OFFICIAL REPORT
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DRAFT

Delegated Powers and Law Reform Committee

Tuesday 20 May 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 20 May 2025

CONTENTS

DELEGATED POWERS AND LAW REFORM COMMITTEE

17th Meeting 2025, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Katy Clark (West Scotland) (Lab)
*Roz McCall (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Siobhian Brown (Minister for Victims and Community Safety)
Michael Paparakis (Scottish Government)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 20 May 2025

[The Convener opened the meeting at 09:52]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 17th meeting in 2025 of the Delegated Powers and Law Reform Committee. I remind everyone to switch off or put to silent their mobile phones and other electronic devices.

The first item of business is a decision on whether to take in private items 6, 7, 8, 9, 10 and 11. Is the committee content to take those items in private?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

09:52

The Convener: Under agenda item 2, we are considering four instruments. An issue has been raised on the following instrument.

Environmental Regulation (Enforcement Measures) (Scotland) Amendment Order 2025 [Draft]

The Convener: The instrument amends the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015—the principal order—to include offences under the Producer Responsibility Obligations (Packaging and Packaging Waste) Regulations 2024 as relevant offences. That would enable the Scottish Environment Protection Agency to use civil sanctions in respect of those offences.

In relation to the instrument, the committee asked the Scottish Government about an apparent error in a reference to the principal order. The reference had also not been footnoted. The full detail of the correspondence is set out in the committee papers published for this meeting.

The Scottish Government confirmed the typographical error and that the correct footnote had been misplaced, and that it intends to correct those errors in the signing version of the instrument, assuming that the instrument is approved by the Scottish Parliament.

Does the committee wish to draw the instrument to the attention of the Parliament on the general reporting ground in respect of those errors?

Members *indicated agreement.*

The Convener: Does the committee wish to highlight its correspondence to the lead committee, noting that the Scottish Government intends to correct the errors in the signing copy of the instrument?

Members *indicated agreement.*

The Convener: In so doing, does the committee wish to make clear that it is not expressing a view on the proposed method of correction?

Members *indicated agreement.*

The Convener: Issues have also been raised on the following two linked instruments.

Deposit and Return Scheme for Scotland Amendment Regulations 2025 [Draft]

Deposit and Return Scheme for Scotland (Designation of Scheme Administrator) Order 2025 [Draft]

The Convener: The correspondence in relation to the instruments has been published alongside the papers for this meeting. It sets out the committee's questions and the Scottish Government's responses in full.

The committee's detailed findings will be set out in its report, which will be published in due course. The report will also set out its consideration of subordinate legislation at this meeting.

The first instrument would make significant amendments to the deposit and return scheme that is contained in the Deposit and Return Scheme for Scotland Regulations 2020, or SSI 2020/154. Does the committee wish to draw the instrument to the attention of the Parliament on reporting ground (i), which is that its drafting appears to be defective in respect of the point that is raised in the committee's question 10, and on the general reporting ground in respect of the points that are raised in questions 2, 4, 5, 6, 7, 8 and 9?

Members *indicated agreement.*

The Convener: Does the committee wish to note that the Scottish Government has advised that it will take action to address the points raised in questions 2, 4, 5, 8, 9 and 10?

Members *indicated agreement.*

The Convener: The second instrument would designate a body as the scheme administrator to operate the deposit and return scheme in Scotland and would confer functions on it for that purpose. The body being designated is the UK Deposit Management Organisation Ltd. Does the committee wish to draw the instrument to the attention of the Parliament on reporting ground (i), which is that its drafting appears to be defective in respect of the point that is raised in question 5; on reporting ground (h), which is that its meaning could be clearer in respect of the point that is raised in question 7; and on the general reporting ground in respect of the points that are raised in questions 3 and 8?

Members *indicated agreement.*

The Convener: Does the committee wish to highlight its correspondence with the Scottish Government to the lead committee in respect of the matters that are discussed in questions 1 and 2?

Members *indicated agreement.*

The Convener: Does the committee wish to note that the Scottish Government has advised that it will take action to correct the points that are raised in questions 3, 5, 7, 8 and 9?

Members *indicated agreement.*

The Convener: The committee also asked the Scottish Government questions about the following instrument.

Restitution Fund (Scotland) Order 2025 [Draft]

The Convener: Does the committee wish to highlight its correspondence with the Government to the lead committee, and is the committee otherwise content with the instrument?

Members *indicated agreement.*

Instrument subject to Negative Procedure

09:57

The Convener: Under agenda item 3, we are considering one instrument, on which an issue has been raised.

Public Service Vehicles (Registration of Local Services) (Local Services Franchises Transitional Provisions) (Scotland) Regulations 2025 (SSI 2025/137)

The Convener: The instrument seeks to minimise the potential disruption of services and ensure that passengers have continuity of service should operators seek to vary or cancel local services before a franchising framework can come into operation. In correspondence with the Scottish Government, which was published alongside the papers for this meeting, the committee queried an apparent minor drafting error in the instrument. In response, the Scottish Government confirmed that there is a minor drafting error in regulation 7(1), which it proposes to correct by correction slip.

In regulation 7(1), the reference to “paragraphs (2) to (4)” should be a reference to “paragraphs (2) and (3)”. Does the committee wish to draw the instrument to the attention of the Parliament on the general reporting ground?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

09:58

The Convener: Under agenda item 4, we are considering two instruments, on which no points have been raised.

