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Prescription (Scotland) Bill

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Prescription sets time limits after which legal obligations (and associated rights) will be extinguished. In day to day life a wide range of legal obligations are affected by prescription, making it important in practice. This briefing provides an introduction to the current law of prescription and to the Prescription (Scotland) Bill.



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Executive Summary

What the Bill does

The [Prescription \(Scotland\) Bill](#)¹ ('the Bill') would implement recommendations of the [Scottish Law Commission](#) (SLC) in its [Report on Prescription](#).² The SLC is the statutory body that makes recommendations on law reform to Scottish Ministers.

The Bill would amend the current law found in the **Prescription and Limitation (Scotland) Act 1973**. The 1973 Act says that some legal obligations are affected by **five year prescription**, some obligations are only affected by **twenty year prescription** and some are **never brought to an end by prescription**.

Why do we have prescription in Scots law?

We have prescription in Scots law to encourage people to **enforce their rights promptly**, before it becomes too difficult for the person or organisation defending the claim to gather the appropriate evidence. We also have prescription to offer people and organisations some **certainty**, so they can plan for their lives and resources after a certain point knowing they will not get sued. However, prescription **can cause harsh results in individual cases**, as [a petition on prescription](#)³ being considered by the [Public Petitions Committee](#) illustrates.

The specific proposals

The Bill proposes a set of reforms to both **five year prescription** and **twenty year prescription** (with no proposed changes to the list of obligations which do not prescribe.)

The range of legal obligations covered by **five year prescription** would be extended (under sections 1-3 of the Bill).

Section 5 of the Bill also sets out a new test determining **when five year prescription starts** in relation to the **obligation to pay damages**. This would be a substitute for the test set out in a UK Supreme Court case ([David T Morrison & Co Limited v ICL Plastics Ltd](#)).⁴ The effect of this case had been criticised as being unfair to people raising court actions.

The Bill would also **help those defending court actions**. Specifically, the ticking of the clock on the twenty year period would **no longer be able to be interrupted**, for example, by starting a court action (sections 6 and 7). For obligations to pay damages, the clock would also start to tick in respect of the twenty year period from a point that is **potentially much earlier in some cases** than the start point set out in the current law (section 8).

Reactions to the proposals

The key proposals in the Bill received the **support of a significant majority** when the SLC consulted on them. Respondents gave particularly careful consideration to what the new test should be in relation to section 5 of the Bill, as this is an important provision in policy terms. The SLC had put forward **four options** to consider (with the Bill featuring option 3 of these).

On the scope of five year prescription, most attention was given to the proposed new rule in section 3. This says that **statutory obligations to make payment** should be subject to **five year prescription**.

Local councils, [HM Revenue & Customs](#) and the UK Government's [Department of Work and Pensions](#) focused on section 3, arguing that the longer prescription period (twenty years) was needed for successful public sector debt collection.

Respondents' views led to **extra exceptions being made to the rule in section 3** as the proposal developed. Broadly speaking, these would preserve the current law (twenty year prescription) for the types of obligation named in the exceptions.

Support was **more mixed** for the proposals which became section 13 of the Bill. Section 13 would allow people to **agree by contract that the five year prescription could be extended** in some circumstances. However, the SLC has tried to address the concerns expressed by narrowing the scope of the original proposals. Section 13 focuses on situations where the purpose of the contract is to halt prescription for a **maximum of one year** while people try to settle their dispute out of court - so called **standstill agreements**.

Background to the Bill

Overview

In February 2018, the Scottish Government introduced [the Prescription \(Scotland\) Bill](#)⁵ ('the Bill') in the Scottish Parliament. It was accompanied by a [Policy Memorandum](#);⁶ [Explanatory Notes](#);⁷ a [Financial Memorandum](#);⁸ a [Delegated Powers Memorandum](#)⁹ and a [Statement on Legislative Competence](#).¹⁰

The Bill does not contain a comprehensive package of reforms to the law of prescription. Rather, **the aim is to address specific issues** which have caused, or may cause, difficulty in practice.

The **Scottish Government** says the changes are designed to increase **clarity, certainty and fairness**. It also aims to **reduce costs** for those involved in litigation and insurance. It wants to make it **less likely that people and organisations will have to raise court proceedings** to preserve their legal rights ([Policy Memorandum](#), para 4).

This briefing provides an introduction to **the current law of prescription**, summarises the **changes which would be made by the Bill** and **the responses to the proposals**. A **quick summary** of what the Bill would do can be found in the briefing [here](#).

Whilst this briefing gives an overview of the Bill, its coverage is not exhaustive. See the [Explanatory Notes](#) to the Bill for a detailed description of what each statutory provision does.

Policy development and consultation process

The SLC published a [Discussion Paper on Prescription](#) .¹¹ (with [Summary](#))¹² in **February 2016** ('the Discussion Paper').ⁱ

Twenty responses were received and collated responses are [published online](#).¹³ These were mainly from the **legal profession** (firms, individuals and representative bodies) as well as [HM Revenue and Customs](#) (HMRC) and **representatives of the insurance industry**.

The SLC also [issued a short consultation on a draft bill](#) in **March 2017**.¹⁴ It received [sixteen responses](#).¹⁵ Again, the **legal profession** provided the bulk of the responses. Various **local councils**, HMRC and the UK Government's [Department of Work and Pensions](#) (DWP) responded in relation to **debt collection by public bodies**.

