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SPF Response to The Tenancy of Shops (Scotland) Act 1949

The Scottish Property Federation (SPF) is the voice for the real estate industry in Scotland. As a part of the wider British Property Federation, we include among our members: property investors, including major institutional pension and life funds; developers; landlords of commercial and residential property; and professional property consultants and advisers. Our members build Scotland's workplaces, homes, shops, schools and other facilities and the infrastructure that serves them. Our industry is therefore a core component of the Scottish economy.

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

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List of Questions

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)

Comments on Question 1
From feedback with our members, there is very little awareness or indeed use of the Act.

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

(Paragraph 3.82)

Comments on Question 2
On balance, we do not feel the need for the unamended 1949 Act to remain part of the law. As mentioned, the Act is rarely invoked and with significant shifts in the commercial market since the Act's inception post World War II means that the legislation no longer reflects market conditions.

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)

Comments on Question 3
Given the challenging market conditions for high streets, characterised by an oversupply of commercial and retail space resulting in higher vacancy rates, we do not think there is a shortage of rented premises for the listed businesses.
Whilst shortages may be present in more affluent towns or city centres for example, our members report ongoing challenges for landlords and investors in retaining and attracting tenants in these types of premises.
Considering advancements in digital commerce, we do not foresee a lack of suitable premises for the listed businesses being a significant issue.

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)

Comments on Question 4

Outside prime pockets or affluent areas, we do not expect a dramatic increase in rent considering the well-publicised challenges for the high street. Instead, our members have expressed significant concern over business rates, which represents a substantial cost for businesses.

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)

Comments on Question 5

Broadly no. There may be specific instances dependent on the clientele where some businesses may have built a reputation that is closely tied to their location, and this could impact their customer base should they have to move.

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)

Comments on Question 6

We understand listed businesses may have unique needs that would warrant special considerations in relation to the termination of the lease. Whilst likely to be rare, we anticipate that some hospitality or serviced based premises like a pharmacy may require additional time to relocate to obtain necessary licensing and regulatory compliance for instance.

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)

Comments on Question 7

Again, a pharmacy would be an essential service that may merit special provision at the end of a lease.

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)

Comments on Question 8
No, we feel the modern lease system and current market conditions sufficiently address this and therefore we have no compelling reason to continue the special provisions based on the reasons advanced in 1963.

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

(Paragraph 4.23)

Comments on Question 9
No comments.

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)

Comments on Question 10
No comments.

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)

Comments on Question 11
In situations where a landlord is planning for guaranteed vacant repossession at the point of the lease's expiration (such as to lease to a new tenant or to undertake re-development or

other works), the likely risk of the outgoing tenant invoking the 1949 Act adds an unhelpful layer of uncertainty regarding the outcome and timeline. The landlord therefore will have to consider this possibility and mitigate the potential effects of not having a guaranteed date in securing vacant repossession in their forward planning.

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

(Paragraph 4.27)

Comments on Question 12
Due to the limited use and awareness of the Act, we do not think it would be detrimental to the market should the 1949 Act be repealed. A single, lease framework for all commercial premises would improve certainty around the end of leases and reduce the complexity. Our members continually underscore the importance of reducing the complexity of legislation. Our members feel that modern lease agreements have evolved to offer stability and protection to tenants.

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

(Paragraph 4.27)

Comments on Question 13
We do not anticipate any significant economic impact should the Act be repealed.

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

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

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

(c) hot food takeaway premises;

(d) cafes, snack bars, and restaurants;

(e) pubs;

(f) hairdressing salons and barber shops;

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

(h) warehouses;

(i) wholesale premises;

(j) retail auction premises;

and if not, why not?

(Paragraph 4.35)

Comments on Question 14

For the reasons stated previously, we do not feel the need for the Act to be reformed. However, if there is agreement that the Act should be reformed, then we feel this list could be reduced to prioritise hospitality and specialist services, including those who cannot operate online.

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)

Comments on Question 15

We agree.

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

(Paragraph 4.37)

Comments on Question 16

We agree.

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)

Comments on Question 17
This mandatory notice to quit period would provide certainty but on the other hand results in less flexibility. In some rare instances, leases may be for a year or less so this would need to be accounted for.