Act of Sederunt (Lands Valuation Appeal Court) 2025 (SSI 2025/140)

Act of Sederunt (Registration Appeal Court) 2025 (SSI 2025/141)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Leases (Automatic Continuation etc) (Scotland) Bill

09:58

The Convener: Under agenda item 5, we are taking evidence from Siobhian Brown, the Minister for Victims and Community Safety, on the Leases (Automatic Continuation etc) (Scotland) Bill. The minister is accompanied by Scottish Government officials Michael Paparakis, who is the policy and bill programme manager in the private law unit, and Lori Pidgeon, who is a solicitor in the constitutional and civil law division. I welcome you all to the meeting and invite the minister to make opening remarks.

The Minister for Victims and Community Safety (Siobhian Brown): Good morning. The Leases (Automatic Continuation etc) (Scotland) Bill will implement recommendations that the Scottish Law Commission made in 2022 to reform aspects of the Scots law of commercial leases. This is the fourth SLC bill in the current parliamentary session and a fifth, which is on contract law, was recently announced in the programme for government, demonstrating our commitment to law reform.

10:00

Most businesses, large or small, operate from let premises, at least to some extent, and the relationship between landlord and tenant is crucial to commercial life in this country. It is important that the law that governs that relationship functions effectively, so the bill aims to improve, simplify and update aspects of the Scots law of commercial leases so that it meets the needs of a modern Scottish economy.

The bill's principal purpose is to reform the current law of tacit relocation. That is the process whereby a lease continues automatically after its termination date unless one party gives notice to the other that it will come to an end or both parties agree at the time that it will come to an end.

I have listened to the evidence of stakeholders, including those who have questioned the need for reform in the area and others who have suggested that the bill might need to be rewritten. I do not agree with the latter view. As far back as 2010, the SLC was approached by practitioners and solicitors in the area who said that the law should be reformed because it was uncertain and was acting as a deterrent to commercial property investment. The SLC's project sets out clearly that the law of termination of commercial leases is inaccessible, uncertain and outdated and why that is so. Representative bodies of Scottish small businesses and landlords have welcomed the bill and are supportive of it. No doubt we will discuss that further in today's meeting.

All that aside, however, a number of technical issues have come up during stage 1 evidence. I have worked constructively with the committee on previous SLC bills and I will continue to do so as this bill progresses. I look forward to answering the committee's questions.

The Convener: Thank you, minister. I will open the questioning before handing over to colleagues.

Will you explain the general rationale behind the bill and how you think the proposed changes will benefit landlords and tenants as well as the economy generally?

Siobhian Brown: As I said in my opening speech, the law of termination of leases needs reform because it is inaccessible, uncertain and outdated. The SLC considered the case for reform by consulting advisory groups, issuing a small discussion paper and engaging with the legal profession, landlords and small businesses.

The evidence that the committee has heard shows that legal professionals, the Faculty of Advocates and the Law Society of Scotland have all agreed that reform of some kind is needed. The Law Society, for instance, was clear that there is sufficient litigation and confusion in the area to justify reform for the advantage of tenants and landlords. In Scots law currently, commercial leases are principally agreed and governed by common law rules. When the law is not clear or readily accessible, that can result in unnecessary costs to the tenant and the landlord. Current legalities can cause difficulty for the landlord and the tenant, and resolving those can result in the expense of court proceedings. The bill is looking to simplify and improve that for the tenant and the landlord.

On the economic impact of the bill, I believe that it will have some economic benefit. Most businesses, whether they are small or large, from manufacturing through to professional services, retail, digital start-ups and the hospitality sector, operate to some extent out of let premises. Let premises make up 44 per cent of all non-domestic premises that pay rates, and the rateable value from those premises comes to £2.6 billion pounds. Making the law more certain and accessible can only benefit both tenants and landlords.

The Convener: What you have indicated, particularly at the end, ties in with my next question. Is that the reason why the decision was made to attempt to codify the law in the way that is suggested in the bill, instead of, for example, abolishing tacit relocation or only amending parts of the law that are not working well?

Siobhian Brown: My understanding is that codification will simplify things by bringing into legislation all the legal principles of tacit relocation. It is a technical legal question, which I will pass over to Michael Paparakis to expand on, given his expertise.

Michael Paparakis (Scottish Government): One of the options, as you suggested, convener, was to reform part of the law and leave other parts to the common law. Doing that would perhaps make the law even more complex or just as complex as it is currently, with landlords and tenants needing to look at the common law from case decisions and legal textbooks, before then trying to figure out how that interacts with any provisions that are in statute.

The decision to codify and bring most of it into the bill is about making things more accessible and making it easier for tenants and landlords to understand what the law is and to figure out what they should be doing themselves.

Roz McCall (Mid Scotland and Fife) (Con): I am interested in your views on the various suggestions that have been made to tighten up the definitions in part 1 and schedule 1 in relation to excluding movables from the bill, mixed uses of land in rural areas, and grazing and mowing leases. Those are just a few examples—there is a big list of suggestions.

What are your views of the argument that was made by the Faculty of Advocates and the academics who gave evidence to the committee that having a statutory regime for the automatic continuation of commercial leases and a common law regime for agricultural and other leases will create unnecessary complexity?

