

Prescription (Scotland) Bill

Policy memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Prescription (Scotland) Bill introduced in the Scottish Parliament on 8 February 2018.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 26–EN);
- a Financial Memorandum (SP Bill 26–FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 26–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

4. The doctrine of prescription serves a vital function in the civil justice system. Negative prescription sets time-limits for when obligations (and 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 pursuers being less likely to have to raise court proceedings to preserve a right, and reduce costs for those involved in litigation and insurance.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

5. The Bill makes a number of amendments to the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act'). The Bill implements the legislative recommendations contained in the Scottish Law Commission ('SLC') Report on Prescription¹ which is item No 7 of the Commission's Ninth Programme of Law Reform². Greater detail as to the legal and practical issues which informed the Bill are set out in the Report and also in the preceding SLC Discussion Paper on Prescription³, both of which are available on the SLC's website.

6. The SLC review was not a wholesale review of the law of prescription but a review of certain issues within the law of negative prescription which have caused or may cause difficulty in practice. The SLC Report and the Bill are therefore only concerned with aspects of negative prescription and do not deal with positive prescription where, once a period of time has elapsed, a possessor who satisfies certain conditions acquires property rights. Moreover it does not change the law in relation to limitation. Limitation also sets time limits but is different from prescription in that it does not extinguish rights, rather it sets a procedural barrier for raising proceedings in court after a certain time. For example, a seller's right to be paid the price of goods is extinguished by prescription: if no claim is made for the price within the prescriptive period, the right to payment ceases to exist. By contrast, limitation does not extinguish rights but sets a procedural barrier to raising proceedings in court. Claims for damages for personal injury, for example, are subject to limitation. If no claim is made within the limitation period, the claim still exists, but other than in exceptional circumstances it will not be possible to pursue it. This Bill and the Scottish Law Commission Report on Prescription are not relevant to claims affected by limitation. Given that prescription was removed from personal injury actions in 1984⁴, this Bill and the SLC report are not relevant to such actions.

¹ SLC Report on Prescription No 247 July 2017
https://www.scotlawcom.gov.uk/files/3414/9978/5138/Report_on_Prescription_Report_No_247.pdf

² SLC Ninth Programme of Law Reform (2015)
https://www.scotlawcom.gov.uk/files/6414/2321/6887/Ninth_Programme_of_Law_Reform_Scot_Law_Com_No_242.pdf

³ SLC Discussion paper on Prescription (No_160) February 2016
https://www.scotlawcom.gov.uk/files/3514/5614/9429/Discussion_Paper_on_Prescription_DP_No_160.pdf

⁴ The Prescription and Limitation (Scotland) Act 1984.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

Background

7. This Policy Memorandum refers to creditors (those holding rights) and debtors (those subject to an obligation). Scots law, like many legal systems, recognises that it is fair, in certain circumstances, for a creditor to lose a legal right with the passage of time. Prescription is justified by a number of policy considerations. There are clear benefits to bringing actions early, in particular, delay may adversely affect the quality of justice. Evidence may deteriorate or be lost, including witnesses dying or becoming incapacitated. It may be unfair for a debtor to have an action raised against him or her long after the circumstances that gave rise to it have passed. It is reasonable that debtors should be able to organise their affairs and resources on the basis that, after a definite period of time, their obligation is extinguished. The public interest also lies in disputes being resolved as quickly as possible. Considerations of legal certainty justify, as a general rule, a cut-off beyond which obligations are extinguished and therefore claims may not be litigated. Prescription is an essential part of balancing individual interests on one hand and serving the wider public interest on the other. This means that there will be individual cases where prescription appears to operate harshly to extinguish a creditor's right. For example, the 20-year prescription (discussed below) extinguishes a right after 20 years, whether or not the person entitled to the right knew of its existence. Depending on the precise facts of a case, that may seem harsh to the individual. But from a wider perspective there are good reasons - such as fairness to the person against whom the right would be enforced; difficulties in obtaining reliable evidence after such a long period, and so forth - why it should not be possible to assert claims to rights that have not been enforced for 20 years. However, in the wider interests of fairness, justice and certainty, prescription needs to strike a fair balance overall.

The current law

8. The law of prescription is set out in the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act'). Section 6 of the 1973 Act provides for the extinction of certain types of obligations on the expiry of a period of five years from the date on which they became enforceable. It does not apply to all obligations but only to those listed in paragraph 1 of schedule 1 of the 1973 Act and not listed in paragraph 2 of that schedule. Section 7 of the 1973 Act provides for the extinction of obligations after they have subsisted for a continuous period of 20 years from the date on which they became enforceable. It is a "long stop" period which provides an absolute "cut off" point: it is absolute in the sense that it takes no account of whether the

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

creditor or pursuer knew the right in question existed. This “cut off” point ultimately takes effect if an obligation has not already been extinguished during the preceding 20 year period. By contrast with the five-year prescriptive period, it applies to all obligations other than those specifically excluded from it, namely obligations to make reparation in respect of personal injuries, or for damage caused by a defective product, and obligations identified in schedule 3 of the 1973 Act as being imprescriptible. Section 8 of the 1973 Act provides for a similar long-stop period of prescription in relation to the extinction of certain rights relating to property.

9. The 1973 Act provides for the start of the prescriptive period to be postponed, or for it to be suspended, in particular situations. For example, section 6(4) provides that the five-year prescriptive period will not run during any period for which the creditor is induced by fraud or error on the part of the debtor (caused by the debtor innocently or otherwise) to refrain from making a claim. Section 11(3) deals with what is required, in terms of the state of knowledge of the creditor, to start the running of the five-year prescriptive period where there is latent damage. This is known as the “discoverability test” and is discussed further below.