ⁱ For an overview of this project and a full list of the SLC documents associated with it, see: <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/aspects-of-the-law-of-prescription/>

The SLC published its [Report on Prescription](#)² with [Summary](#)¹⁶ in **July 2017** ('the Report'), making various recommendations for reform. The Scottish Government published its [initial response](#) to the Report on **12 September 2017**.¹⁷ This accepted **the approach in the Report** and reaffirmed, [following an earlier announcement by the First Minister on 5 September](#),¹⁸ that a bill would be included in the current legislative programme.

The Bill has not been publicly consulted on by the [Scottish](#) Government. It wrote to "key stakeholders" for views on **14 September 2017**.¹⁹ One substantive response was received from [COSLA](#) (on behalf of some of its members). This was supportive of the proposed Bill.²⁰

The Scottish Parliament's [Delegated Powers and Law Reform Committee](#) ('the Committee') was designated as the lead committee at Stage 1 of the Parliament's consideration of the Bill. It issued a [Call for Evidence](#), which closes on **4 April 2018**.

An introduction to the law of prescription

Terminology

Terminology associated with prescription

There are two types of prescription - **positive** and **negative**. Positive prescription creates rights; negative prescription removes rights (and obligations). The Bill relates to **negative prescription only** - it is referred to simply as 'prescription' in the rest of this briefing.

Prescription relates to obligations but, of course, an obligation is always owed to someone - a person or organisation will hold the corresponding right. Readers should bear in this mind when the terms **right** and **obligation** are used in isolation from each other in the briefing.

For i) the person having the right; and ii) the person bound by the obligation, the [Policy Memorandum](#) uses the terms **creditor** and **debtor** respectively (as the academic textbooks do). However, it is important to bear in mind that prescription **does not only apply to financial debts**. Rather, it applies to a wide range of legal obligations.

Prescription should not be confused with limitation

Prescription is also not to be confused with **limitation**, which, for example, applies instead of prescription for **damages actions for personal injuries**.

Prescription and limitation are very similar, **both containing time limits which courts must consider**. However, limitation does not completely remove a right, it just prevents a person raising court proceedings based on the right. The court also has a discretion to overrule the time limit - no equivalent discretion currently exists for prescription.

Limitation was [recently reformed](#)²¹ (for childhood abuse cases) via the Limitation (Childhood Abuse)(Scotland) Act 2017.

Some court-related terminology

Despite the differences between prescription and limitation, the significance of prescription is often that it **determines whether or not a person or organisation can still raise a court action**. It is, therefore, helpful to be familiar with some basic court-related terminology.

With some exceptions, the person bringing a court action in Scotland is referred to as the **pursuer**, the person or organisation defending it is the **defender**. These terms are used in this briefing.

Why do we have a law of prescription?

When people first learn about prescription there is often confusion about why it is needed. Surely, the argument goes, if someone has a legal right it should last forever - unless they have agreed this should not be the case. However, legal systems all over the world have prescription or an equivalent to it, for various policy reasons.

For one thing, 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, these things could cause insurmountable difficulties for the defender.

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 not get sued over a particular issue.

Prescription, as we will explore later, can cause [harsh results in individual cases](#). The policy justification is that the **public interest considerations** discussed above should take priority over some difficult individual outcomes ([Policy Memorandum](#), para 7).

The current law

The current law of prescription is found in the **Prescription and Limitation (Scotland) Act 1973** ('the 1973 Act').

Under the current law of prescription, some obligations are subject to **five year prescription** (section 6 and schedule 1), some obligations are only affected by **twenty year prescription** (section 7 and 8) and some are **never extinguished** by prescription (schedule 3).ⁱⁱ

In practice, most obligations in Scots law end after **five years**.

ⁱⁱ Ownership of land and buildings and a tenant's right under a (recordable) lease are examples of rights and obligations which are never extinguished by prescription. However, they can be extinguished or transferred to other people in other circumstances.

Both the five year time period and the twenty year period begin **when an obligation becomes enforceable**. However, the starting point can be **suspended or postponed** in certain circumstances.

Under section 11(3) of the 1973 Act, when **the obligation is to pay damages**, the law takes some account of a person's **state of knowledge** of the circumstances of the case in determining when the five year period starts to run (1973 Act, section 11(3)).

This is a key issue associated with the Bill - see further [The Discoverability Test \(section 5\)](#).

On the other hand, the twenty year period functions as a kind of **long stop** or **absolute cut-off point**. It takes no account of whether the person with the right knew that it existed in determining when the time period starts.

For both five year prescription and twenty year prescription the **running of the relevant time period** can be **interrupted and halted**. One of the main ways this happens is by **raising court proceedings**.

When the twenty year period should start and whether it should be able to be interrupted are also important issues in relation to the Bill - see further [Twenty Year Prescription](#) (sections 6-8).

Twenty years and five years are the main time periods in the 1973 Act. However, a **two year prescription** and a **ten year prescription** apply to two specific types of legal obligation (section 8A and 22A). **Other statutes** also provide specific prescription (and limitation) periods for certain types of obligation.