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

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

(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)

Comments on Question 18
A mandatory notice period must balance the right, responsibilities and risk for all landlords, investors and tenants. At the same time, it must not be forgotten that tenants will be aware of their lease terms and expiry date thus, well informed to begin planning for the future well in advance.

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)

Comments on Question 19
In these circumstances, the default mandatory period appears reasonable.

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)

Comments on Question 20

Yes, and ideally as close to the landlords statutory six months' notice as much as possible. It is important to consider that the risks and liabilities for the landlord will substantially increase the closer to the deadline should they not have a tenant to fill the vacancy.

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)

Comments on Question 21

Yes and three months must be the minimum tenant break. As mentioned, landlords will often need to plan ahead for gaining vacant repossession of the property to allow for reletting or development works. The risks of achieving this will substantially increase if there is continued uncertainty as to whether the tenant will end the lease.

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

(Paragraph 5.19)

Comments on Question 22

As mentioned, a balance of interests must be struck between tenants who need adequate time to transition and landlords in finding a replacement tenant. Any less than three months may not provide the landlord with sufficient time to replace the tenant and then is in danger of incurring vacancy costs such as utilities, empty property rates and insurance. A tenant break should be no shorter than three months.

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

(Paragraph 6.7)

Comments on Question 23

The tenant should be allowed to make a deal to contract out of the application.

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)

Comments on Question 24
We agree that the sheriff's discretion should be replaced by the objectives test to enable greater certainty and clarity for each party.

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)

Comments on Question 25
Yes, both options, to provide clarity to the court.

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)

Comments on Question 26
Yes, we agree. All seem reasonable.

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

(Paragraph 6.22)

Comments on Question 27
No comments

28. Do you think the statutory statement of objects should include a provision that its objects do not include relieving tenants who would reasonably have been able to plan for the removal of their business at the termination date?

(Paragraph 6.23)

Comments on Question 28
No.

29. Do you think that qualifying the "reasonableness" test with a list of disregards would be an appropriate way of addressing the concerns over its width and the unpredictability of outcome when it is applied?

(Paragraph 6.25)

Comments on Question 29
We would advocate for a stronger approach to be taken.

30. If a list of disregards is appropriate, should it be in place of, or in addition to, the statutory statement of objects?

(Paragraph 6.25)

Comments on Question 30
We feel this should be in addition to.

31. If a list of disregards is appropriate, should a "strong" or a "soft" approach be adopted?

(Paragraph 6.25)

Comments on Question 31
Again, we would advocate for a stronger approach to be adopted.

32. In applying the "reasonableness" test, should the court be required to disregard the importance of the shop to the public, including the local community?

(Paragraph 6.27)

Comments on Question 32

We recognise the court will wish to consider local circumstances. However, Commercial leases are a transaction between landlord and tenant and a business transaction with rights and resposnibilities bestowed on each party.

33. In applying the "reasonableness" test, should the court be required to disregard any effect of renewal or of refusal to renew on the numbers or terms and conditions of employees of the parties or of any prospective user of the premises?

(Paragraph 6.28)

Comments on Question 33
No, we feel it's important that a court considers the local context.

34. In applying the "reasonableness" test, should the court be required to disregard any effect of renewal or refusal to renew on any prospective third-party buyer, tenant or other user of the premises that is not controlled by or closely linked to the landlord?

(Paragraph 6.30)

Comments on Question 34
No, as mentioned the court should consider the wider economic and social impact in the local area.

35. In applying the "reasonableness" test, should the court be required to disregard any effect of the renewal or termination of the lease on the family of the parties or the individuals who own or control those parties (subject to any applicable UNCRC requirements)?

(Paragraph 6.32)

Comments on Question 35
No, while it may add complexity, the court should consider the broader social impact.

36. Are there any other circumstances that have not been discussed which you think should feature in a list of disregards?

(Paragraph 6.33)

Comments on Question 36
No.

37. Do you agree that the sheriff should retain the discretion under section 1(2) of the 1949 Act to vary both the rent due under, and also the other terms and conditions of, the renewed lease if, in all the circumstances, they think such variations reasonable? If not, why?

(Paragraph 6.35)

Comments on Question 37
No. We believe the courts may lack the necessary expertise in local markets required to efficiently determine rents or to mandate terms and conditions for renewed leases. The RICS Dispute Resolution Service is an alternative independent commercial rent review service that we believe would be better placed to vary the rent in exceptional circumstances.