10. There are also other prescriptive periods set out in the 1973 Act. Section 8A deals with the two-year prescription of obligations to make contribution between wrongdoers and section 22A deals with the 10-year prescription of obligations arising from liability under Part I of the Consumer Protection Act 1987.

Previous Work on Prescription

11. The 1973 Act came out of SLC recommendations in 1970⁵ and since then it has been substantially amended. The SLC also published a Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues)⁶ in 1989. This report included recommendations to add factors to the discoverability test; in relation to an obligation to make reparation, to retain the current position on the start of the long negative prescriptive period and set the length of the long prescriptive period at 15 years; and to prohibit agreements to lengthen the prescriptive periods but allow agreements to shorten them, amongst other things. Some of the

⁵ Report on Reform of the Law Relating to Prescription and Limitation of Actions, Scot Law Com No 15 (1970)

⁶ Scot Law Com No 122 (1989)

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

recommendations in that Report proved contentious which led to the decision to not implement the Report⁷.

Morrison v ICL Plastics

12. A key issue within the law of prescription is the treatment of claims for latent damage. Recently, this was brought to the fore through the judgment of the UK Supreme Court in the *David T Morrison v ICL Plastics* case⁸. Until that judgment, it was generally understood that section 11(3) of the 1973 Act postponed the start of the five year prescriptive period until the date the creditor was aware of both (a) that he or she had sustained loss and (b) that the loss had been caused by fault or negligence. In this case, the pursuers were owners of a shop which was damaged by the explosion at the Stockline factory in Glasgow in May 2004. Whilst at the time of the explosion it was apparent that the pursuers had suffered loss, the cause of that loss was not clear. In August 2009 they raised proceedings against three companies which traded from the factory relying on section 11(3) of the 1973 Act, as on the face of it their right to reparation had not prescribed under the five-year prescription. However, the Outer House of the Court of Session ruled against the pursuers. It was held that the pursuers must have known, at the time, that the explosion was due to fault since buildings do not explode spontaneously. It did not matter that the pursuer didn't know the identity of the person to sue. The Inner House of the Court of Session disagreed but was later overruled by the UK Supreme Court⁹. Following these judgments, it is now clear that the prescriptive period is postponed until the creditor knows of the fact that he or she has sustained loss, injury or damage – but nothing more.

13. This decision has caused some concern, in particular among those who frequently have to deal with claims for latent damage, such as those in the construction industry, insurance, and litigation generally. One of the Justices of the UK Supreme Court urged that fresh consideration should be given to the recommendations about discoverability made in the SLC's 1989 Report¹⁰.

⁷ SLC Discussion paper on Prescription (No_160) 2017, paras 3.4 – 3.6 and 6.13 – 6.15.

⁸ *David T Morrison & Co Limited v ICL Plastics Limited* [2014] UKSC 48

⁹ 2014 UKSC 48, 2014 SC (UKSC) 222.

¹⁰ Morrison, at para [101] (Lord Hodge).

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

14. When the SLC consulted on its Ninth Programme of Law Reform, the re-examination of this and certain other aspects of the law of prescription attracted support and was included in the Programme. As noted above, the project and the resulting Report is not a wholesale review of the law of prescription. Rather it is targeted at certain issues which have caused or are likely to cause difficulty in practice. In addressing these issues, the SLC has aimed to strike a fair balance overall and has carefully considered how the prescription regime as a whole impacts on creditors and debtors respectively. The SLC's recommendations therefore form a package of reforms, carefully designed to maintain the necessary overall balance.

Overview of Bill

15. The Bill is based on the 22 recommendations the SLC made in its recent Report on Prescription. The provisions are discussed below.

The Scope of the Five-Year Negative Prescription

Extension of the five-year prescription to all statutory obligations to make payment

16. The Bill includes provision to extend the five-year prescription to all statutory obligations to make payment in so far as they are not expressly excluded. Exceptions include: obligations to pay taxes and duties recoverable by the Crown, council tax and non-domestic rates, sums recoverable under specified social security and tax credit legislation, and child maintenance support (section 3).

17. To establish whether a legal obligation prescribes after five years requires analysis as to whether it falls into one of the specified categories listed in schedule 1 paragraph 1 of the 1973 Act. This is not always straightforward and also means that schedule 1 paragraph 1 needs to be amended when new types of statutory obligations that are intended to prescribe after five years are created. The SLC's review identified a number of statutory obligations to make payment as obligations which, without sound policy justification, do not fall within the five-year prescription. The SLC therefore proposed a general provision that statutory obligations to make payment are subject to the five-year prescription.

18. The SLC originally consulted on a wider provision to introduce a general rule that all statutory obligations, whether or not to make a payment, prescribe under the five-year prescription. This suggestion received strong support. Having considered the issue further, however, the

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

SLC recommended making the provision somewhat narrower by restricting it to obligations to make payment. It noted:

“The policy reasons mentioned in the Discussion Paper for applying the five-year prescription to obligations which are essentially of a private-law character yet which are given expression on a statutory rather than common-law basis seem to us to remain valid. But it is important that any reform of this kind should not extinguish rights, powers and duties that arise in the public sphere. In particular, it would clearly be inappropriate for our recommendations to extend to an obligation to perform a duty which a statute requires a Minister or public body to perform.”¹¹

19. The SLC therefore recommended that only statutory obligations to make payment should be brought within the scope of the five-year prescription, with certain exceptions.