What the Bill would do

The Bill, if passed and enacted, would make a series of changes to the parts of the 1973 Act mainly relating to **five year prescription** and **twenty year prescription**.

The parts of the Bill which are particularly important are considered in more detail later in the briefing. However, overall, the Bill can be summarised as follows:

Five year prescription

Sections 1 - 3

These sections would **extend the scope of the obligations** covered by five year prescription.

Section 4

This technical provision would clarify the effect of **fraud** by a debtor **or error** induced by a debtor on how the five year period is calculated.

Section 5

This key section relates to the **obligation to pay damages**. It sets out **what the pursuer would have to know about the circumstances of his or her case** before the five year period would start.

Twenty year prescription

Sections 6 and 7

These sections say the running of the twenty year period would **no longer be able to be interrupted**, for example by raising court proceedings. (At present, such an interruption has the effect of a full twenty year period starting again.)

However, there would be the possibility of an **extension** to twenty year prescription but only to allow litigation which has started to finish.

Section 8

This section would **change the starting point of twenty year prescription** in relation to the **obligation to pay damages**. It would make it begin on the date of **the defender's last act or omission**, as opposed to when the loss or damage actually occurred. This would benefit defenders.

Miscellaneous

Section 9

This says that **specific rules in other statutes** on prescription and limitation **should take priority** over the general provisions in the 1973 Act.

Sections 10 - 12

Sections 10 and 11 provide **revised definitions** relating to **interruptions to five year prescription** (which would still be permitted under the proposed new law).

Section 12 is also a definition section - relating to the possibility of **extending the twenty year prescriptive period** (discussed above under sections 6 and 7).

Section 13

Section 13 would make it possible, in some circumstances, to **agree by contract** (once only) **to extend the five year prescription** for a period of **up to one year**. In practice, this type of agreement is referred to as a **standstill agreement**.

Section 14

This says that, when a question arises as to whether an obligation or right has been extinguished by prescription, it is **for the right holder** to prove that it has not been extinguished. (To describe this, lawyers say the **burden of proof** rests with the right holder.)

Sections 15 - 16

These sections contain the powers for Scottish Ministers to **commence the new law** (by secondary legislation) and to **make other secondary legislation** related to the Bill.

Any secondary legislation which **adds to, replaces or omits any part of an Act** is subject to the [affirmative procedure](#).

Policy issues associated with the Bill

The scope of five year prescription (section 3 of the Bill)

The most significant change proposed in policy terms to the scope of five year prescription is found in section 3 (**statutory obligations to make payment**). This is considered in more detail in this section.

As a preliminary point, note that, even though **an obligation is subject to five year prescription**, it may ultimately get **extinguished under twenty year prescription**.

This is a potentially confusing idea at first, but is related to the **start point of the running of the five year period**. This can sometimes get **postponed for long periods**, in a way that the twenty year period is much less likely to be.

Background

Five year prescription applies to those obligations on **one statutory list** and **not** to those obligations on a **second statutory list** (1973 Act, schedule 1, paras 1 and 2).

This approach makes the law complex, particularly as the lists have been **heavily amended** over the years.

If an obligation does not appear on the first list mentioned above, the assumption is that the obligation is **only affected by twenty year prescription** (or does not prescribe). However, **there are many grey areas** where people have not been sure into which category an obligation falls. Courts have had to reach decisions in such cases,ⁱⁱⁱ and uncertainties remain.

List 1 - what is included in five year prescription

Broadly speaking, obligations covered by five year prescription include:

- various types of **obligations to pay money** (e.g. **rent under a lease**)
- most **obligations under contract**
- the obligation to pay financial compensation (**damages**)
- a collection of **statutory compensation payments** associated with land and buildings
- some miscellaneous obligations (e.g. the obligation to **pay criminal injuries compensation**)

ⁱⁱⁱ An example is interest on unpaid tax which the courts decided was subject to the twenty year period only (Lord Advocate v Butt 1992 SC 140).

List 2 - what is not included in five year prescription

The list of obligations **excluded from five year prescription** includes but is not limited to:

- obligations relating to **land and buildings** not specifically mentioned on the first list
- obligations to pay out under the **statutory rules on inheritance** (which apply when someone dies without leaving a will)
- statutory obligations to recognise **decrees from courts** or **orders from tribunals**
(types of legally binding instructions from these bodies)

For the **obligation to pay damages** and **obligations under contract**, the second list also creates some **specific exceptions** in these general categories which are excluded from the scope of five year prescription. For example, in relation to the obligation to pay damages, **damages associated with defective products** are excluded from the scope of five year prescription.^{iv}

What section 3 says

Section 3 would extend five year prescription to **all statutory obligations to pay money**. However, despite the attempt to simplify the law, there would still be **exceptions** which would remain within the scope of twenty year prescription.

The exceptions in section 3 include:

- **taxes** and **duties** recoverable by HMRC and [Revenue Scotland](#)
- **council tax** and **non-domestic rates** (also called **business rates**),^v as well as sums connected with enforcement of these obligations
- the obligation to pay **child maintenance**
- sums recoverable under legislation relating to **(reserved) social security benefits and tax credits**, including the recovery of **overpayments**^{vi}

An **overpayment** is an amount of benefit or tax credit **paid to someone incorrectly**, where the amount is too high or the entitlement conditions were not met. For some benefits or tax credits, overpayments are always recoverable, and for others some fault on the part of the claimant must be shown for it to be recoverable from them.

iv For damages associated with defective products a separate ten year prescription applies (1973 Act, section 22A).

v Local tax on business properties to pay for council services.

vi **Note that the time limits on individuals claiming benefits and tax credits are not covered by the general rules on prescription. Instead they are covered by time limits set out in specific statutes.**

Reaction to section to 3 on consultation

All statutory obligations or only those to pay money?

