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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Prescription (Scotland) Bill: Stage 1 Report**



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# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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# Committee Membership



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**Tom Arthur**  
Scottish National Party



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Scottish Labour



**Alison Harris**  
Scottish Conservative  
and Unionist Party

# Executive Summary

This section provides a full list of the Committee's recommendations.

## *General aims and objectives of the Bill*

- The Committee notes that stakeholders are generally content that the Bill is a welcome reform to the law relating to negative prescription.
- The Committee welcomes the greater certainty this Bill provides for the users of the law.
- The Committee recognises that the Bill aims to achieve an overall balance between the rights and obligations of creditors and debtors. In particular, the Committee considered this overall balance when deliberating the effects of sections 3, 5, and 8 as discussed later in this report.

## *The Consultation Process: Scottish Law Commission and Scottish Government*

- The Committee notes that welfare rights organisations appeared on the list of consultees to the Scottish Law Commission's February 2016 discussion paper.
- The Committee notes the response from the Justice Committee on the Scottish Law Commission consultation process.
- The Committee notes that its Stage 1 scrutiny process for this Bill had reached a different audience to that of the Scottish Law Commission and Scottish Government consultations, particularly in relation to the welfare rights sector. The issues unpacked by the Committee's Stage 1 enquiry relating to the welfare rights sector are discussed in this report.
- Accordingly, the Committee recommends that the Scottish Law Commission review its consultation processes with a view to giving policy considerations a greater level of attention when deliberating on law reforms.

## *Section 3: the five year rule and exceptions: council tax and non-domestic rates*

- The Committee notes that the Scottish Government regards the exception for council tax as reflecting the status quo.
- The Committee also notes the response from SOLAR reiterating the preference of local authorities for the proposed exception in the Bill.
- The Committee notes the response from COSLA and welcomes the clear explanation of the public policy landscape in relation to the collection of council tax. The Committee notes COSLA's support for the exception from the five year prescription rule but also notes that this response was not politically endorsed.
- The Committee also notes the points raised by the Law Society of Scotland, Govan Law Centre, and Citizens Advice Scotland in regard to the recovery of council tax debts.

- The Committee is mindful that there are public policy arguments for the exception. The Committee is also mindful of the arguments made that applying a twenty year prescription period to council tax is perceived by some witnesses to be unfair.
- The Committee did not reach agreement as to whether the exception for council tax and business rates was appropriate. The Committee therefore recommends that the Scottish Government provides further rationale for excepting council tax and business rates from the five year rule in advance of Stage 2.
- The Committee nevertheless agreed, in advance of Stage 2, to write to all 32 local authorities to ask how many council tax and business rates debts are still outstanding after five years and how many times local authorities have had to make use of the twenty year prescription period to seek payment of such debts.
- The Committee also agreed in advance of Stage 2, to write to the Scottish Law Commission seeking an explanation for its decision to include council tax and business rates as an exception in section 3 when the draft bill at consultation stage had not included that exception.

*Section 3: the five year rule and exceptions: certain social security benefits and tax credits*

- The Committee notes the Equalities and Human Rights Committee's response.
- The Committee is grateful for the evidence provided to it on the impact this divergence in approach [between reserved and devolved social security benefits] may have. In particular, the Committee is grateful for the evidence provided by the welfare rights sector, which highlighted some issues that had not been in the foreground during the previous consultation periods.
- The Committee welcomes the explanation provided by the Minister for Social Security on the Scottish Government's approach to recovering overpayments of social security benefits.
- The Committee also welcomes the explanation provided by the Department for Work and Pensions in regard to its debt recovery policies and its recognition that there is a need to balance recovering money owed to the public purse and the impact on vulnerable people.
- The Committee is keen to ensure that it does not increase the financial hardship for vulnerable people and, in doing so, notes that the debt recovery policies of the Department of Work and Pensions take into account the need to recover debt over a long period of time to mitigate any such financial hardship.
- The Committee acknowledges that the devolution of certain aspects of social security benefits has brought them under the jurisdiction of Scots law and this, therefore, creates a divergence of approach.
- The Committee did not reach agreement as to the different prescriptive periods that would apply to devolved and reserved benefits.

