

Citizen Participation and Public Petitions Committee

2nd Meeting, 2021 (Session 6), Wednesday, 1
September 2021

PE1860: New legislation for Prescription and Limitation Act

Note by the Clerk

| | |
|-----------------------------|---|
| Petitioners | Jennifer Morrison-Holdham |
| Petition summary | Calling on the Scottish Parliament to urge the Scottish Government to amend the Prescription and Limitation Act to allow retrospective claims to be made. |
| Webpage | petitions.parliament.scot/petitions/PE1860 |

Introduction

1. This is a new petition that has been under consideration since 24 March 2021.
2. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe A**.
3. While not a formal requirement, petitioners have the option to collect signatures and comments on their petition. On this occasion, the petitioner elected to collect this information. 3 signatures have been received.
4. In Session 5, the Public Petitions Committee agreed to seek advanced views from the Scottish Government on all new petitions before they are formally considered. The Committee has received a response from the Scottish Government and this is included at **Annexe B** of this paper.
5. The petitioner has also provided a written submission. This is included at **Annexe C** of this paper.

Committee consideration

6. The legal doctrines of prescription and limitation are explained in both the SPICe briefing and the Scottish Government's written submission.
7. Prescription can create ('positive prescription') or extinguish legal rights ('negative prescription'), after the passage of a set period. Prescription applies in respect of a wide range of legal rights and obligations.
8. Although it does not extinguish legal rights, limitation sets a procedural barrier for raising proceedings in court after a certain time, effectively setting time limits on making claims. Unlike prescription, however, limitation only applies in the context of court claims for financial damages (i.e. compensation).

Scottish Government submission

9. In its submission, the Scottish Government states that prescription and limitation incentivise people to enforce their legal rights through the courts promptly, without delay.
10. It further states that these two doctrines provide legal certainty, arguing that there should be a point in time after which a person should be able to plan their affairs and resources knowing they will likely not be pursued over a particular matter.
11. The Scottish Government believes that, in the case of negative prescription, allowing retrospective claims to be made would undermine legal certainty and could cause insurmountable difficulties for the defender in a court action as the quality of evidence may deteriorate over time.
12. Its submission notes, however, that in the case of limitation, it is possible for a court to override the principal limitation time limits to allow a legal action, should it be persuaded that it is equitable to do so.
13. Furthermore, it highlights that there are other potential remedies open to people should they be prevented from pursuing legal action, causing them a loss, because a solicitor has failed to perform their responsibilities to the relevant standard. In such cases, it may be possible to raise a claim of professional negligence against them or, where appropriate, make a complaint to the Scottish Legal Complaints Commission.
14. In its submission, the Scottish Government notes that the law of negative prescription in Scotland was recently looked at by the Scottish Law Commission.
15. Following its consideration, the Scottish Law Commission made a number of [recommendations](#) that were taken forward in the Prescription and Limitation (Scotland) Act 2018. The Act, which is not yet in force, will make changes to the detailed rules associated with both the five and the twenty year periods for negative prescription.

16. The Scottish Government, in its submission, highlights statements made by the Scottish Law Commission in the review, which emphasise the importance of prompt litigation and legal certainty.
17. The Scottish Government agrees that encouraging prompt litigation (where litigation is appropriate) and legal certainty are of general benefit to the legal system.
18. Furthermore, it considers the current balance between these general interests and the interests of individuals to be appropriate.

Petitioner submission

19. In her written submission, the petitioner explains that she received inadequate compensation, following the tragic death of her husband.
20. Although she engaged solicitors to pursue further compensation, she states that owing to the actions or lack thereof, of these solicitors any further action became time barred.
21. She believes that she has been treated very unfairly, and that there should be an opportunity for people in such situations to be able to make retrospective claims, at any time.

Action

22. The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee



Briefing for the Citizen Participation and Public Petitions Committee

Petition Number: [PE01860](#)

Main Petitioner: Jennifer Morrison Holdham

Subject: New legislation for Prescription and Limitation Act

Calling on the Scottish Parliament to urge the Scottish Government to amend the Prescription and Limitation Act to allow retrospective claims to be made.

Background

The [Prescription and Limitation \(Scotland\) Act 1973](#) ('the 1973 Act') covers two similar, but distinct, concepts in Scots law – **prescription** and **limitation**. (Limitation is also known as **time bar**.)

In many cases, prescription and limitation produce the same practical result, i.e. that the person or organisation defending a court action can argue the case should not be heard due to the passage of a period of time set out in the 1973 Act.

Prescription

Prescription can either create legal rights ('positive prescription') or extinguish legal rights ('negative prescription') after the passage of a set period. The relevant periods of time are set out in the 1973 Act.

Where negative prescription is concerned, broadly speaking, legal rights are either extinguished under the 1973 Act after **five years** or **twenty years** or are exempt from the scope of prescription ('imprescriptible').

Limitation

Whereas prescription applies to a wide range of legal rights and obligations, limitation applies in the context of court claims for financial damages (i.e. compensation).