The SLC [Discussion Paper](#) originally suggested that **all statutory obligations**, rather than just statutory obligations to pay money, should be included within the scope of five year prescription.²²

Despite **strong support on consultation** (with only a handful of those responding disagreeing), the SLC later narrowed its proposal to the one now contained in the Bill. It was anxious that its recommended reforms should not extinguish rights, powers and duties that arise in the public sphere:

“ 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.”

Scottish Law Commission, 2017²³

What should the exceptions be?

The **exceptions** contained in section 3 are the other main area of interest.

As the policy has developed through consultation **more exceptions** have been added and **one proposed exception has been dropped**.

Taxes, duties and forfeiture

Taxes and duties

The [Report](#),²⁴ the [draft bill](#) and the Bill (as introduced) propose an exception relating to central government and Revenue Scotland **taxes and duties**. This exception, if enacted, would **retain the current law in Scotland**, as well as keep Scots law in line with law in England and Wales.^{vii}

This exception was suggested by HMRC and the [Senators of the College of Justice](#),^{viii} in response to the earlier [Discussion Paper](#).

Forfeiture

Forfeiture relates to **property which has been seized** by HMRC or the [Border Force](#), in relation to unpaid taxes and duties, or because the property has entered the country illegally. Forfeiture legally transfers the seized property to these bodies.

vii In England and Wales, taxes and duties are not subject to six year limitation - the equivalent of five year prescription (Limitation Act 1980 ('the 1980 Act') section 37(2)(a)).

viii Senior judges who sit in the Court of Session and High Court in Edinburgh.

The [Report](#) and the [draft Bill](#), mirroring the law in **England and Wales**,^{ix} contained specific exceptions for proceedings relating to **forfeiture** (including in relation to ships).

This exception was [supported by the Senators of the College of Justice](#)²⁵ in response to the [Discussion Paper](#). It does **not** appear in the Bill as introduced.

The [Policy Memorandum](#) (at para 23) says that, after further reflection, and consultation with the SLC, the Scottish Government consider that relevant proceedings for forfeiture are covered by the proposed general **exception for taxes and duties**.

National insurance contributions

The intention of both the SLC and the Scottish Government is that the **exception for taxes and duties** includes **national insurance contributions**.^x In [response to the the draft bill](#),²⁶ HRMC said that the relevant wording (also in the Bill) is not sufficiently clear on this point. The Bill (as introduced) contains revised wording which aims to address this point.^{xi}

In Scotland, an exception for national insurance contributions would **retain what is probably the current law**, although, in contrast, in England and Wales this obligation is extinguished after **six years**.^{xii}

Council tax and business rates

The Bill contains an **exception for council tax and business rates**. This differs from the [draft Bill](#) which the SLC consulted on but mirrors the [Report](#).

Under the current law in Scotland, council taxes and business rates are **probably only covered by twenty year prescription**. ('Probably' because the SLC thinks there is a possible argument the other way). There is no decided case on the point, leading to **some uncertainty in practice**.^{xiii}

In its response to the [Discussion Paper](#) the [Law Society of Scotland](#) commented as follows:

ix 1980 Act, section 37(2).

x the Report, para 2.27. Policy Memorandum, para 20.

xi section 3(b), inserting (fa) into schedule 1, para 2 of the 1973 Act. In (fa) the phrase "or other sum" has been added to the Bill which did not appear in the draft Bill.

xii On the current law for national insurance contributions, see the Discussion Paper, para 2.29.

xiii the Report, para 2.29.

“ We would certainly think there are political reasons why...council tax or business rates would not prescribe, but we see no logical reason or legal reason why that ought to be. As we understand it, council tax and business rates...in England and Wales... "prescribe" after 6 years in the usual way.”

Scottish Law Commission, 2016²⁷

In response to the later [consultation on the draft bill](#), **various councils** ([Aberdeenshire](#),²⁸ [Fife](#),²⁹ [Glasgow](#),³⁰ [South Lanarkshire](#)³¹) argued successfully in favour of **an exception for council tax and business rates**. Arguments included that, in many cases, this type of debt recovery can only be successful if it takes place over a long time period.

Child maintenance, social security and tax credits

Child maintenance

For similar reasons, [Brodiès](#) (in response to the [Discussion Paper](#)) and DWP (in [response to the draft Bill](#))³² argued successfully for an exception for **child maintenance**. (DWP's interest relates to the fact that it has statutory powers to recover arrears).^{xiv} The proposed exception is in line with the **equivalent law in England and Wales** and **the likely current position in Scotland**.^{xv}

Social security benefits and tax credits

Again, because of the long-term nature of public sector debt collection, DWP (in [response to the draft bill](#))³² argued successfully for further exceptions. These relate to sums recoverable under legislation relating to **(reserved) social security benefits and tax credits**, including recovery of **overpayments**.