38. In respect of the mandatory ground for refusal for ongoing monetary breach of the lease, do you:

(a) agree with an irritancy-based approach?

(b) agree with an "any ongoing arrears"-up-to-decision approach?

(c) propose any other approach?

(Paragraph 6.40)

Comments on Question 3
We agree with option b.

39. Should it be a mandatory ground for refusal that the tenant has persistently breached any monetary obligation under the lease?

(Paragraph 6.41)

Comments on Question 39
Yes.

40. If so,

(a) should the ground incorporate an additional condition that, as a result of the persistent breaches, the landlord has a reasonable apprehension that a breach will occur if the lease is renewed?

or

(b) should the ground be excluded if the tenant can establish that their circumstances have changed since the breaches and that a breach will not occur if the lease is renewed?

(Paragraph 6.41)

Comments on Question 40
Yes, it is reasonable for persistent breaches to be seen as a reasonable ground for a landlord to argue that a future breach will occur if a lease is renewed.

41. Do you agree with the retention of the mandatory ground in section 1(3)(a) in respect of non-monetary breaches by the tenant?

(Paragraph 6.42)

Comments on Question 41
Yes. We agree direction on a material breach at time of decision on renewal is required.

42. Do you think that the Act should expressly direct the sheriff in making their decision to have regard to any provision in the lease whereby a particular breach is made material or justifying irritancy?

(Paragraph 6.42)

Comments on Question 42
Yes. We believe direction to the sheriff is required as the express intention of parties as set out in the lease needs to be recognised and taken into account by the court.

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)

Comments on Question 43
Yes, we agree.

44. Do you agree that the mandatory ground in section 1(3)(c) should be repealed without replacement?

(Paragraph 6.44)

Comments on Question 44
Yes, we agree this should be repealed without replacement.

45. Do you agree that the mandatory ground under section 1(3)(d) should be retained?

(Paragraph 6.45)

Comments on Question 45
Yes, agree this is a reasonable ground.

46. Do you agree that the mandatory ground under section 1(3)(e) should be retained, but with an adjustment that the landlord should have to show "material adverse effect" on them, rather than "serious prejudice"?

(Paragraph 6.47)

Comments on Question 46
It is reasonable for a landlord to seek repossession having planned in good faith that a tenant will quit. Therefore, we agree with the material adverse approach.

47. Do you agree that the mandatory ground under section 1(3)(f) should be repealed without replacement?

(Paragraph 6.50)

Comments on Question 47
On balance, we agree with the SLC's recommendation to repeal given the intention to apply a statement of objects (principles) with appropriate disregards (caveats to be considered) in relation to any reformed Tenancy of Shops procedures.

48. Should it be a mandatory ground for refusal that the lease contains an unexercised option for the tenant to extend the lease?

(Paragraph 6.51)

Comments on Question 48
Yes. If a tenant has had an option they have failed to exercise, then the grounds for protection under the Act do not appear justified, and landlords also deserve certainty. But our answer

should be seen in the context that we expect most landlords to be motivated to retain good tenants because this is a very different market context to the one that existed in 1949/1963. We would expect and be surprised that if there had been circumstances where tenant ownerships for example had changed, then landlords should expect this to have delayed decision making in relation to lease renewals or terminations

49. Should it be a mandatory ground for refusal that an application is made to renew a lease the termination date of which was fixed by the court under a previous application?

(Paragraph 6.53)

Comments on Question 49

Yes, this should be a mandatory ground for refusal. Our understanding is that Act was intended to be a last resort where for whatever reason termination/renewal negotiations had not come to a conclusion.

50. Should it be a mandatory ground for refusal that the landlord requires possession of the premises in order to carry out work in fulfilment of:

(a) a statutory obligation relating to climate change legislation? or

(b) any statutory obligation?

(Paragraph 6.56)

Comments on Question 50

These are very important points which will require significant cooperation between landlords and tenants. To be blunt, if it is not a potential condition of renewal, then improvements may never be delivered thus frustrating the intent of Parliament. In truth there is a considerable gap between the aspiration of governments across the UK and the ability of landlords to deliver climate change responses, both in legal terms and in terms of capacity and resources.

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)

Comments on Question 51

Yes, if the Act is intended primarily to provide a protection for small businesses, then a gateway check for smaller businesses would appear appropriate.