Siobhian Brown: On the Faculty of Advocates' comments, I know that the organisation criticised the general approach to the definition of commercial leases at stage 1, arguing that it does not make sense to have the automatic continuation for commercial leases and the common law of tacit relocation for other leases.

The majority of respondents to the committee's call for views were content with the approach, although they had questions about certain types of leases being included or excluded, and noted that, if automatic continuation were to be extended beyond commercial leases, that would be a significant extension and would require extremely careful consideration. That issue was not raised when the SLC was consulting on it or in any written response in the discussion paper preceding its recommendations.

If I may, I will address a few of the issues that came up during your stage 1 evidence-gathering sessions. I could mention where we are with them at this point and what we will be doing moving forward. Would you like me to cover those?

Roz McCall: Yes.

Siobhian Brown: An issue was raised about charity accommodation for veterans and care leavers. Residential leases in general are excluded from the scope of the bill. Sometimes, leases such as holiday lets are covered, and the SLC is clear in its report about the reasons why they are not excluded. We know that the centre for Scots law has raised an issue about leases of accommodation that are provided by charities for veterans, which are not excluded under the bill in so far as termination is concerned and would be caught up in the bill's provisions. I intend to review the matter, and I will write to the committee ahead of the stage 1 debate.

On mixed-use leases, I note that it is already possible to have a mixed-use lease under current law. For example, one part of a lease can be regulated by agricultural legislation while the other part can be subject to the common law. The bill does not create that issue. If a mixed-use lease is entered into after any provisions come into force, parties or their advisers would simply deal with the issue in the same way that they currently do. Parties would have to satisfy themselves as to whether other legislation applies. If it does not, the provisions of the bill would apply. That is what they have to do under the current law.

One way to prevent that would be to prohibit mixed-use leases, but that would likely affect the flexibility of commercial arrangements, and I do not think that it would be necessary to do so.

Would you like me to move on to other issues? I have quite a bit here.

Roz McCall: May I come back in on that point? I am sorry to interrupt, minister—that was rude of me. As we are looking at a bill that is meant to make the law more accessible, I see a slight contradiction in that we are also looking at what we do now with the law as it stands. If we have the opportunity to make it better and more accessible, should we consider doing that at this stage?

Siobhian Brown: Yes. You will be aware that the three main types of leases that we have in Scotland are agricultural, residential and commercial. The bill specifically looks at the commercial aspect. To widen it would probably be a huge job and require another bill. When the SLC considered it, it was specifically tailored for commercial leases. That is why those are the only types of leases that are covered in the bill. Perhaps Michael Paparakis has something to add to that.

Michael Paparakis: As the minister said, agricultural and mixed-use leases can currently

happen. In essence, that is due to the fact that the definition of an agricultural lease is contained in separate legislation. The bill does not touch on or look to reform that legislation. We are solely interested in commercial leases. The approach that we have taken at stage 1 is to exclude other types of regulated leases and focus on commercial leases.

Roz McCall: Okay. Thank you. Please continue, minister.

Siobhian Brown: Moving on to the grazing and mowing leases, I know that a number of respondents to the committee's call for views suggested that section 1 should be clarified with respect to grazing or mowing leases. The provisions in the bill will reflect the existing law and the fact that there are currently grazing leases that fall under common law rather than agricultural legislation. Under section 1, a grazing or mowing lease of less than a year is an agricultural lease and will be excluded from the bill's provisions. Such leases are included in schedule 1, which deals with leases that do not automatically continue. However, grazing leases exist that are not defined as agricultural under the current legislation. Those can be dealt with. If not, the common law of tacit relocation would continue to apply to them after any provisions of the bill come into force.

I will move on to telecoms infrastructure, such as wind farms and electricity substations. There are already two parallel processes for the termination of telecoms leases under the current legal framework. Currently, parties have to satisfy themselves as to whether the electronic communications code applies. If not, common law will apply. If any provisions of the bill come into force, those will apply rather than common law. Members may recall, from the committee's work on the recent SLC bills, the idea of specific legislation applying in circumstances where there is more legislation. This is just another extremely technical example of where a specific code applies even when there is more general provision within the bill.

If we are looking at clarifying the application to heritable property, the Law Society of Scotland has suggested that it could be made clearer in the bill that it does not apply to leases of movable property. My officials are looking into this specific issue, and we will speak to the Law Society to get more information on it. I will write to the committee ahead of the stage 1 debate with information on that issue and on anything that we intend to take further.

Roz McCall: Thank you, minister. That is all very helpful. I have an additional question regarding the termination of leases with the telecommunications and electricity sector. Have you had any contact with the UK Government on how the bill might affect the termination of such leases?

Siobhian Brown: I have not personally sent any communication. My officials might have had conversations that I am not aware of.

Michael Paparakis: We have had no contact with the UK Government about the telecommunications code. That is essentially because, as the minister pointed out, if a lease falls under the telecommunications code, it falls to be dealt with by that, and the bill would not affect that. The bill would affect leases that do not fall within the code, as the minister has pointed out. In such cases, rather than the common law of Scotland applying, it would be the bill. That would be the difference.

Essentially, if the lease is covered by the code, it will continue to be covered by the code after the bill comes into force.

Roz McCall: That is helpful, thank you.