So, for example, an individual suffers personal injuries resulting in death due to the negligence of another person or organisation. After **three years** the relative of that person is usually prevented under the 1973 Act from raising court proceedings related to those injuries under the law of limitation.

In that example, the clock usually starts ticking on the three year period either from the date of death or the point the relative became aware, or should reasonably have become aware, that the fatal injuries were attributable to a negligent act or failure to act.¹

One technical point is that, with limitation the legal right is not actually *extinguished* by the passage of time. However, after the relevant statutory period has passed, a person is usually prevented from raising court proceedings based on the existence of the legal right.

Another key feature of the law of limitation, which does not apply to the law of prescription, is that the court has the power to override the statutory time limit where this is “equitable” (i.e. fair considering the interests of both parties).²

The policy underpinning prescription and limitation

When people first learn about prescription and limitation there is often confusion about why they are needed. Surely, the argument goes, if someone has a legal right it should last or be enforceable in court forever, unless everyone concerned has agreed this should not be the case. However, legal systems all over the world have prescription and limitation or equivalents to them, for various policy reasons.

The law tries to incentivise people to enforce their legal rights through the courts promptly, without delay. Delay causes the quality of evidence available in a court case to deteriorate. Witnesses may have died, be untraceable or, even if they are found and able to give evidence, important memories may have faded. Vital documents may also have been destroyed by individuals or organisations. Without prescription or limitation, these circumstances could cause insurmountable difficulties for the person or organisation defending the court action.

Scots law also favours legal certainty - recognising that there should be a point after which a person or organisation should be able to plan their affairs and resources knowing they will likely not be sued over a particular issue.

Prescription and limitation do have the potential to cause harsh results in individual cases. However, the court’s discretion to extend the limitation period in an individual case does give the court greater flexibility with limitation than with prescription.

Prescription and limitation are part of a wider body of law

The current petition focuses on the 1973 Act and time limits. However, it is worth noting that, when advising a client on the potential for any type of

¹ 1973 Act, section 18.

² 1973 Act, section 19A.

successful court action, the 1973 Act is one of a number of aspects of the law a solicitor will be considering.

For example, with a potential court action relating to personal injuries, a solicitor will also consider whether a person has a valid case under the law of negligence. This sets out the (complex) rules determining whether an individual or organisation has been negligent or not in respect of those injuries. Sometimes there have been personal injuries but the law of negligence does not recognise that an individual or organisation is legally at fault in respect of those injuries.

The solicitor in such a case will also assess the amount of damages a person might be legally entitled to for any loss which it is established has been suffered under the law of negligence. There are also complex legal rules governing how damages are calculated.

Scottish Government and Scottish Parliament Action

In Sessions 4 and Session 5 of the Scottish Parliament, the Scottish Government consulted on several changes to the law of prescription and limitation, as set out in the 1973 Act. Some of these proposed changes were later implemented in legislation.

The 2012 consultation paper

In 2012, [the Scottish Government consulted on proposals](#) set out in three reports of the [Scottish Law Commission](#) (the independent statutory body that makes recommendations for law reform to Scottish Ministers). The three reports covered the law of personal injuries, i.e. the branch of law which compensates people for (physical or psychological) injuries suffered because of the negligence of another person or organisation.

[One of these Commission reports, from 2007, focused on the 1973 Act](#). This report recommended that the three year limitation period be extended to five years. It also proposed changes to the point from which the limitation period would start to run, as well as the introduction of statutory factors to guide the courts in their exercise of the discretion to extend the time limit in individual cases.

The Scottish Government decided not to introduce legislation to implement the 2012 consultation paper. There was opposition to some of the proposals, including, for example, the proposal to extend the limitation period from three to five years.³

³ See the analysis of responses associated with that consultation paper: <https://www.webarchive.org.uk/wayback/archive/20141129005835/http://www.scotland.gov.uk/Publications/2013/08/6983>

Limitation (Childhood Abuse) (Scotland) Act 2017

In 2015, [the Scottish Government consulted on proposals which would abolish the three year time limit](#) where the claim for financial damages for personal injuries related to abuse of a child or young person under the age of 18.

These proposals became law in the [Limitation \(Childhood Abuse\) \(Scotland\) Act 2017](#), which came into force in October 2017.

Prescription (Scotland) Act 2018

The [Scottish Law Commission](#) published its [Report on Prescription](#) in 2017. The Scottish Government later introduced a Bill based on the report, which, on completing its parliamentary passage, became the [Prescription \(Scotland\) Act 2018](#) ('the 2018 Act').

The 2018 Act, which is not yet in force, will make changes to the detailed rules associated with both the five and the twenty year periods for negative prescription.

Petition – proposed reform to the law of prescription

In October 2017, the parliamentary petition [PE01672](#) was lodged, in the name of Mr Hugh Paterson. This discussed an issue which had arisen with the purchase of Mr Paterson's house. A potential right to claim for damages against his solicitors for defective work was extinguished by the twenty year negative prescription rule before the petitioner was aware the work was defective. Mr Paterson argued the law in this area needed reform.

