



**Response by the Faculty of Advocates  
to the Scottish Law Commission letter dated 25<sup>th</sup> September 2020 in connection  
with SLC Discussion Paper No. 165 on Tacit Relocation.**

In the above mentioned letter, the Faculty of Advocates has been asked, in the circumstances set out in the letter, and in connection with the proposal set out in the letter, whether “you agree with this way forward?”

The proposal (the proposed way forward) is:

“In order to allow the reforms in the Discussion Paper to be implemented in the most effective way possible we propose that the rules on tacit relocation (incorporating those reforms) be put on a clear statutory footing with a new transparent name such as “automatic extension”. This would apply only to “commercial leases”, namely leases not covered by residential tenancy, agricultural holdings or crofting legislation.”

In the original Discussion Paper response, the Faculty Committee was asked the question:

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

The Committee responded:

“No.

We consider that the law of tacit relocation is simple and easy for parties to understand (assuming knowledge of it). If a scheme of non-contractual automatic relocation is desired, we consider that there would be little benefit, if not unnecessary confusion, from the substitution of the known, simple common law scheme with a statutory scheme.”

The Scottish Law Commission’s letter of 25<sup>th</sup> September 2020 identifies an issue with the practical implementation of integrating legislative proposals with the existing common law.

From the above, we take it that the Scottish Law Commission favours some legislative change, but that the existing common law and the favoured legislative change are mutually exclusive, at least in meaningful terms.

If that is correct, the question asked by the Scottish Law Commission is largely self-determinative. If the favoured legislative proposals are to prevail, the existing common law must give way. It seems to us, in the first instance at least, that to test whether an effective legislative scheme can be implemented, the existing common law must, notionally, be put aside. Any statutory scheme, in the absence of complementary common law provisions, must be comprehensive and tested as a complete solution.

If a comprehensive and effective statutory scheme could not be devised and/or implemented, it might indicate that the existing common law should, at least in large part and subject to the other responses previously given, prevail.

In these circumstances, our view is, subject to the observations above, we do agree with the proposed way forward, at least in the first instance and with the specific intention of devising a comprehensive statutory scheme.

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