

# Prescription (Scotland) Bill

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## Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Prescription (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### Outline of Bill provisions

3. The doctrine of prescription serves a vital function in the civil justice system. Negative prescription sets time-limits for when obligations (and correlative rights), such as obligations under a contract, are extinguished. The policy objective of the Bill is to change the law of negative prescription to address certain issues which have caused or may cause difficulty in practice. These changes are designed to increase clarity, certainty and fairness as well as promote a more efficient use of resources, (such as creditors being less likely to require to raise court proceedings to preserve a right), and reduced costs for those involved in litigation and insurance. The Bill makes amendments to the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

4. In particular, the Bill will:

- extend the scope of the five-year prescription in a number of respects

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- reform the so-called discoverability test in section 11(3) of the 1973 Act relating to the state of knowledge of a creditor in cases of latent damage
- set the start date of the 20-year prescriptive period in relation to claims for damages as the date of the act or omission giving rise to the claim
- ensure that the 20-year prescriptive periods are not amenable to interruption
- allow parties to agree an extension to the five-year prescription period and the two-year prescription periods but only for a limited period and subject to certain other conditions
- clarify that the burden of proof as to whether a right has prescribed or not falls on the creditor

## Rationale for subordinate legislation

5. Ancillary provision is standard practice for Bills of this scope and complexity and commencement provision is standard for all Bills.

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### Section 15 – Ancillary Provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative/negative

### Provision

6. Section 15(1) of the Bill provides that the Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill. Subsection (2) provides that such regulations may make different provision for different purposes and may modify any enactment, instrument or document (including the Bill).

### Reason for taking power

7. The Bill makes substantive reforms to a technical and longstanding area of Scots private law that has an effect across a wide range of different

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subject areas. Ancillary provision may be needed to deal with any unforeseen matters to ensure that the proper effect of the reforms are realised and to ensure that the Bill achieves its purpose of improving clarity, certainty and fairness in the operation of the law of negative prescription. For example there may be a need for small, technical adjustments to fine tune the interaction of the Bill's provisions with other legislation. It would not be an effective use of the Parliament's time to deal with such matters through subsequent primary legislation. It is considered that such matters can be best addressed through subordinate legislation. The power is restricted in that it can only be used for the purposes of, or in connection with the Bill, or for the purposes of giving full effect to, any provision of the Bill.

### Choice of procedure

8. Regulations under this section are subject to the negative procedure except where they add to, replace or omit any part of the text of an Act, in which case the regulations are subject to the affirmative procedure. These procedures provide the necessary safeguards with regard to the type of legislation which can be made.

### Section 16 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

### Provision

9. Section 16(1) of the Bill provides that sections 15 (ancillary provision), 17 (short title) and 16 itself will come into force automatically on the day after Royal Assent.

10. Section 16(2) of the Bill confers a regulation-making power on the Scottish Ministers to bring into force the majority of the provisions of the Act which will result from the Bill (if it is passed). The power includes power to make transitional, transitory or savings provision to appoint different days for different purposes.

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### Reason for taking power

11. It is standard for the Scottish Ministers to have control over the date of commencement.

12. The coming into force of the Bill's substantive provisions will have implications for creditors and debtors involved in the enforcement of obligations and rights, in particular, the time scales available to raise civil actions in relation to latent damage. In order to allow creditors and debtors appropriate time to arrange their affairs accordingly, it is important for the Scottish Ministers to have power to allow for the planning of orderly implementation and to commence the substantive changes when they consider it appropriate to do so. It is preferable to ensure there is flexibility in the commencement power in case it transpires that there is a need for staged commencement of the Bill's provisions. The Scottish Government therefore considers that, in accordance with usual practice, the regulations should be capable of making different provision for different purposes.

13. There may be some need to make transitional provision on commencement and the Scottish Government considers that, in accordance with usual practice, there should be flexibility to include such transitional provision in the commencement regulations.

### Choice of procedure

14. As is now usual for commencement regulations, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010). This is considered appropriate because the policy behind the provisions will have already been considered by the Parliament during the passage of the Bill.

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