These exceptions **reflect the current position in Scotland**. In contrast, in **England and Wales** a distinction is made between **recovery by court action** (to which a six year time limit applies) and recovery of an overpayment by **deductions from ongoing benefits** (to which no time limit applies).^{xvi}

There is also proposed divergence of approach in relation to **reserved and devolved social security benefits in Scotland**. This is due to how section 3 of the Bill interacts with section 38 of the [Social Security \(Scotland\) Bill](#),³³ as amended at Stage 2.

The combined effect of the two provisions is that **five years** would apply to **devolved benefits** but **twenty years** to **reserved benefits**.

xiv via the [Child Maintenance Service](#).

xv the Discussion Paper, para 2.30.

xvi 1980 Act, section 38(11).

The discoverability test (section 5)

Background

As mentioned earlier, five year prescription generally runs from the point an obligation becomes enforceable.

However, for **the obligation to pay damages**, section 11(3) of the 1973 Act requires the potential pursuer to have **a degree of knowledge** about the circumstances associated with the legal claim before the clock starts to tick.

For many years it was thought that section 11(3) meant that the five year period was postponed until the pursuer knew that:

- he or she had suffered loss, injury or damage; and
- that loss injury or damage had been caused by **fault or negligence**

On the other hand, the pursuer did **not** have to know the identity of the defender (although in practice he or she often did).

The 2014 UK Supreme Court case of [David T Morrison & Co Limited v ICL Plastics Ltd](#) (**'the Morrison case'**)³⁴ turned understanding of section 11(3) on its head.

This case relates to an explosion in a plastics factory, where it took many years of investigation to work out precisely what had happened.

The UK Supreme Court said in the Morrison case that the start of the five year period should be postponed **until the pursuer knew he or she had suffered loss, injury or damage - nothing more.**

The decision in the Morrison case caused particular concern amongst those who had to deal with cases associated with **latent damage**, such as in the construction and insurance industries.

Latent damage is damage which may not become apparent or readily detectable (even with the exercise of reasonable care) until many years after the incident that caused it.

One of the key concerns with Morrison was that, due to the clock starting to tick at an early stage, in future would-be pursuers would have to start court proceedings quickly, rather than fully investigating a complex case.

A recent case highlighted how Morrison could work in **professional negligence cases** ([Gordon's Trustees v Campbell, Riddell, Breeze and Paterson LLP](#)).³⁵

In this case, solicitors were asked by landlords to serve eviction notices on agricultural tenants. However, due to mistakes in the solicitors' work, the [Scottish Land Court](#)

eventually decided that the agricultural leases were still in place, causing loss to the landlords (who could not develop the land).

The unhappy landlords were prevented from suing, as the Supreme Court said the five year period started at the point the pursuers paid the solicitors for their (defective) work. (This was even though they did not know, at that stage, that the Land Court would later rule against them).

What section 5 says

In its [Discussion Paper](#) the SLC looked again at section 11(3) of the 1973 Act as a result of the Morrison case. The SLC consulted on **four options** and made recommendations, now contained in section 5 of the Bill.

Section 5, if enacted, would amend the law to say that the start of the five year period is postponed until the pursuer knows:

- he or she had suffered loss, injury or damage;
- that loss injury or damage had been caused by **fault or negligence**; and
- the **identity of the person (or organisation)** who caused it

This proposed change would be **more favourable to the pursuer** compared to the law as set out in the Morrison case.

Reaction to section 5

The four options the SLC consulted on were as follows: ³⁶

- apart from minor changes, **keeping the law** as described in Morrison (option 1)
- going back to **the law as previously understood** before Morrison (option 2)
- going back to the previous law but **adding the additional requirement** that the pursuer must know the **identify of the defender** before the clock starts to tick (option 3 - now contained in section 5 of the Bill)
- **leaving it to the court to decide when the time period starts**, according to what is "just and reasonable having regard to all the circumstances of the case" (option 4)

The relevant question in the [Discussion Paper](#) received **16 responses**, with many respondents explaining the reasons for their views in detail. ³⁷

Three quarters of respondents (12) to the relevant question favoured reconsidering the test in section 11(3) after the Morrison case.

In terms of how the law should be changed, **half of those respondents** (8) favoured **option 3**, including the Law Society of Scotland, various law firms and insurance companies. **A quarter of those respondents** (4) identified advantages to both **options 2 and 3**, including the [Faculty of Advocates](#) and the Senators of the College of Justice.^{xvii}

A **quarter of the respondents** (4) were generally happy with the law as set out in Morrison (option 1). Of these respondents, two were law firms ([BLM](#) and [Clyde and Co](#)) and two were solicitors working for commercial firms but responding in a personal capacity (Craig Connal QC and Charles McGregor from Clyde and Co). Craig Connal QC supported option 1, "failing which, reluctantly, option 2."

No respondents favoured option 4. It was criticised for making the law uncertain.

Twenty year prescription (sections 6 - 8)

With what became section 5 of the Bill, the SLC proposed shifting the law of prescription in favour of the pursuer.

One way prescription can be analysed in policy terms is whether it strikes a fair balance between the interests of **pursuers and defenders**.

