuation at the termination of the lease. The logic of excluding certain leases from tacit relocation is consistent with the general principle of presumed consent which underlies the law. At least in principle, there is space within the common law for the list of leases excluded from tacit relocation to expand or contract. In replacing the principle of presumed consent with a fixed list, some of the flexibility of the current approach is lost — albeit for the benefit of making the law slightly more certain.

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Miscellaneous provisions relating to start, end or length of lease

Part 3 of the Bill makes miscellaneous provisions relating to the start, end or length of a lease with the aim of clarifying the law and making it more straightforward to apply.

7. What is your view on the provisions in Part 3 of the Bill?
Please provide your response in the box provided.

We believe these provisions are unnecessary.

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Terminology in the Bill

The Bill substitutes the terms "tacit relocation" with the terms "automatic continuation" and the term "ish" with "termination date" with the aim of using plain English terms to better reflect the meaning behind these doctrines.

8. What is your view on this new terminology? Are there any other areas in the Bill where the terminology could be improved or changed?

We are content that 'tacit relocation" should be referred to as "automatic continuation" and that the "ish" should be referred to as the "termination date". The proposed new terms accurately describe the concepts which they label.

We do, however, question the need for replacement of the existing terminology, particularly where pre-existing case law (which will, of course, refer to tacit relocation) will continue to be applicable to leases subject to the new statutory regime. Playing devil's advocate, we would observe that a change in terminology would obscure the connections between the old and new regimes, and make the law harder for non-lawyers (and student lawyers) to understand and apply correctly. Given the increasing presence of party litigants in the Scottish courts, the replacement of established terms of art should be approached with a considerable degree of care.

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Tenancy of Shops (Scotland) Act 1949

The Bill does not include reforms to the Tenancy of Shops (Scotland) Act 1949. The Scottish Law Commission's draft Bill also did not include reforms to the Tenancy of Shops (Scotland) Act 1949 on the basis that further consultation was needed in this area. The Scottish Law Commission has, however, now consulted on this topic and aims to publish its report in the first quarter of 2025.

9. What is your view on the fact that the Bill does not include reforms to the Tenancy of Shops (Scotland) Act 1949? Is this something which should be added to the Bill?

In our view, the Tenancy of Shops (Scotland) Act 1949 ought to be repealed outright. We note that the Law Commission published its report on 18 February 2025, and has recommended repeal of the Act. It may be that this will be added as an amendment to the current Bill, an initiative we would support.

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Any other issues or views?

10. Is there anything else you think should or should not have been included in the Bill? If so, please provide details.

We have nothing to add to the comments already made.

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