10:15

Jeremy Balfour (Lothian) (Con): Good morning, minister.

We have taken a lot of evidence on this. Some people have given evidence that the law on giving notice in commercial leases may need to be changed. Others have said that, due to the 2021 Rockford Trilogy case, the rules are now clear and we do not need to do that. What is your view on those opinions?

Siobhian Brown: My view is that the law in that area needs reform.

Different views have been given about what the Rockford Trilogy case involved. Some legal professionals have welcomed the decision, whereas others have not. For some, the decision brings certainty but, for others, it means that the negotiations between the tenant and the landlord at the end of the lease are fraught with difficulties and uncertainties. The committee heard from Steven Blane that the Rockford Trilogy case had added complexity to parties' negotiations when a lease is coming to an end. The provisions in the bill on giving clear and certain notice in those situations should, in my view, be preferred.

Your original question whether the law needs to be reformed has come up several times in the committee's evidence sessions. I have seen the responses of some of the legal practitioners and academics to the committee's calls for views who have said that reform is not needed because the law is well known and works in practice. However, the committee has also heard from representatives of tenants and landlords who say

that reform is welcome. The Federation of Small Businesses Scotland told the committee that small businesses welcomed the bill's

"attempt to modernise ... the legislation"—[*Official Report, Delegated Powers and Law Reform Committee,* 6 May 2025; c 25.]

on the termination of commercial leases. The Scottish Property Federation also welcomed the bill and supports bringing together in one place various pieces of common law and statute. The Scottish Law Commission said that, as far back as 2010, it

"was approached by practitioners and solicitors in the commercial leasing area who indicated that the law should be reformed as it was uncertain and was acting as a deterrent to commercial property investment."—[*Official Report*, *Delegated Powers and Law Reform Committee*, 29 April 2025; c 5.]

Taking those together, the law of termination of commercial leases needs reform. As it stands, the bill delivers that, but, as I have said previously, I am happy to work with the committee on it.

Jeremy Balfour: To develop that, what is your view on the advantages and disadvantages of codifying the law instead of simply updating areas that the Scottish Law Commission does not think work, such as the 40-day notice period or other notice provisions in the Sheriff Courts (Scotland) Act 1907?

Siobhian Brown: We touched on that earlier—the codification in the bill brings all the different parts together to make it more accessible to tenants and landlords. It is all in one place. Michael, do you want to add any more?

Michael Paparakis: I reiterate the point that I made earlier to the convener: if you only update aspects of the law and do not look at the wider issue, there is the potential for unintended consequences. As the SLC told the committee, the common law is uncertain at the moment. Trying to put sticking plasters on it will not work—in fact, it could have the opposite effect and make the law more complex and difficult for practitioners and lay people to navigate.

Jeremy Balfour: Everybody agrees that this is a technically difficult area of law. The Scottish Law Commission's goal was to try to make the law simpler so that landlords and tenants did not always have to seek legal advice about it. There are mixed views about whether the bill does simplify the law. How do you think the law is now more simple? Do you think that, in practice, lawyers will get involved in the area less often because tenants and landlords will be able to do the work without having to use practitioners?

Siobhian Brown: I will pass the question to Michael, to talk about the technicalities.

Michael Paparakis: I think that the law is more simple because it has been brought together in one place. Tenants and landlords will be able to look up the act and find out what the law is. In that respect, it will certainly be simpler. We are dealing with codification—we are looking at the law in the round, rather than just at notice periods—so that whole sphere of the law will be there for individuals to look at.

As to whether that might lead to less use of legal professionals, I suspect not. If you use a legal professional, you will use them whether there is a statute or not. I think the bill will benefit small businesses—both tenants and landlords—that would probably not be able to afford a solicitor, either now or after any provisions come into force. The difference is that those people would be able to look at a single piece of legislation to understand their duties and obligations.

Jeremy Balfour: Thank you. I will leave it there for the moment.

Bill Kidd (Glasgow Anniesland) (SNP): Thank you for being here today, minister and colleagues. What is your view of arguments made to the committee that the new rules in the bill on giving notice might be difficult to follow because they are very complicated?

Siobhian Brown: Thank you, Mr Kidd. I do not agree that all sections of the bill that deal with notice are too complex. The current law already lacks clarity and certainty, so the bill will resolve that issue. The bill provides a short list of essential requirements for a notice to quit and a notice of intention to quit, which offers the flexibility to deal with the wide set of circumstances that are likely to be encountered by the landlords and the tenants in practice.

I know that the Scottish Property Federation told the committee that it does not see those provisions being

"any more difficult to follow"—[*Official Report*, *Delegated Powers and Law Reform Committee*, 6 May 2025; c 32.]

than the current rules.

Moving forward, if there are any suggestions in the stage 1 committee report on how things could be simplified, I am happy to consider them.

Bill Kidd: Following up on that, what is your view of the arguments made by the Strathclyde law school and others to the committee that it would be better to have less rigid notice rules in the bill and to give the parties to a commercial lease more choice on how to serve notice?

Siobhian Brown: The issue of adding a bit more flexibility between the tenant and the landlord has been raised by a few people. It is an interesting suggestion, which we could explore

moving forward. I do not know whether there would be any legal or technical obstacles to that. Michael might want to comment on that.