20. Among the exceptions recommended were obligations to pay taxes or duties that are recoverable by the Crown. The current legal position is that obligations to pay taxes and duties recoverable by HM Revenue and Customs (HMRC) and by Revenue Scotland are not subject to the five-year prescription. That is also the position in England and Wales¹². The SLC recommended leaving this position unchanged by excepting tax obligations from the new general rule. The exception applies to taxes and duties collected by both HMRC and Revenue Scotland and not only to taxes and duties but also to any penalty, interest or other sum which is recoverable as if it were a tax or duty (including, for example, National Insurance contributions).

21. Respondents to the consultation on the draft Bill also proposed some additional exceptions. Department for Work and Pensions (DWP) proposed exceptions for recovery of social security overpayments and social security debt, tax credit overpayments and child maintenance debt. According to DWP, social security and child maintenance debt recovery often takes place over long periods of time and a five-year prescription period would be of concern. The SLC accepted these arguments, which would align the position in Scotland with the law in England and Wales where these obligations are also subject to a 20-year period. The SLC therefore

¹¹ SLC Report on Prescription, No 147, July 2017 paragraph 2.22

¹² Limitation Act 1980 section 37.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

recommended excepting obligations to pay sums recoverable under certain social security and tax credit legislation, and any obligation to pay child support maintenance under the Child Support Act 1991, from the five-year prescription. It is noted that the Social Security (Scotland) Bill makes provision for future devolved social security overpayment obligations to prescribed after five years.

22. A number of local authorities made the case that obligations to pay council tax and business rates should continue to prescribe after 20 years and that they therefore should also be excluded from the five-year prescription. They suggested that the same policy reasons which justify excepting taxes payable to the Crown apply equally to taxes payable to local authorities and that there are cases where the five-year time period would not be long enough. The SLC accepted these arguments and recommended that obligations to pay council tax and business rates be excluded from the five-year prescription. The Bill will maintain the current position.

23. The draft Bill published by the SLC in its Report¹³ contained further provisions to exclude proceedings for forfeiture from the five-year prescription, mirroring the Limitation Act 1980, section 37(2). However, having considered the matter further and discussed with the SLC, it was concluded that these provisions are not necessary and should be removed. The SLC's intention in this regard is already covered by provision in the Bill dealing with obligations to pay tax.

Obligations arising out of delict

24. The Bill includes provision to:

- amend paragraph 1 of schedule 1 of the 1973 Act to the effect that the five-year prescription, in addition to applying to any obligation to pay damages (whatever the source of the obligation), should extend to any obligation arising from delict (section 1).

25. The SLC highlighted in its Report¹⁴ that in schedule 1 of the 1973 Act there is no reference to delict as a source of obligation, rather reference is made to “any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation”. Delict refers to the

¹³ SLC Report on Prescription, No 147, July 2017

¹⁴ SLC Report on Prescription, No 147, July 2017, para 2.32.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

obligation of person A, to compensate person B, for the losses B has sustained as a result of harm caused to B by the wrongful actions or omissions of A. While “delict” and “reparation” have often been considered synonymous, that is to say, to refer generally to the obligation which arises from a civil wrong, such as a negligent breach of duty, this is not strictly the case. In its Report¹⁵, the SLC points out that the case law on schedule 1 of the 1973 Act construes the word “reparation” narrowly, to mean only payment of damages. Therefore obligations arising from delict other than the obligation to pay damages do not fall within the five-year prescription. There does not appear to be any policy reasons why this is the case. All but one respondent to the consultation agreed that obligations arising from delict should prescribe after five years. The Faculty of Advocates noted:

“[i]t might also be helpful to expand Schedule 1 paragraph (1)(d) to cover all obligations to make reparation irrespective of the source of the obligation (so as to encompass obligations arising under both contract and delict). That would have the advantage of effectively giving obligations to make reparation their own regime courtesy of Sch 1 and s.11”.¹⁶

26. The SLC recommended a revised provision referring not to reparation, but to any obligation to pay damages regardless of the source of the obligation and a provision which brings within the scope of the five-year prescription any obligations arising from the law of delict which do not otherwise fall within the 1973 Act.

Pre-contractual liability and validity of contract

27. The Bill makes provision to:

- bring any obligation to reimburse expenditure incurred in reliance on a representation about the existence of a contract and any obligation relating to the validity of a contract within the scope of the five-year prescription (section 2).

28. The SLC raised the question of how prescription should function in situations of pre-contractual liability – where someone incurs expenditure in good faith based on the understanding that there is a contract before the contract is actually formed. Based on its review, the SLC came to the

¹⁵ SLC Report on Prescription, No 147, July 2017, para 2.33.

¹⁶ Faculty of Advocates’ response to the Discussion Paper on Prescription (DP No 160).

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

conclusion that pre-contractual liability does not currently fall within schedule 1 paragraph 1 of the 1973 Act but it saw no policy reasons for this. As the SLC points out, it would make little sense to have a different prescription period for pre-contractual liability from the one that applies to contractual and delictual obligations generally. All but one response to the SLC's consultation agreed that obligations arising from pre-contractual liability should be brought, by statute, within the scope of the five-year prescription. While the Faculty of Advocates agreed with the general policy here, the Faculty suggested that development of this area of law, at least in the short term, should be left to the courts. The SLC recommended reform by statute.