This is one of the reasons why, having recommended reform of five year prescription, the SLC looked again at specific aspects of twenty year prescription - to review the overall balance of the proposed new law.

Changing the start date of twenty year prescription (section 8)

Background

Section 7 of the 1973 Act sets out a twenty year prescription rule for **most types of legal obligation** (apart from those which cannot prescribe). **Section 8 of the 1973 Act** describes a similar twenty year prescription rule for certain **rights relating to property** (but again not those which do not prescribe).

Twenty year prescription, like five year prescription, starts from the **date the obligation becomes enforceable**.

For obligations to pay damages (as with five year prescription) this is **when the loss, injury or damage occurs**. This means that it is quite possible for a long period of time to pass without the twenty year period starting to run.

On the other hand (unlike five year prescription), twenty year prescription takes no **account of the pursuer's knowledge of the circumstances of the claim** in deciding when the clock starts to tick. For this reason, it is often referred to as a **long stop rule** or **absolute cut off point** because it can extinguish a legal obligation before the five year prescription has even started.

Different scenarios can produce a variety of different outcomes.

xvii The Senators of the College of Justice (as judges in the Scottish courts) were careful not to express a firm view on what was essentially a question of policy.

Example

In **2001**, contractors constructed a building with sub-standard foundations, not visible on reasonable inspection.

In **2015**, significant cracks appeared in the fabric of the building due to the building moving on its poor foundations. These would cost a lot of money to fix and affected the building's market value (the losses).

Under the current law, **2015** is the year the twenty year period (and the five year period) starts to run.

What section 8 says

Section 8 says that, for the obligation to pay damages, the twenty year period should run from **the date on which the defender's act or omission occurred**.

This is the **last date** if there was **more than one act or omission**. It is the **date the act or omission stopped** if the failings in question were ongoing (**continuing**) ones.

Unlike the changes for five year prescription, this proposed change would be a shift in the law **in favour of the defender**. For the new start point would be much earlier than the old one in some cases (and would never be later).

The SLC and the Scottish Government were motivated to make the twenty year period function as a firmer cut off point, after which the defender could plan his or her affairs with certainty (knowing he or she would not get sued).^{xviii}

xviii See, for example, para 4.9 of the Report and para 44 of the Policy Memorandum.

Example

In **2021**, a building was constructed with sub-standard foundations, which nobody could reasonably have discovered at the time.

By **2034**, cracks were visible in the building's structure (due to its poor foundations), causing losses.

By **2037**, investigations finished into what had gone wrong. This concluded that the design was not at fault, but the builders had not followed specified plans for the building.

Under section 8 of the Bill the **twenty year period** would start to run in **2021** and extinguish the builder's obligation to pay damages in **2041**.

Under section 5 of the Bill (relating to five year prescription) the five year period starts to run in **2037** when the pursuers know there has been a loss, that someone was at fault and who that person is.

The pursuers would have four years to sue before the obligation is extinguished.

Reaction to section 8

All but one of the respondents who answered the question (14 out of 15) gave their general support for the proposal to **change the start date of twenty year prescription**.

With differing degrees of concern expressed, the Faculty of Advocates and Charles McGregor (a solicitor) questioned whether the proposed rule would work so well when there had been an **omission**. This is some type of failure to act in a certain way. (Omissions are included in section 8 of the Bill).

The Law Society also questioned how well the proposed rule would work in relation to ongoing (**continuing**) breaches (also within the scope of section 8). On balance, it concluded that fairness favoured the proposed start date.

Hugh Paterson, who later lodged a [petition](#)³ with the Scottish Parliament, discussed his particular experience of the twenty year prescription in response to this question. (He acknowledged this was not directly relevant to the question itself). This topic is returned to here under '[Hard cases](#)' and the [parliamentary petition in the name of Hugh Paterson \(PE01672\)](#).

Should the twenty year prescription be able to be interrupted or extended? (sections 6, 7 and 12)

Background

At the moment, the twenty year prescription (and the five year prescription) can be interrupted and therefore **halted** by someone starting court proceedings in respect of the obligation (and right) in question (a **relevant claim**) (1973 Act, sections 7 and 8).

For the main type of twenty year prescription (under section 7 of the 1973 Act) it can also be interrupted and halted by the person bound by the obligation acknowledging it still exists (**a relevant acknowledgement**). This can be in a written statement or it can be by doing something else to show that the person still thinks the obligation still exists. For example, partly paying off a debt due.

The word 'interruption' in this context, although appearing in the 1973 Act, is perhaps slightly misleading. Once interrupted, the twenty year period has **no opportunity to restart from the same point**. Instead, **an entirely new twenty year period** starts to run at the date of the so-called interruption.

What the Bill says

Section 6 of the Bill would amend the law so that the main type of twenty year prescription (found in section 7 of the 1973 Act) **could no longer be interrupted and halted** by a **relevant claim** or a **relevant acknowledgement**.

Section 7 of the Bill would similarly amend the specific type of 20 year prescription which applies to certain rights relating to property so it cannot be interrupted by a relevant claim.

The Bill also says what should happen under the proposed new law if court proceedings have been started **but not concluded** when the twenty year period is up. Specifically, it says **the twenty year period can be extended until the legal claim has been finally disposed of** and there is no possibility of further appeal (section 6, 7 and 12).