Michael Paparakis: This might be a reference to allowing tenants a longer or shorter period of notice compared with the landlord. Section 23, read with section 3, currently provides that the tenants and landlords have the same notice periods, and one can never be more or less than the other.

The view that there should be more flexibility is interesting. It has been raised in the oral and written evidence, and it is something that we will be considering. We can write to the committee, either ahead of the stage 1 debate or ahead of stage 2, to signal whether we will be doing anything on that.

Bill Kidd: That is helpful. I was also going to ask your view on the arguments that have been made to the committee about how service of notices is implemented by tenants and landlords. Will you possibly consider providing that notices by the tenant and by the landlord should be the same when it comes to the rules on timing and presentation? [*Interruption*.] I thought I was being cheered, there.

Siobhian Brown: Yes, I think that all those issues can be considered. I do not know whether there is anything different in your question compared with the original question on the notice period as between landlord and tenant, but we will be considering those aspects, and we will write to the committee about that.

Bill Kidd: Thank you; that is useful.

The Convener: Before I bring in Jeremy Balfour, I have a couple of questions along this line of questioning. Bill Kidd asked a couple of questions on this, but, whatever process is in the bill—and regardless of whether any amendments go forward—surely it should be clear to any party involved in a lease exactly what the implications will be for them. They should understand what the notice period would be and what the process is for ending a lease. The point that there needs to be a clear narrative and a clear set of rules has come across in the evidence that we have heard, irrespective of evidence on various other things.

You could also argue that there should be a consistent approach. The rigid approach, as proposed in the bill, could work well. However, business is not always as rigid as the rules that are set out. Having a bit of flexibility could be beneficial, as long as everyone understands exactly where they are.

Siobhian Brown: To respond to that point, one of the main aims of the bill is to simplify the process and make it easier for tenants and landlords to navigate.

The Convener: Okay. I call Jeremy Balfour.

Jeremy Balfour: I was going to ask this question at the end of the evidence session, but it seems appropriate to ask it now. It seems clear that, in light of the evidence that has been heard, you will be lodging some fairly major amendments to change the bill at stage 2. Given what I have been hearing from you, one of my concerns is that the committee will not have an opportunity to scrutinise such changes by taking evidence, because we will move straight to stage 2. At this point, is the bill generally fit for purpose, or does the Government need to consider bringing those amendments forward before the bill goes any further?

Siobhian Brown: The bill is still in the very early stages. You have just had your latest evidence session and I welcome the committee's scrutiny of the bill. I will take on board everything that you have said. I do not know whether, at this stage, I will commit that the bill will be heavily amended throughout stage 2—I am not able to tell you that. However, interesting things have been brought up that could be advantageous to the bill with regard to simplifying things, which I am willing to consider and write to the committee on. Michael, is there something that we could do to assist the committee in the scrutiny of the bill moving forward?

Michael Paparakis: We will be able to write to the committee ahead of the stage 1 debate, so that the committee will have a chance to consider what the Government is going to do. I do not think that the nature of the amendments that the minister has said that she will consider are going to be as drastic or as major as has perhaps been suggested. They do not feel as though they would be particularly drastic or a major change in policy; they seem to be the usual kind of drafting changes that have been dealt with in previous bills proposed by the SLC.

Jeremy Balfour: I have nothing further to ask.

Katy Clark (West Scotland) (Lab): As you know, a range of representations have been made to us. What is your view of the arguments that have been made to the committee that criticise the proposal to allow tenants to give notice orally when a lease has a term of less than one year?

Siobhian Brown: The provisions in the bill on oral notice by tenants reflect the law as it is at the moment. For those who think that a tenant should give notice in writing, there is flexibility in the bill to provide for that. It is open to the parties to agree a provision in the lease that written notice must be given to terminate it—section 23 allows for that. To be clear, oral notice can be given by the tenant

only when the lease is for less than a year, so that will not apply in all cases.

Leases of less than a year in duration tend to be more informal in nature and do not need to be in writing. They are of particular value to businesses that need flexibility because they are involved in temporary activities or are testing new markets, for example by operating concessions or food stands.

Requiring tenants to give written notice in all circumstances would be a significant change in the current law, and the Scottish Law Commission did not consult on it. It could also create a trap for small business people, who might think that, because they have entered into a lease by way of an oral agreement, they can terminate the lease in the same way, but they might find themselves having to continue to let the premises.

We should reflect on the possible unintended consequences that such a change in the law could have, particularly for small businesses when they are starting out.

10:30

Katy Clark: Are you satisfied that oral notice is workable? You have given it thought and you believe that it is workable.

Siobhian Brown: Yes.

Katy Clark: What is your view of the arguments that have been made to the committee that it is not desirable to change the existing terminology on the law of tacit relocation in the bill? Is there any particular reason why you want to get rid of the terminology, given that it is a tenet of Scots law?

Siobhian Brown: From my understanding, when the Scottish Law Commission drafted the bill, its intention was to make the legislation more accessible, but also to modernise it. I think that someone said that you could google the terminology to find out what it means, but should you need to google a Latin word in 2025?

That is my understanding of the issue. Lori Pidgeon or Michael Paparakis might have further input.

Michael Paparakis: There are obviously competing interests. The legislation has to be in plain English. I understand the point—which Dr Jonathan Brown put quite forcefully—that these are good Scottish words that should be kept, but, as the minister has pointed out, the phrase “tacit relocation” does not really describe what is going on in the way that “automatic continuation” does. The benefits of changing that language outweigh the disadvantages of keeping it.