29. Further, the SLC also considered the possibility of adding a new paragraph to schedule 1 to cover a prescriptible right or obligation relating to the validity of a contract rather than arising from "a contract" (which is already caught by schedule 1 paragraph 1). An example would be the right to set aside a contract where it has been induced by an innocent misrepresentation by the other party. The SLC concluded that:

"if the rights of parties under a void contract are already subject to the five-year prescription, it is difficult to see why the rights of a party affected by an innocent misrepresentation should not be"¹⁷ (p. 22).

30. The SLC went on to conclude that it saw no reason why prescription should function differently in these instances. Again, all but one respondent agreed. The Faculty of Advocates considered that reform in this area would create additional complexity and the possibility of unjust results. The SLC, however, considered that the advantage of greater certainty which the suggested reform would bring provided a compelling case for proceeding. In line with the majority view, the SLC therefore put forward the recommendation to bring an obligation relating to the validity of a contract within the scope of the five-year prescription.

Alternative approaches

31. One alternative approach would be to not make these changes and leave the 1973 Act as it is regarding the scope of the five-year negative prescription. While such an approach may have the limited benefit of keeping things consistent and there would be no changes to get used to, it

¹⁷ SLC Report on Prescription, paragraph 2.60.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

would not bring the much needed clarity and certainty that the recommendations discussed above would.

32. As noted above, the structure of the 1973 Act, including schedule 1, paragraphs 1 and 2, means the question of whether an obligation is within the scope of the five-year prescription often requires in-depth analysis and consideration of the case-law. The SLC made these recommendations based on the policy that obligations should be covered by the five-year prescription unless there are policy reasons for excepting them. The recommendations are designed to plug gaps where the five-year prescription period currently does not apply, but where there does not appear to be any policy reasons for this, thereby making the law more consistent and clear.

Section 11(3) of the 1973 Act and the Discoverability Test

33. The Bill makes provision to:

- replace the discoverability test currently set out in section 11(3) of the 1973 Act by a new test to the effect that, in relation to obligations to pay damages, before the five-year prescriptive period begins to run the creditor must be aware, as a matter of fact, (i) that loss, injury or damage has occurred; (ii) that the loss, injury or damage was caused by a person's act or omission; and (iii) the identity of that person. Whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law will be irrelevant (section 5).
- replace the words "act, neglect or default", currently used in section 11 of the 1973 Act by the words "act or omission" (section 5).

34. As discussed above in paragraph 13, a recent Court judgment¹⁸ in relation to latent damage claims has brought the wording of the so called 'discoverability test' in section 11(3) to the fore. In particular, concerns have been raised that the law, as it is now understood, may produce a harsh outcome for pursuers. The prescriptive period is postponed only until the creditor knows of the fact that he or she has sustained loss, injury or damage, but nothing more. As demonstrated by the *Morrison* case, knowing that loss has occurred does not always allow a creditor to raise an

¹⁸ David T Morrison & Co Limited v ICL Plastics Limited [2014] UKSC 48.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

action – they may still be in the dark as to the fact that the loss was caused by someone and as to who that person is.

35. Similar issues were also raised in the recent case *Gordon's Trustees*¹⁹ in the Supreme Court. Here the issue at stake was whether creditors are aware of “loss, injury or damage” when they know that they have incurred expenditure but do not know that it was caused by the act, neglect or default of the debtor. In that case the pursuers knew that they had incurred a liability to their solicitors in the form of legal expenses but they argued that, since they thought they were simply paying for the solicitors’ services, they did not know that they had suffered “loss” within the meaning of section 11(3), until such time as they became aware that the legal expenses had been incurred as a result of the solicitors’ breach of duty. It could be argued *Gordon's Trustees* represents a hard case which the existing drafting of section 11(3) could not resolve fairly.

36. The SLC therefore raised the question of whether the law as it is currently understood is fair or whether reform is needed. The question at the heart of this is precisely what knowledge the pursuer needs to have for the five-year prescription period to start. The SLC consulted on four options:

1. knowledge of the fact of the loss, which is law as it is now understood.
2. knowledge of the facts (a) of the loss and (b) of the act or omission which caused it, which was how the law was generally understood before *Morrison*.
3. knowledge of the facts (a) of the loss and (b) of the act or omission which caused it and (c) the identity of the person who caused it, which was the option the SLC itself recommended.
4. the prescription period would not start until such time as seems to the court to be just and reasonable having regard to all the circumstances of the case.

37. A majority of respondents to this question agreed with the need to revisit the discoverability test. Only one respondent favoured option 1, none

¹⁹ *Gordon and others, as the Trustees of the Inter Vivos Trust of the late William Strathdee Gordon (Appellants) v Campbell Riddell Breeze Paterson LLP (Respondent) (Scotland) [2017] UKSC 75.*

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

favoured option 4 , and three respondents favoured no reform of section 11(3). The remaining respondents favoured either option 3 or both option 2 and 3.

38. After careful consideration, the SLC concluded that reform is necessary to ensure a fair balance is struck between the interests of creditors and debtors. It therefore continued to recommend option 3. While the SLC recognise that there is often little practical difference between option 2 and 3, this is not always the case, as demonstrated by the *Morrison* case. Option 3 also addresses the key issue in the *Gordon's Trustees* case discussed above by requiring that there be awareness of the factual cause of loss by an act or omission. If creditors are aware that they have incurred expenditure but do not know that the reason they incurred it was an act or omission of the debtor (as opposed, for instance, to simply paying the debtor's invoice for services rendered), then they do not yet have the awareness necessary for time to start to run against them. The SLC considered option 3 to be the fairest, noting²⁰:

“there is the logical point that section 11 is concerned with the date on which an obligation to make reparation became enforceable. It is odd to speak of an obligation being “enforceable” before the pursuer knows whom to sue. The identity of the defender is, as the Law Society of Scotland put it [in their response to the Discussion Paper], one of the three “key elements” for raising a claim.”