The petition was closed in 2019, on the basis that the Scottish Government had no plans to change the law but had agreed to update the relevant guidance.

Key Organisations

[Law Society of Scotland](#)

[Faculty of Advocates](#)

[Scottish Law Commission](#)

[Association of Personal Injury Lawyers](#)

[Forum of Insurance Lawyers](#)

[Forum of Scottish Claims Managers](#)

Sarah Harvie-Clark
Senior Researcher
SPICe

24 March 2021

SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@scottish.parliament.uk

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

Scottish Government submission of 1 June 2021

PE1860/A

Thank you for your email of 12 May 2021 regarding the above petition. 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.

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. 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 it will not be possible to proceed unless a court decides it is equitable to allow the case to do so. The court's discretion must be exercised having regard to the interests and conduct of the parties and their advisers as well as the nature, circumstances and prospects of success in pursuit of the claim.

These two legal doctrines incentivise people to enforce their legal rights through the courts promptly, without delay. Delay may cause deterioration in the quality of evidence available in proceedings; essential documentary evidence may have been lost or destroyed; witnesses may have died, be untraceable or, even if they are found and able to give evidence, memories may have faded. Without prescription or limitation, these circumstances could cause insurmountable difficulties for the defender in a court action.

In addition, the two doctrines provide legal certainty – after all, there should be a point in time after which a person should be able to plan their affairs and resources knowing they will likely not be pursued over a particular matter.

In the case of negative prescription, to allow a retrospective action would mean reviving an extinguished legal right or obligation, thereby undermining any legal certainty and running up against the difficulties of evidence outlined above. It may also raise issues with Article 1 of the First Protocol of the European Convention on Human Rights – the right to peaceful enjoyment of one's own property. In the case of limitation, as noted above, section 19A of the Prescription and Limitation (Scotland) Act 1973 already allows the courts to override the principal limitation time limits where they are persuaded that it is equitable to do so.

Whilst the Scottish Government cannot comment on the specifics of any given case, where a solicitor has failed to perform their responsibilities to the relevant standard and caused a person loss, then that person might be able to raise a claim against the solicitor at fault for professional negligence or, where appropriate, make a complaint to the Scottish Legal Complaints Commission (“the SLCC”). This failure might include, for example, failure to serve a writ timeously. It is possible that the loss suffered (that is, the benefit which the person has foregone by not being able to enforce their rights before prescription or limitation affected the right or claim) could be recovered in whole, or in part, in an action for professional negligence raised against the solicitor at fault, or (if within the limits of its powers) through the SLCC awarding compensation.

The Scottish Government recognises that in individual cases the law of negative prescription and limitation pursuers can be deprived of remedies they would otherwise be able to access, but encouraging prompt litigation (where litigation is appropriate) and legal certainty are of general benefit to the legal system. The Scottish Law Commission, an independent body advising the Scottish Government on law reform, recently looked at the law of negative prescription in Scotland, making a number of recommendations that were taken forward in the Prescription and Limitation (Scotland) Act 2018. In its 2016 [Discussion Paper on Prescription](#), the Commission recognised the balance that the law must seek between the interests of pursuers and defenders on this issue:

“Justice between the parties to a litigation means that after a certain lapse of time it is actually fairer to deprive a pursuer of a claim than to allow it to trouble a defender. That is connected with concerns about stale or missing evidence and the difficulties facing a court in trying to administer justice in those circumstances. But there is more to prescription than justice between the parties to a litigation. There is a wider public interest in having litigation initiated promptly if it is to be initiated at all. The reason is that that is conducive to legal certainty.”

In another report, its 2006 [Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims](#), the Commission describe why this legal certainty is needed:

“It is appropriate that there should come a point at which businesses, public authorities and insurance companies should be able, in reasonable safety, to “close their files” and dispose of records. People have an important interest in being able, after the lapse of a particular period of time, to arrange their

affairs with some confidence that claims can no longer be made against them.”

It is the view of the Scottish Government that the current balance is appropriate between individual interests and the more general interests of legal certainty. To allow the retrospective raising of claims would run counter to the need for our laws on limitation and prescription, reducing legal certainty and potentially leading to decades old claims being pursued. Not only would it undermine the public interest in prompt litigation but is unnecessary where, in relevant circumstances, the law already provides alternative legal remedies for harsh cases.

Petitioner submission of 20 June 2021

PE1860/B

In my case, my husband was killed in an accident as a young man of 29 years old. Although I received compensation at the time, it was quite a small sum, and I was advised by an experienced lawyer later that I should have received more. A family member was able to successfully claim for money, which I believe proves that the initial payment to me was inadequate and that further payment is justified.

Given that, I instructed lawyers to act for me to try to obtain a fairer settlement. However, they strung me along with false information and advice, and ultimately failed to serve a further writ timeously.

I complained to the lawyers about these delays at the time, something that they denied to the Law Society. As a result of these delays, any further action became time barred.

I believe that I have been treated very unfairly, and that there should be an opportunity for me, and people in similar situations, to be able to get the settlements that should have been paid out in the first place.