Katy Clark: What is your view on the point that was put to the committee that vagueness in the bill’s language in some places, such as the use in section 5 of the term “within a reasonable period”, will lead to litigation, and that it should be replaced with definite and measurable—although less flexible—timescales such as 30 days? What is your view on that vagueness?

Siobhian Brown: The drafting of section 5 strikes an appropriate balance, and it will ensure that the law can respond flexibly to an array of circumstances that tenants and landlords might find themselves in. The drafting reflects the current common law, and it will allow the courts to continue to apply the law flexibly in many different situations in which landlords and tenants might find themselves on the termination of a tenancy.

Dr Brown told the committee that what might appear to be ambiguous drafting is likely, in practice, to provide flexibility. I know that some stakeholders suggested that “reasonable period” should be replaced with a specific timeframe, such as 28 days or 30 days, but I disagree. Such a rigid rule cannot take into account all circumstances that parties to a lease might find themselves in. There could be many reasons why a landlord might fail to take steps within 28 days or 30 days—for example, they might be away on holiday or have an illness or incapacity. That would result in automatic continuation of the tenancy, which would be an unfortunate result, especially if the landlord already had a new tenant lined up.

Katy Clark: Do you envisage that that vagueness is likely to lead to litigation and that we will have case law about what “within a reasonable period” means?

Siobhian Brown: I might ask the legal team about that.

Katy Clark: It must be something that you have given some consideration to, minister.

Siobhian Brown: Yes, of course. My understanding is—

Katy Clark: One of the concerns about the bill is that it will lead to more litigation. That is a political issue, not just a legal one.

Siobhian Brown: Yes, I know. My advisers have advised that they do not feel that that will be the case, but if something is flagged up, we will consider it.

Katy Clark: So you are satisfied that there will not be litigation.

Siobhian Brown: At this stage, yes.

Do you want to add anything, Michael?

Michael Paparakis: Section 5 is reflective of the current common law. If advisers and legal professionals are saying that there is no litigiousness between tenants and landlords under the current law, I would not expect there to be any

uptick in litigation as a result of us putting that in statute. I think that it was Mr Bartos who pointed out that the proposed language was reflective of the common law.

Katy Clark: So you would fall back on current practice when it comes to what "within a reasonable period" means.

Michael Paparakis: I would say that the provision reflects the current law. It is not about current practice; the point is that what happens now will continue after any provision comes into force. If there is no litigation on the matter at the moment, I would not expect to see an uptick in litigation as a result of the bill.

Katy Clark: So the current practice is what happens now.

What is your view of the arguments of the Scottish Property Federation and the Federation of Small Businesses that section 23(2)(b) should be amended so that the parties to a lease can negotiate a clause whereby the landlord would be required to provide a longer notice period than the tenant? Have you given thought to that, minister?

Siobhian Brown: Yes—that has been brought up previously in evidence. It is an interesting proposal, and we are looking at how we can move forward on it.

Katy Clark: Okay—thank you.

Bill Kidd: What is your position on the criticism of section 28, which will allow tenants to withhold payment if the landlord fails to notify them of their UK address? That is unusual, but there you go.

Siobhian Brown: Communication between landlord and tenant is vital, especially when it comes to serving notice and bringing the lease to an end, and sections 27 and 28 will resolve the issues with that.

The committee has heard from the Federation of Small Businesses that, in general, it is common for tenants to have problems in getting in touch with their landlord, and not just in the context of serving a document. I understand that some respondents consider that withholding rent because of a failure to provide a UK address is disproportionate, but a majority of consultees who responded to the SLC consultation on the issue were content with the remedy.

Retention of rent is not the sole remedy for the tenant and, of course, it is open to tenants not to exercise the remedy at all or even to retain only a small proportion of the rent. I also point out that the bill sets out a wide range of circumstances in which the remedy cannot be applied. For example, it cannot be applied if a UK postal address for the party is included in the lease or in certain documents that are registered in the land register or recorded in the register of sasines, where the other party to the lease has been given a copy of the document. Further, the provision does not apply to a body corporate or other legal person with a registered office in the UK, and it does not apply where the duration of the lease is less than a year.

That is similar to the statutory provision for residential leases in England and Wales in section 48(1) of the Landlord and Tenant Act 1987, which addresses the difficulties that residential tenants have when they do not have UK postal addresses for their landlord. I think that the provision will come into force for a very small minority of people who do not have a UK address.

Bill Kidd: Okay—that makes sense.

Do you have a position on the criticism of section 30(3), which seems to require landlords to serve irritancy notices to a tenant's creditor? I am not sure how you will address that one.

Siobhian Brown: Section 30 concerns the irritancy of leases and the landlord's need to serve an irritancy notice on a tenant's heritable creditor. Some stakeholders have criticised the provision, but I disagree and think that it is both workable and of wider public importance. The responsibility of landlords to search the registers will not place a disproportionate or undue burden on them. The committee has heard from the Scottish Property Federation, which represents landlords, that it has no issue with the requirement and that it is not much different from the reality of how leases work currently.

Bill Kidd: I understand that, but what do you think of the suggestion that there should be an obligation on the tenant to provide information on heritable creditors to the landlord so that the landlord knows who those people are?