39. The proposed reform also needs to be considered within the wider context of how section 11 and the 1973 Act are constructed. As the SLC points out, section 11(3) is subject to a test of reasonable diligence, meaning that it is not the pursuer's actual knowledge that matters but rather what he or she could have known when exercising reasonable diligence. Moreover, while section 11 can extend the five-year prescription period, the long-stop prescription of section 7 would still function as a definite cut-off after 20 years. In that regard, it is also worth highlighting the further reforms of section 7 proposed by the SLC in this Bill (discussed in paragraphs 43 to 50 below). By setting a clearer starting point for the prescription of obligations to pay damages and by preventing interruptions and making extensions a narrow exception, these provisions are designed to make the 20-year prescription a true long stop.

²⁰ SLC Report on Prescription No 147 July 2017 paragraph 3.16

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

40. The SLC also made two minor recommendations in relation to section 11 of the 1973 Act. These are replacing the words “act, neglect or default” with “act or omission” and clarifying, for the avoidance of doubt, that knowledge about the actionability of an act or omission is irrelevant. These proposals were originally put forward in the SLC’s 1989 Report on Prescription²¹ and the SLC still considers them relevant. Using “act or omission” will more clearly focus the discoverability test on matters of fact and will make it easier to understand for the general public. A majority of respondents agreed with both sets of proposals. While some respondents suggested the latter proposal was not necessary given that this issue is now well settled, the SLC noted:

“We accept that the point appears to have been settled by the case law. Nonetheless we attach importance to improving, where possible, the clarity of the legislation. In this instance we think there is much to be said for spelling out what the law is rather than assuming that it is well understood”²².

Alternative approaches

41. The SLC consulted on four different options (paragraph 37 above) and considered the responses carefully. As set out above, the option to maintain the position as it is now understood (option 1) attracted little support, instead a clear majority of consultees favoured reform of this area of law. The SLC recognised that option 1 would be the simplest and clearest, however, in its view, it would not achieve the desired degree of fairness. Furthermore, the SLC was not persuaded that reverting back to the position before *Morrison* (option 2) would be the best way forward. Given that adjustments have already been made to address concerns, there is little added benefit from this option being the position previously. The SLC would only favour this option if it could be demonstrated to be the fairest. In the SLC’s view, based on its comparable review and consultation, it could not. The option of giving the court discretion on these matters (option 4) attracted no support and would not be in line with the SLC’s overall aim of increasing certainty and clarity.

²¹ Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (Scot Law Com No 122 (1989)), available at: http://www.scotlawcom.gov.uk/files/3512/8015/1839/26-07-2010_1443_345.pdf

²² SLC Report on Prescription paragraph 3.32.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

The Long-Stop Prescriptive Periods under sections 7 and 8 of the 1973 Act

42. The Bill makes provision to:

- in the case of obligations to pay damages in respect of loss, injury or damage caused by an act or omission, commence the 20-year prescriptive period on the date of the act or omission giving rise to the claim, or, where there was more than one act or omission or the act or omission is continuing, from the date of the last act or omission or the date when it ceased (section 8).
- make the 20-year prescription under section 7 of the 1973 Act no longer amenable to interruption either by a relevant claim or by a relevant acknowledgment, and the 20-year prescription under section 8 of the 1973 Act no longer amenable to interruption by a relevant claim (sections 6, 7 and 12).
- allow the 20-year prescriptive periods to be extended where a relevant claim has been made during the prescriptive period but by the end of that period the claim has not been finally disposed of, and the proceedings in which the claim is made have not otherwise come to an end, so that it expires when the claim is finally disposed of or the proceedings otherwise come to an end (sections 6, 7 and 12).

43. The SLC have identified two features of the 20-year prescription that currently do not appear to strike the right balance in terms of fairness. The first is the starting date and the second is the fact that the prescriptive period can be interrupted by a relevant claim or acknowledgment in just the same way as the five-year prescription.

44. In terms of the starting date, the 20-year period currently runs from the date on which an obligation became enforceable. For obligations to pay damages, that is the date on which loss, injury or damage occurred. This means that both short and long prescription run from the date of loss (unlike short prescription, the state of the pursuer's knowledge is not taken into account for the long prescription period) which is unusual compared to other legal systems. The SLC points to problems that can arise under the current system, in particular, in situations where the loss does not occur until after a long time period, such as in latent damage. For example, structural problems in a building may be latent for many years and become patent only long after it was constructed. In such cases, the prescriptive

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

period would not start to run until after a long time-period. This appears to go against a fundamental rationale of prescription that after a certain period a defender should be able to arrange his or her affairs on the assumption that the risk of litigation has passed. This principle stems from considerations of fairness, as well as practical considerations of evidence deteriorating over time, as was noted above.

45. The SLC therefore put forward the proposal to change the starting point of the long-stop prescriptive period for obligations to pay damages to the date of a defender's act or omission (and where there was more than one act or omission or the act or omission is continuing, it would start from the date of the last act or omission or the date when it ceased). For other obligations the date of commencement of the 20-year prescriptive period would remain unchanged. Almost all respondents to the consultation agreed with this proposal. In its response to the SLC Discussion paper, Clyde and co noted:

“Changing the starting point for the long-stop negative prescription period of twenty years to run from the date of the defender's last act or omission is logical. The purpose of the long-stop provision is to provide a degree of finality for both parties. This finality is not provided to the defenders when the period only begins to run from the date on which the loss, injury or damage flowed from the act, neglect or fault.”