52. For purposes of the test, should the definition of "small business" be based on it falling below thresholds based on:

(a) all of (i) annual turnover, (ii) closing net assets, and (iii) a monthly average of number of employees; or

(b) just one or two of these criteria, and if so which ones?

(Paragraph 6.68)

Comments on Question 52
Yes, we agree that annual turnover and the number of employees would appear best, relevant to the business in Scotland

53. Are the proposed thresholds for turnover, net assets, and number of employees which currently denote a micro-entity under the Companies Act 2006 appropriate for identifying the "small business" for whose benefit a reformed Act should operate? If not, should the figures be lower or higher and if so, why?

(Paragraph 6.68)

Comments on Question 53
This would be consistent if this is the preferred method.

54. Should Scottish Ministers have the power to review and adjust the thresholds based on turnover and net assets?

(Paragraph 6.68)

Comments on Question 54
Scottish Ministers should be able to change these criteria. Scottish Ministers tend to use nondomestic rates relief related measures however based on the number of properties in Scotland and rateable value, which are updated every 3 years.

55. Should the following be disqualified from being a "small business":

(a) public companies?

(b) share-traded companies?

(Paragraph 6.68)

Comments on Question 55
Yes, these should be disqualified.

56. If the tenant's business is part of a group, should the group's turnover, net assets, and employee figures be attributed to the tenant as if they were the tenant's business' own figures?

(Paragraph 6.68)

Comments on Question 56
The definition should apply to all forms of businesses subject to the wider eligibility criteria on the turnover or number of properties leased etc. It should also be noted that leases are often in the name of one company which is part of a larger business made up of other group companies, and the group as a whole should be assessed for these purposes.

57. Should the proposed definition of "small business" apply to all tenants, including sole traders, partnerships, SCIOs, and trustees? If not, why not?

(Paragraph 6.68)

Comments on Question 57
Yes, as the legal nature of the tenant entity itself should not in itself be a defining factor for the availability of rights under the new mechanisms.

58. Do you have any other proposal or criteria for a gateway test?

(Paragraph 6.68)

Comments on Question 58
The Scottish Government tend to prefer the rateable value combined with the numbers of properties as measures. This could be an option as it would be consistent with government support via the Small Business Bonus Scheme.

59. How should a foreign-registered tenant entity be treated under the gateway test?

(Paragraph 6.69)

Comments on Question 59
The issue should be whether the business is genuinely an SME not whether it is foreign registered. This is why a combination of tests on Companies House or rateable value or the number of other properties in Scotland is probably necessary. It would surely be wrong for a business to be excluded from protection simply because of its origin of registration being overseas.

60. Should short-term leases be excluded from a reformed 1949 Act?

(Paragraph 6.71)

Comments on Question 60
Yes, less than one year would not appear to be appropriate as under this term many tenants may instead operate under licence terms rather than leases.

61. If so, should the leases being excluded be ones that were granted for:

(a) less than six months? or

(b) less than one year?

(Paragraph 6.71)

Comments on Question 61
Less than one year should be excluded.

62. If you favour the exclusion of leases for less than six months, should leases of over six months but less than one year be renewable by the court only if the lease has previously been continued by tacit relocation (automatic continuation) under which the tenant has been in continuous possession of the subjects of the lease for one year or more at the date of renewal?

(Paragraph 6.71)

Comments on Question 62
We do not agree the Act should apply for leases less than one year.

63. If the premises are occupied by a sub-tenant, should the sub-tenant be excluded from seeking renewal under a reformed Act?

(Paragraph 6.77)

Comments on Question 63
In the current weak commercial property market this may not be an unusual circumstance. Ideally this should be for the sub-tenant and tenant to agree but the head tenant, having gained landlord approval, is also likely to be ultimately answerable for their sub tenants' responsibilities. In addition, under the reformed Act, the sub-tenant should not be given a direct lease relationship with the landlord.

64. If so, should there be an exception where the sub-lease is held under a registered ground lease?

(Paragraph 6.77)

Comments on Question 64
A ground lease is not a lease of a building, it is typically a lease of bare land upon which the tenant has constructed premises itself. It is therefore not appropriate for the mechanisms of the reformed Act to apply in these circumstances.

65. If the premises are sub-let to any extent, should the mid-landlord (tenant under the head lease) be excluded from seeking renewal of the head lease under a reformed Act?