Siobhian Brown: I understand that there has been a suggestion that tenants should be obliged to provide information about a heritable security to the landlord. There are potential difficulties with that in practice. For example, by the time the irritancy notice is required to be served, the heritable security could have been discharged or assigned. The Scottish Property Federation, when asked that question, told the committee that, although it might be helpful to be given notice, there are nonetheless ways in which the landlord could find out about security, which a prudent landlord would normally undertake before they serve notice.

Bill Kidd: Okay. Basically, though, I think that most people think that, if the tenant has a heritable creditor, they should make the landlord aware of that. If they do not, they do not, but what would be wrong with them having to alert the landlord to that fact?

Siobhian Brown: It is just a suggestion, and I think that any prudent landlord would normally undertake to do that before entering into a lease.

Bill Kidd: Okay. Thank you.

Jeremy Balfour: What is your view of the argument that the transitional provisions in the bill could lead to uncertainty for businesses that wish to terminate a commercial lease?

Siobhian Brown: The new law is intended to replace the pre-commencement law underlying a lease, including any implied terms. It is not intended to validate or invalidate the arrangements that the parties have expressed in their lease, as paragraphs 8 and 10 of schedule 2 make clear.

Any express lease terms that are carefully negotiated by the parties will be unaffected by any provisions in the bill coming into force. For example, if a lease has an express term providing for a three-week period of notice for a lease that is longer than six months, that period will continue to be valid, notwithstanding the fact that the bill provides for a minimum period of 28 days.

The alternative that has been suggested by some stakeholders is to apply the new law to leases that are entered into after the coming into force of any other provision, but that would mean that one kind of complexity would be replaced by another. For instance, if the new law were to apply only to new leases, then, for many years into the future, the current common law would apply only to old leases, and landlords and tenants could encounter difficulties in the future because they do not understand which legal regime applies to their case.

The provisions of the bill will be commenced by regulations, and I will ensure that there is sufficient lead-in time for legal professionals and interested stakeholders to make sure that they have all their affairs in order with regard to this issue.

Jeremy Balfour: There seems to be quite a lot of confusion around the issue. For example, in the evidence that it submitted in response to the committee's call for views, Shepherd and Wedderburn said that it is not clear whether the transitional arrangements will apply to existing leases that are extended by tacit relocation beyond the six-month cut-off period in the bill. Are you looking to bring some clarity to the issue, so that the legal profession at least knows what you are talking about?

Siobhian Brown: I ask Michael Paparakis to comment on that.

Michael Paparakis: I think that Shepherd and Wedderburn gave a specific example, and, rather than address that just now, I am happy to write to the committee on it. Essentially, however, if the bill's provisions had been brought into force and the six-month period had elapsed, the lease would continue by automatic continuation rather than tacit relocation. I can set that out in a letter to the committee.

On the transitional provisions, as the minister has pointed out, the suggestion seems to be that the six-month period would be too complex, because it would result in the common law running alongside the new provisions. However, the suggestion from some that automatic continuation should apply only to new leases would seem to be a worse position, because it would mean that the old law of tacit relocation would continue for a lot longer than six months. As the minister has pointed out, a tenant or landlord who wants to terminate a lease many years down the line might not be able to understand whether the position at the beginning of the lease involved tacit relocation or automatic continuation.

Therefore, we think that having a six-month period provides a short and clean break that will allow legal professionals and tenants and landlords to get their affairs in order before the new provisions come into force.

10:45

Jeremy Balfour: I think that there would be clarity, because everybody would know that any lease that was entered into before the date of commencement of the act would fall under one set of rules, and that any lease that came into force after the act had come into force would fall under the new rules. That would give absolute certainty, because anyone would be able to look at the date of their lease and see which side of the line it fell on, whereas the six-month hybrid period that is suggested in the bill will lead to complete uncertainty for that six-month period.

Michael Paparakis: Years down the line, there might not be a lease—the lease might have been lost. The parties—the landlord and the tenants—might not be the original parties. The tenants might not be the tenants who took out the lease. There could be many circumstances in which it is not clear whether tacit relocation or automatic continuation would be in effect. In our view, it is simpler to have the transitional provisions that are set out in the bill.

The Convener: I have a supplementary question. Does the Scottish Government have any figures on the number of leases that it is estimated would come to an end and come under the new law, if it is passed? How many leases would be covered by that? In addition, do you have any figures on circumstances in which leases have been lost and different folk are involved?

Siobhian Brown: I have not seen any data on those specific figures.

Michael Paparakis: We do not have any figures. Those are largely private arrangements, so it would be difficult to obtain any data on that.

Jeremy Balfour: I will move on to a very technical point that was raised by Burges Salmon. It said that the way in which "notice" is defined in paragraph 8 in part 2 of schedule 2 is problematic and that the term "intimation" should be used instead. Have you considered that suggestion?

Siobhian Brown: I will pass over to Michael Paparakis or Lori Pidgeon, because that is a technical issue.

Michael Paparakis: Off the top of my head, that is not an issue that I can say that I considered, but I could write to the committee with a view on it. I could probably get that done before the stage 1 report is due.

Jeremy Balfour: That would be helpful—thank you.