46. The other unusual feature of the 20-year prescription is that the 20-year prescription is amenable to interruption by a relevant claim or acknowledgement under section 7 (though only by a relevant claim in terms of section 8). This means that when a relevant claim or acknowledgement is made, a full 20-year period starts again and it is therefore possible for very long time periods to pass before a claim finally prescribes – in fact the prescription period could in theory run indefinitely. The 20-year prescription does not therefore function as a true long-stop and the SLC consulted on the proposal to prevent it from being interrupted in this way. The SLC recognised however that there may be cases where an extension to the prescriptive period is needed, such as when a claim is pending before the courts at the time of the end of the prescriptive period. It therefore also suggested that where a claim is made, the prescriptive period could be extended until the claim was finally disposed of. The SLC noted:

“[this] means that the claimant has the benefit of the extension to the long-stop prescriptive period only if the claim has not been finally

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

disposed of and the proceedings in which it is made have not otherwise come to an end. In other words, if the proceedings have ended by the time the prescriptive period expires, it does not matter that there has not been a final disposal of the relevant claim; it is enough that the proceedings have ended. This seems to us to be necessary to ensure that what is intended to be a narrow exception from the long-stop prescription is kept within tight bounds.”²³

47. Almost all the respondents to the consultation agreed. The SLC also noted that the issues in relation to the 20-year prescription of section 7 of the 1973 Act apply equally in relation to section 8 (extinction of other rights relating to property by prescriptive periods of twenty years) of the same Act and it therefore proposed the changes should be applied to the same effect to both types of prescription.

Alternative approaches

48. An alternative approach would be to not make these changes and retain the current position with regards to the starting date of the 20-year prescription and its ability to be interrupted by a relevant claim or acknowledgement. While there may be some limited benefit of consistency by maintaining the status quo, such an approach would continue to suffer from uncertainty and lack of finality. The recommended changes to sections 7 and 8 are designed to increase fairness, certainty and finality. In particular, they are designed to make the 20-year prescription a true long-stop; a definite cut off according to which individuals and organisations can arrange their affairs. It is hard to see how the limited benefit of consistency in maintaining the status quo could outweigh the benefits of this reform.

²³ SLC Report on Prescription paragraph 4.31

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

Contracting Out and Standstill Agreements

49. The Bill makes provision that:

- agreements to extend the five-year prescription under section 6 of the 1973 Act, or the two-year prescription under section 8A, of the 1973 Act are valid provided (i) that they are made after the appropriate prescriptive period has started to run but before it has been completed; (ii) that they extend the prescriptive period by no more than one year; and (iii) that only one such extension may be made in relation to the same obligation (section 13).
- agreements to disapply or in any other way alter the operation of prescription provided by any of sections 6, 7, 8 or 8A of the 1973 Act is (except as set out in the previous recommendation) of no effect (section 13).

50. The SLC points out that the current wording of section 13 of the 1973 Act (which purports to prohibit contracting out of prescription periods) is far from clear with regard to which agreements to disapply negative prescription are prohibited. Noting the benefits of agreements between parties to stop the prescription clock ticking for a specified period of time which would allow parties to negotiate an end to their dispute without the need for a creditor to raise protective proceedings in court in cases to preserve their right where the prescriptive period may otherwise have ended, the SLC asked their consultees whether such agreements should be allowed.

51. Responses to its consultation were somewhat divided on the issue – nine out of 17 respondents were in favour of allowing agreements to lengthen the prescriptive period while seven respondents disagreed. Among those who disagreed, concerns were raised about increased cost, complexity, and uncertainty. Having considered the arguments, the SLC concluded agreements to extend the prescription period should be permitted. However, the SLC set out key limitations to such agreements, designed to ensure uncertainty, complexity, or costs do not increase.

52. Following analysis of the consultation responses, the SLC recommended:

- the 20-year prescription period should not be amenable to extension (except to the limited extent described in paragraph 42 above), ensuring that it functions as a genuine long-stop.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

- it should only be possible to enter into an agreement to extend the prescription period after a dispute has arisen, giving the parties the opportunity to extend the prescription period while they resolve their dispute. Allowing such agreements would therefore not mean that parties can choose their own prescriptive period.
- parties should only be allowed to extend the prescription period once.
- the extension should be limited to a short period – one year with no further extensions allowed.

53. These limitations ensure that the five-year prescription (and two-year in the case of section 8A) still function with certainty and clarity – extensions will only be made to allow time to resolve a dispute once it has arisen, avoiding the need for the creditor to raise protective proceedings in court to preserve their right, and thereby avoiding wasting resources.

54. The SLC also raised the question of whether agreement to shorten the prescriptive period should be permitted. Six respondents agreed it should and nine respondents disagreed. Having considered respondents' views, the SLC concluded that there was an argument that such agreements might cause uncertainty and unfairness. In particular, it could disadvantage parties with unequal bargaining power, such as when small businesses deal with more sophisticated businesses. Moreover, it could also create more complexity and uncertainty and thereby lead to increases in disputes, litigation and costs overall. For these reasons the SLC recommended that agreements to shorten the prescriptive period should have no effect.