(Paragraph 6.77)

Comments on Question 65
No. We do not see why the head tenant should be excluded.

66. Should an application under a reformed Act be made no later than the day that is two months before the termination date of the lease?

(Paragraph 6.80)

Comments on Question 66
Two months' notice by a tenant of an application for (protection) a reformed Act appears to be reasonable.

67. Should the application be made no earlier than the day that is one year before the termination date of the lease?

(Paragraph 6.80)

Comments on Question 67
No earlier than one year before termination of the lease appears reasonable.

68. Alternatively, do you consider that some other time limit or limits should apply and, if so, what should they be?

(Paragraph 6.80)

Comments on Question 68
«InsertTextHere»

69. Should a reformed Act clarify on whom the onus lies for proving the relevant elements of any application for renewal?

(Paragraph 6.81)

Comments on Question 69
We agree with the SLC's assessment that for applications for renewal the tenant should be expected to prove they are a small business and that it is reasonable to grant them renewal. Similarly, the landlord must be required to explain why one of the mandatory grounds for refusal has been reached.

70. If so, do you agree that the burden of proof be distributed such that it lies on the tenant to establish (i) their "small tenant" eligibility, and (ii) that renewal of the lease would be reasonable, while it should be for the landlord to establish one (or more) of the mandatory grounds for refusal?

(Paragraph 6.81)

Comments on Question 70
Yes, for the reasons stated in the comments to question 69.

71. Should a reformed Act clarify that, if it is not possible to dispose finally of the application within the extension granted in any interim order, the sheriff should have power to make further interim orders authorising the tenant to continue in occupation, for a further period not exceeding three months, and on such terms and conditions as the sheriff thinks fit?

(Paragraph 6.82)

Comments on Question 71
We agree that this is pragmatic and fair, but we believe there must be a limit to any further interim notices.

72. Would transferring applications under a reformed Act to the simple procedure assist parties in reducing:

(a) the delay in deciding an application; and

(b) the costs involved in relation to an application?

(Paragraph 6.89)

Comments on Question 72
The simplified procedure may allow a landlord and tenant to more swiftly decide an application. This could be to the interest of both parties.

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)

Comments on Question 73
Option b would be appropriate.

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)

Comments on Question 74
Assuming there is a small business gateway check then it would seem appropriate and logical to ensure a cap for an unsuccessful party. However, it should be noted that this will not result in lower legal bills overall, it will simply limit the ability of the successful party to recover legal costs from the other party. Setting a cap at too low a level will therefore be unfair to successful parties and will simply encourage tenants to raise proceedings without proper consideration as to whether they have a reasonable case for doing so.

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)

Comments on Question 75
There is a concern for both smaller landlords and tenants of what they may be induced tox` agree to by way of waiving appeal rights.

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

(Paragraph 6.90)

Comments on Question 76
Leave to appeal serves as an effective filter to prevent weak cases from progressing to appeal.

77. Should it be a pre-condition of a tenant's entitlement to apply for renewal of the lease that they have made a formal proposal for mediation to the landlord?

(Paragraph 6.98)

Comments on Question 77
We do not agree mediation should be a pre-condition.

78. Should the sheriff have express powers to:

(a) disallow liability of the unsuccessful party for the court-related expenses of the successful party if the successful party has acted unreasonably in not engaging with mediation of the dispute; or

(b) make some other order in relation to court-related expenses as sanction for non-engagement in mediation?

(Paragraph 6.98)

Comments on Question 78
We agree if a Sheriff believes a successful party has behaved unreasonably.

79. If your answer to the above question is "yes", should the onus lie on the party who has not engaged in the mediation to establish that they had reasonable grounds for non-engagement?

(Paragraph 6.98)

Comments on Question 79
Yes, we agree.

80. What, if any, economic impact would the proposed reform of the 1949 Act have?

(Paragraph 6.99)

Comments on Question 80
If there is a gateway test, then this may reduce the number of large retailers able to make use of the Act. The Act is not commonly used and therefore the economic impact may be limited to more process and court action which is not necessarily in the wider economic interests of the business community, tenants or landlords.

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)

If we cannot have option B then it would appear that option C would be better with its focus on a small business gateway check. Possibly the ideal combination could be option B with a small business gateway check.

General Comments
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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.