Roz McCall: The Scottish Law Commission has consulted on the Tenancy of Shops (Scotland) Act 1949 and has proposed that the bill be amended to implement its recommendation on that act. We have had mixed representations on that—some people are in favour of repealing the 1949 act, while others would prefer separate legislation to be used to reform it.

Is it the Scottish Government's intention to use the bill to repeal the Tenancy of Shops (Scotland) Act 1949? If so, could you explain the rationale behind that?

Siobhian Brown: I am pleased that the responses to the SLC's recommendation that a stage 2 amendment be lodged to give effect to its recommendation have been generally positive, and I welcome the scrutiny that the committee has done on the matter.

As members will be aware, the SLC's recommendation that the 1949 act be repealed was made in February this year, which was two months after the bill had been introduced. The Federation of Small Businesses, which represents businesses that have the kind of tenancy that the act is meant to help, told the committee that it would be a little bit softer with regard to using the bill to repeal the 1949 act.

I am aware that the SLC has expressed its hope that the Scottish Government will take forward its recommendation by lodging an amendment to the bill. I will consider carefully the responses from stakeholders and, in particular, whether any other consequential amendments might need to be made to the bill. I will write to the committee ahead of the stage 1 debate to set out my views on the repeal of the 1949 act and the lodging of an amendment.

Roz McCall: For clarity, the Federation of Small Businesses is concerned that the 1949 act should not be repealed without something else being put in its place. Will that be clarified?

Siobhian Brown: We will look into it and I will write to the committee with that information.

Roz McCall: In that case, I have no more questions.

The Convener: Minister, what are your thoughts on the argument that the Scottish Government should carry out an awareness raising campaign on the impact of the bill? If the Government is minded to do so, what form would a campaign take?

Siobhian Brown: That goes back to your point about raising awareness to simplify things for tenants and landlords. I recognise that the provisions of the bill are important for small businesses and landlords across the country. The changes that will be made by the bill will ensure that the legislation on termination of leases will be brought together in one place and be accessible to all. Stakeholders have been clear that they would like to see the Scottish Government raising awareness of the reforms. I am open to working with representative bodies such as the FSB and the SPF to consider what the Scottish Government can do to ensure that tenants and landlords know that they might be bringing their lease to an end.

As for legal professionals, generally, the familiarisation costs of any change in the law will be incurred by the legal firms that provide training. Such training is typically already provided for within firms' budgets and the cost of maintaining solicitors' legal knowledge is covered by fee-earning income. Scottish solicitors are required to undertake 20 hours a year of continuing professional development, and familiarisation training on changes to the law would typically count towards that figure. I am happy to meet representatives and discuss how we can raise awareness of the proposed changes.

Katy Clark: What is your view on the argument that the bill needs to clarify the rules on serving notice to trusts and unincorporated associations?

Siobhian Brown: I do not have any information on that, because it is technical. I will pass the question to Lori Pidgeon or Michael Paparakis.

Michael Paparakis: Having worked on trusts before, I know that they are extremely complex, so it will take us some time to work through the suggestion that has been raised. First, we would need to talk to the stakeholder who raised the issue to try to understand it and the situation in practice. We would then work through whether any potential solutions could be included in the bill. We

will be looking to work with them to address their concerns.

Katy Clark: Would you be happy to write to the committee with the outcome of those deliberations?

Michael Paparakis: Yes.

Katy Clark: Thank you—that is very helpful.

What is your view on the argument that the provisions on giving notice in the Sheriff Courts (Scotland) Act 1907 should be reviewed more generally and potentially repealed? Have you considered that?

Siobhian Brown: No, I have just considered the bill that we are discussing. I do not know whether the SLC has been looking at that in work of a wider scope.

Michael Paparakis: Part of the issue with the 1907 act is that it does not just deal with termination of leases; it deals with a host of other issues. We have heard that the act can cause problems. However, it is not a priority for the Scottish Government to look at that aspect of the 1907 act at this time, although I know that the Scottish Law Commission will be consulting on a new programme for law reform in the near future—perhaps next year. If practitioners or stakeholders feel that that is a particular concern, they can make representations as part of that consultation that will feed into the programme, and the SLC would consider it.

Katy Clark: You will have seen the representations that have been made to the committee, which vary, but there are calls for a review of the rules of the 1907 act. Are you looking at those representations? I appreciate your point that that act is broader than the issues that are in the scope of the bill, but are you looking at the wider issues that have been raised by a number of stakeholders—individuals and firms of solicitors—that have responded to the committee?

Siobhian Brown: We can definitely consider that.

Katy Clark: It has been raised with us, which is why we are asking for a response. I appreciate that.

The Convener: In evidence, we have received a range of detailed drafting suggestions for the bill. Do you have any comments on any of the suggestions that have been made by members of the legal profession and others who have been in touch with the committee?

Siobhian Brown: I know that a few suggestions have been made to the committee. I will have to go away and consider them with my officials before I comment on any of them.

The Convener: As members have no further questions, is there anything else that you would like to put on record, minister?

Siobhian Brown: No. Thank you very much for the opportunity to discuss the bill.

The Convener: A range of commitments have been made to come back to the committee with information, so we will get those responses from you—thank you for that.

I thank the minister and her officials for their evidence. The committee might follow up in writing with any further questions after our final discussions.

That concludes the public part of the meeting.

10:56

Meeting continued in private until 11:42.

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