Alternative approaches

55. One alternative approach would be to not make the proposed changes, however, given the lack of clarity in the current wording of section 13, such an approach does not appear desirable. Another alternative would be to allow agreements between parties to lengthen or shorten the prescriptive period without restrictions. However, as the SLC noted, such flexibility in the system would not have the desired effect of increased certainty and clarity and it would be likely to lead to increased litigation and costs. As noted above, the central rationale for having a system of prescription is to provide certainty and finality but such an alternative approach is likely to have the opposite effect. Moreover, as noted above,

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

agreements to shorten the prescriptive period are likely to disadvantage non-consumers with less bargaining power.

Other provisions

Time-limits in other enactments

56. The Bill includes provision to:

- amend the 1973 Act to make clear that neither the five-year nor 20-year prescriptive periods will apply where an enactment other than the 1973 Act provides for a specific limitation or prescriptive period or that an obligation is imprescriptible or is not subject to any period of limitation (section 9).

57. The SLC pointed to a number of statutes that specify particular time periods in which rights can be exercised, for example there is a one-year limitation period for claims for loss of or damage to goods carried at sea²⁴ and there are four and 10 year periods of limitation for breach of planning control²⁵. It is conducive to clarity and certainty to state that the 1973 Act will not apply in such circumstances. All respondents who had a view on this issue in the consultation agreed with this suggestion.

58. The Bill also makes provision that:

- where for the purposes of sections 6, 7, 8, 8A or 22A of the 1973 Act a question arises as to whether an obligation or right has been extinguished by prescription, it is for the creditor to prove that the obligation or right has not been so extinguished (section 14);
- the five-year prescription is suspended in terms of section 6(4) of the 1973 Act against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings (section 4);
- the definition of “relevant claim” includes the submission of a claim in an administration or receivership and the acts that give rise to administration or receivership (section 10).

59. With regard to the burden of proof, the SLC noted that while in most cases this matter was not an issue, there were different views in the case law and the SLC therefore saw merit in putting the matter beyond doubt. It

²⁴ Carriage of Goods by Sea Act 1971, sch, art III, para 6.

²⁵ Town and Country Planning (Scotland) Act 1997, s 124.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

recommended that the burden of proof should rest on the creditor (pursuer), in line with the principle that the burden rests with the party seeking to assert a right. The SLC explained:

“That does not mean that the pursuer will as a matter of course have to plead anything about prescription. It means only that, when faced with a plea by the defender that the obligation in question has prescribed, the pursuer will need to aver and prove that it has not.”²⁶

60. In order to create clarity and consistency, the SLC recommended that this provision should apply to the following prescriptive periods in the 1973 Act: section 6 and section 7; section 8 (20-year prescription of rights relating to property); section 8A (two-year prescription of obligations to make contribution between wrongdoers); and section 22A (10-year prescription of obligations arising from liability under Part I of the Consumer Protection Act 1987).

61. With regards to the suspension of the five-year prescription when the creditor has been caused by the defender to not raise proceedings, the wording of section 6(4) of the 1973 Act has been criticised for suggesting a vigorous connection between the debtor’s behaviour and the creditor’s lack of action – that the debtor intended to mislead the creditor. The SLC pointed out that the key issue should be that the pursuer failed to raise proceedings because of the behaviour of the defender – whether the defender intended to induce (or even knew of) the error is irrelevant. It therefore proposed that the drafting of section 6(4) make this clear. Removing the defender’s state of mind as a factor will in their view make this test more straightforward and easier to apply. A clear majority of respondents to their consultation agreed with this view.

62. Finally, the SLC identified two ways of making a claim that are currently not caught by the definition of “relevant claim” in the 1973 Act applying to the various kinds of negative prescription, but for which it sees no policy reason for their omission: claims which are made in a company administration (process for a company in debt that cannot pay the money it owes); and claims made to a receiver (a receiver is appointed by a party holding a floating charge over some or all of the company’s assets). All consultees agreed that these should be added.

²⁶ SLC Report on Prescription paragraph 6.9

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

Alternative approaches

63. With regard to the burden of proof, an alternative approach would be to not make such provision at all and leave things as they currently are. While the SLC recognises that in practice in most cases, burden of proof is not an issue, such an alternative approach would not solve the problem in the few instances where it does become the subject of an argument before the court. Given that it would not increase clarity and would not save court time, such an approach would be less desirable. The SLC also considered putting the burden of proof on the debtor (defender) and/or having a different burden of proof for the five-year and the 20-year prescription. The SLC included these suggestions in its Discussion Paper but none of them attracted a lot of support and the latter suggestion would not be in line with the aim of increasing clarity.

64. An alternative approach to suspending the five-year prescription based on actions by the defender would be to make the state of mind of the defender a factor, an approach which was favoured by two respondents. However, as the SLC points out, such an approach is likely to lead to unfairness to the pursuer. In cases of error, why should it matter whether the defender intended to induce (or knew of) the error or not? While a case where the defender misleads the pursuer on purpose could perhaps be considered more serious, the outcome for the pursuer is the same regardless of the state of mind of the defender and it would seem unfair that the pursuer should be penalised through no fault of their own.

Consultation

65. The SLC carried out a comprehensive consultation in accordance with the SLC's established practice in conducting law reform projects. Having conducted an extensive review, it published a Discussion paper²⁷ in February 2016 which set out the conclusions from its review and a number of questions. It received views from 20 respondents, amongst them solicitor firms, insurance providers, the Senators of the College of Justice, the Faculty of Advocates, the Law Society of Scotland, HMRC, the Royal Incorporation of Architects in Scotland ('RIAS'), one utility company, and individuals. It also arranged a number of meetings with those with an

²⁷

https://www.scotlawcom.gov.uk/files/3514/5614/9429/Discussion_Paper_on_Prescription_DP_No_160.pdf

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

interest in the project. The consultation responses are available on the SLC website²⁸.