Reaction to the proposals

Interruptions

Of those who responded to the [Discussion Paper](#) on the issue, **a large majority (80%)** were in favour of the principle that **twenty year prescription should not be able to be interrupted**.

Brodies and [Morton Fraser](#) (firms of solicitors) accepted that the proposal gave greater certainty to the defender. However, they also expressed **some reservations**.

Morton Fraser thought that, for technical reasons, the proposal could (unhelpfully) limit a creditor's methods of debt recovery in practice (in some circumstances). **Brodies**

suggested that the period should still be able to be interrupted. However, it should restart (not from the beginning) but **from where it left off in the first place**.

Craig Connal QC liked the idea that prescription could not be interrupted by court proceedings, but had more difficulty with the idea that a relevant acknowledgement (an acceptance of the obligation) should no longer be significant.

An extension to the twenty year period to allow litigation to finish

Of those that responded to the relevant question in the Discussion Paper, again a **large majority (80%)** supported the idea that, where litigation was ongoing, the twenty year period should be able to be extended to allow the claim to be finally disposed of.

For example, Morton Fraser commented:

“ Not allowing this could mean that delays in the course of the determination of the claim which were not the fault of the pursuer could result in the pursuer losing their right to continue with the claim prior to its conclusion.”

Scottish Law Commission, 2016³⁸

The Faculty of Advocates said:

“ This strikes us as being fair and sensible. A defender should not be able to defeat a claim against him by the deployment of Fabian tactics^{xix} in litigation.”

Scottish Law Commission, 2016³⁸

Those responding from the **insurance industry** opposed the idea of a possible extension.

The insurance industry **did not give specific reasons for their views**. Instead (in the case of the [Forum of Scottish Claims Managers](#) and [Zurich](#)), they referred back to their general comments on the idea that the twenty year period should not be able to be interrupted.

'Contracting out' of prescription and 'standstill agreements' (section 13)

Background

Section 13 of the 1973 Act prohibits agreement in a contract to **lengthen** (or **entirely remove**) one of the statutory periods of prescription. ³⁹

^{xix} A strategy of actively trying to delay progress.

There is **some uncertainty** as to whether contractual agreements to **shorten the statutory period** are also prohibited by section 13.⁴⁰

An issue associated with section 13 is whether **standstill agreements** should be valid. These are found in some other countries. They let people agree that **prescription will not run for a set period** while they negotiate to end a legal dispute.

One advantage of standstill agreements is that, while they are in effect, people do not have to raise court proceedings just to prevent prescription from extinguishing their rights. (Such proceedings are sometimes called **protective proceedings**. They are thought to be wasteful of court resources and unhelpful in resolving disputes.)

What section 13 says

Section 13 of the Bill would substitute a new section 13 into the 1973 Act (the identical numbering is probably coincidence rather than by design).

For **five year prescription**^{xx} the new section 13 would say that contracts to **extend** the five year period are **competent where certain conditions are met**. These are:

- it should only be possible to enter into such an agreement **after a dispute has arisen**
- people and organisations should only be able to **extend the five year period once**
- the extension should be limited to **one year**, with **no further extensions allowed**

This is intended to allow **some types of standstill agreement** to be valid.

Section 13 of the Bill makes clear that an agreement in a contract to **remove or shorten** a statutory period of prescription in the 1973 Act would be **invalid** (according to what would be the new section 13(4)).^{xxi}

Reaction to the SLC proposals

Extending the prescriptive periods

In its [Discussion Paper](#), the SLC asked a general question about whether it should be possible to **agree by contract to extend the prescriptive periods**.

Responses were **mixed**, with **nine out of 17 respondents** to the relevant question in favour of agreements to lengthen the prescriptive periods.

In the group in favour, **five respondents** referred to **standstill agreements** specifically.^{xxii} **Two respondents** (the Senators of the College of Justice and [Burness Paul](#) - Dispute

xx And for the two year prescription (found in section 8A) which applies in a limited set of circumstances.

xxi The new 13(4) covers two year prescription, five year prescription and twenty year prescription (found in section 6, 7, 8 and 8A of the 1973 Act.)

Resolution) said the plans should apply to **five year prescription** but **not** twenty year prescription. (This is also the approach the Bill takes).

Reasons for opposing the proposal included a dislike of the **increased complexity** in the law. Fears were also expressed about the possibility of **increased litigation about the contracts** and therefore **increased costs and delay** in the resolution of disputes.⁴¹ (The conditions now contained in section 13 relating to standstill agreements are intended to address these concerns).

Shortening the prescriptive periods

The SLC asked whether contractual agreements to **shorten the prescriptive periods** should be allowed. Also, if so, whether there was a **need for a minimum lower limit** to be set out in legislation.

Responses were **mixed**, with **six out of sixteen expressing support** (without a lower limit) and another respondent (RIAS) saying yes but with a lower limit required.

The majority in opposition suggested it would make the law **uncertain** and **unfair**. There was particular concern for **the weaker party** in the situation where the contracts involved people or organisations with **unequal bargaining power**. Examples given included employment contracts and where a small business was entering into a contract with a large corporation. (The SLC accepted these concerns and did not proceed with the proposal).