66. There was wide support for reform of prescription law among the respondents and there was wide agreement with the recommended approach on most of the issues raised in the Discussion paper. As outlined above, there were some issues where opinion was more divided, for example, whether or not agreements to lengthen or shorten the prescriptive period should be granted. Moreover, while a clear majority favoured reform of the discoverability test in section 11(3) of the 1973 Act, there was some divergent views on its exact formulation. There was also a minority that did not agree that the length of the long-stop period of prescription should remain 20 years. The SLC considered all responses carefully as part of its review.

67. In March 2017 the SLC published a draft bill, the Prescription (Scotland) Bill, for consultation and comments. It received 16 responses which focused on different details of the Bill. In response to these comments, the SLC made some changes to the Bill, mainly addressing drafting issues. In response to this consultation, the Law Society of Scotland commented:

“We are wholly supportive of the Scottish Law Commission’s review of this area of law. For many years in Scotland we consider that parties have been exposed to unnecessary legal costs due to the absence of standstill agreements and therefore the need for protective proceedings to be raised. This, and other issues, has been exacerbated by the UK Supreme Court decision in *David T Morrison & Co Ltd v ICL Plastics Ltd*, which has led to considerable uncertainty surrounding the commencement date for prescriptive periods. It seems to us that many actions are currently being raised to avoid a time-bar argument that could otherwise be dealt with out of court.

In our previous submission we considered that there is much wasted time and expense in raising protective proceedings against parties which would be unnecessary were the starting date for the prescriptive period clearer and an ability to postpone the period by use of standstill agreements. Currently the costs are borne by

²⁸ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-the-law-of-prescription/>

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

commercial parties, individuals' insurers and the public purse by the use of judicial resources.”

68. In completing the BRIA the SLC also consulted a range of business interests. In addition the Scottish Government carried out some targeted consultation on the SLC's Report on Prescription and invited comments from a number of stakeholders. Only one substantive response was received, from COSLA on behalf of some of their members, expressing support and raising some specific points on the current operation of the law, which required no change to the Bill.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

69. The Bill reforms aspects of prescription that have been identified as causing difficulties and unfairness. It applies across the board and does not differentially impact on specific groups. The Scottish Government concludes that the Bill will not impact negatively on a person by virtue of their particular religion, belief, age, disability, sex, sexual orientation, gender, gender reassignment, race or ethnicity. As such, the Bill will not in any way hinder access to equal opportunities.

Human rights

70. The Scottish Government has considered the effects of the Bill on human rights and considers that the provisions of the Bill may have some relevance in relation to article 1 of protocol 1 of ECHR. The Bill will affect obligations and rights under the Prescription and Limitation (Scotland) Act 1973 Act which may be considered 'possessions' within the meaning of article 1 of protocol 1 of the ECHR.

71. So far as it affects rights or obligations this is limited to how certain aspects of negative prescription applies to rights and obligations caught by the 1973 Act. The Bill does not remove substantive rights. The Bill addresses three kinds of issues. First, to bring consistency to the law by, for example, treating statutory obligations to make payment (with exceptions) the same as obligations of a similar nature which are subject to the five-year prescription under the 1973 Act. Second where the law may be considered to be unfair to creditors or debtors, in certain circumstances,

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

adjustment to the law is made on equitable grounds to address the balance of fairness. Third where there may be doubt as to how certain aspects of prescription law operate, adjustment is made to improve clarity and legal certainty.

72. The Bill will have an effect on certain existing rights but this will only be done prospectively. It will not be done retrospectively.

73. Therefore so far as the Bill engages article 1 of protocol 1 this is in relation to certain existing rights or obligations with a view to ensuring consistency with rights or obligations of a similar nature; improving the balance of fairness as between creditors and debtors; and improving the clarity and certainty of the law, and care has been taken to interfere with those rights or obligations to the minimum extent possible to achieve that aim and to ensure the changes are not retrospective.

Island communities

74. No detrimental effects are anticipated.

Local government

75. The Scottish Government does not anticipate any adverse effect on local government. Provisions in section 3 which sets the scope of the five-year prescription period exclude obligations to pay council tax and business rates from the five-year prescription regime. This maintains the current position and no impact is therefore expected on local authorities as a result of this reform. Local authorities, like any other person, will be able to use the Bill's provisions.

Sustainable development

76. No detrimental effects are anticipated. By increasing clarity, certainty and fairness in the law of prescription, it may encourage greater use of Scots law in this area which would have consequential benefits for the Scottish economy.

77. The proposals in the Bill and SLC Report are in line with the Scottish Government's National Outcomes which form part of the Government's National Performance Framework that:

“We live in a Scotland that is the most attractive place for doing business in Europe.”

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

78. The Bill makes the law of negative prescription clearer, more certain and fairer which should result in decreased costs for those involved in litigation: creditors will be less likely to require to raise court proceedings to preserve a right and correspondingly, debtors will be less likely to have to incur costs in investigating claims, intimating them to insurers and seeking legal advice in relation to claims that turn out to have no merit. This could reduce the number of disputes and the consequential expenses (administrative and legal) in resolving disputes. Certainty as to when prescription begins and ends will enable insurance policies to be restricted to a clearly defined period of prescription. The Bill will therefore make a valuable contribution to a strong sustainable economy. The Bill will implement important principles for businesses and individuals which will contribute to making Scotland a more attractive place in which to live, work and invest.

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

Prescription (Scotland) Bill

Policy memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -

www.scottish.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.scot/documents