'Hard cases' and the parliamentary petition in the name of Hugh Paterson (PE01672)

In October 2017, Hugh Paterson submitted a petition ([PE01672](#)) to the Public Petitions Committee of the Scottish Parliament. He did this because he had a particular experience of the effect of twenty year prescription. This was when the conveyancing associated with his house purchase went wrong and he tried to sue his solicitor for damages.

The SLC did **not** recommend reforming the law in a way that would have helped people in situations like the one Mr Paterson found himself in. He wants the Scottish Parliament to ask the Scottish Government to look again at the issue.

No relevant reforms appear in the Bill.

xxii One further respondent (Burness Paull - Construction and Projects) said it would support the proposal if five year prescription started from a different point to the point now contained in section 5 of the Bill.

Background

A recap on prescription and damages cases

Both five year and twenty year prescription can apply to damages claims. To recap a little on the topic of prescription as it applies to such claims:

- **five year prescription** requires the pursuer to have **some knowledge** of the circumstances of his or her legal claim before the clock starts to tick. Section 5 of the Bill would add to the required knowledge in a way that would help pursuers.
- **twenty year prescription** does **not** require the pursuer to have this knowledge. Twenty year prescription currently runs from **the date the loss occurs**. Under section 8 of the Bill it would run from the (potentially earlier point) of **the last act (or failure to act) which caused the loss**. This would help defenders in certain types of cases.

The overall effect of the law (current and proposed) is that **the legal obligation to pay damages can be extinguished by twenty year prescription:**

- without the five year prescriptive period even starting to run; and
- **without the pursuer having been aware that the legal obligation to pay him or her damages existed at all**

Problems with a house purchase

What can go wrong

What happened to Mr Paterson specifically was a problem with his solicitor's work on his house purchase.

Property cannot change hands in Scotland without it being registered in one of two property registers looked after by the [Registers of Scotland](#). This is a key part of what a solicitor does for a house purchaser.

The law can step in to 'cure' some defects in solicitors' work but sometimes the mistake is fundamental - the solicitor fails to register the change of ownership at all. The result is the property does not change hands, even if it goes on to be occupied by a new 'owner'.

As people without a legal background do not routinely cross-check the work of their solicitor, the person affected may not realise the mistake for many years - until a solicitor gets involved again in preparation for the house being sold.

What can the person affected do when this happens

Since 2008, it has been possible to complain about a solicitor to the [Scottish Legal Complaints Commission](#) (the SLCC). If the SLCC agrees there has been inadequate professional services, **it can award damages not exceeding £20,000.**

The Commission operates a **strict time limit** for submitting complaints. The person complaining used to get **one year** from the date the service was last provided. Since 2017, he or she has **three years**. In both instances, periods when the person complaining was **excusably unaware** of the inadequate professional services are excluded.

Another option is to sue the solicitor in question through the civil courts. This has the advantage that the potential level of compensation is not subject to a statutory cap, but the disadvantage of having legal costs attached to it.

In addition, as Mr Paterson discovered, twenty year prescription under the current law runs from the point the loss occurred - and, if the Bill is passed and enacted, it will run from the last action (or omission) causing the loss. Consequently, depending on when the house next comes up for sale, **it is possible a claim for damages could be extinguished by twenty year prescription.**

Extinction by twenty year prescription can occur without the person who bought it having ever realised there was any problem with the original work.

Responses to Mr Paterson's situation

What the Scottish Law Commission said

Mr Paterson responded to the [Discussion Paper](#) explaining his situation. In its [Report](#) the Scottish Law Commission (SLC) carefully considered whether the start point for twenty year prescription should take account of the state of knowledge of the person affected.

Ultimately, it recommended **no change** to the current law.

The SLC responded in detail as follows:

“ On buying a house a purchaser cannot reasonably be expected to review or scrutinise the work done by the conveyancing solicitor, **so there is every justification for him or her to be entirely ignorant of the title defect...** This is a **difficult situation, in which prescription operates harshly**. We have sympathy with the affected purchaser. The question is whether this case (or similar cases) lead to the conclusion that the long-stop prescription should be reconfigured so as to take account of the state of knowledge of the person affected. We have considered this matter closely... The long-stop prescription serves an important purpose, that of bringing about **certainty and finality**. It does so by fixing a **clear time limit** on the period within which a claim can be brought. That clarity and certainty cannot be achieved if the length of the period takes account of factors specific to an individual pursuer, in particular his or her state of knowledge. If that were done, no defender would ever be able to be sure that a potential liability had gone; and it would not be possible safely to dispose of records that might potentially be relevant to a claim from many years earlier. While we recognise that there will be cases in which individuals suffer loss as a result of this rule, we have to take account also of **the wider public interest** which the doctrine of prescription serves. We therefore **do not recommend that the law be changed** so as to address this issue. *[bold text for emphasis added by SPICe]*”

Scottish Law Commission, 2017⁴²

What the Scottish Government said

The [Public Petitions Committee](#) wrote to the Scottish Government on the petition at the end of 2017. In **January 2018** it [responded](#), accepting the SLC's recommendations on this topic. ⁴³

Mr Paterson's latest response

Mr Paterson wrote to the Public Petitions Committee in **February 2018**. In his [latest letter](#) ⁴⁴ it appears he is suggesting **measures to reform land registration law and practice**, rather than reform to the law of prescription.

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