*Section 5: the discoverability test*

- The Committee notes the impact the Supreme Court's decision in regard to the Morrison case [*David T Morrison v ICL Plastics* (2014)] had on the law relating to prescription.
- The Committee therefore agrees that section 5 contributes to the overall objective of the Bill to provide legal certainty.
- The Committee also notes that the new discoverability test tips the balance in favour of the pursuer and that, whilst it makes the law a little more complex, this complexity is offset by fairness.
- The Committee notes that the additional strand to the discoverability test requiring identity lengthens the period before prescription begins to run and that this would mean that the wrongdoer would be exposed to the risk of liability for longer. However, the legal certainty it provides could help the insurance industry and practitioners.
- The Committee nevertheless recommends that the Scottish Government provides further clarification, ahead of Stage 2, on how the test would operate in situations of joint and several liability. In particular, that the Scottish Government provides further clarification on how the third strand of the test will operate in relation to the knowledge of the identity of a particular defender.

*Section 8: the new start date for twenty-year prescription: policy underlying the new start date and harsh cases*

- The Committee recognises that the new start date for twenty year prescription, like any hard deadline, will result in some harsh cases at the margins.
- However, the Committee is persuaded by the argument that evidence deteriorated considerably after twenty years and may be irretrievable, thus resulting in difficulties for the pursuer in compiling a case where many years have elapsed.
- Furthermore, the Committee agrees that legal certainty provided comfort to defenders who would have greater clarity on when their legal obligation would be extinguished and allow them to arrange their affairs accordingly.
- The Committee also takes into account that the judiciary would have difficulty doing justice to parties concerned where there was limited good quality evidence.
- The Committee acknowledges that it is for the Law Society of Scotland to introduce a system of strict liability for solicitors in conveyancing cases.
- However, in view of the evidence the Committee heard in relation to the operation of prescription and conveyancing, the Committee calls on the Scottish Government to consider what alternative courses of action there are to remedy conveyancing cases that are harshly affected by prescription.
- The Committee recommends that the Public Audit and Post-Legislative Scrutiny Committee consider the use of land registration procedures in relation to conveyancing issues as part of any scrutiny of the Land Registration etc. (Scotland) Act 2012.

*Section 8: the new start date for twenty year prescription: omissions and ongoing breaches*

- **The Committee agrees that the language used in relation to omissions and ongoing breaches would be familiar to courts and those who used the law.**

*Sections 6, 7 and 12: interruptions and extensions: section 6 – obligations: twenty year prescriptive period and extension*

- **The Committee notes the views on the extension of the twenty year period to allow legal proceedings to finish and recognises the logic to the view.**

*Interruptions and extensions Section 7: twenty year prescription and property rights*

- **The Committee welcomes the Government's intention to consider the concerns raised and calls on it to respond to the issue ahead of Stage 2.**

*Interruptions and extensions Section 12: final disposal*

- **The Committee welcomes the Government's intention to consider the concerns raised and calls on it to respond to the issue ahead of Stage 2.**

*Section 13: standstill agreements: five year prescription*

- **The Committee is persuaded that the proposed standstill agreements in the new section 13 have merit.**
- **However, the Committee also recognises the argument that standstill agreements may be abused by the economically stronger party.**
- **The Committee acknowledges that the additional safeguard that parties should be required to consult a solicitor or accredited money adviser before entering into such a contract might create further issues, such as cost. Therefore, the Committee welcomes the Minister's commitment to reflect further on the issue.**

*Forfeiture*

- **The Committee welcomes the Minister's commitment to reflect on the matter.**

*Language in the 1973 Act*

- **The Committee agrees that the term "unsoundness of mind" is not now an appropriate phrase to include in the definition of "legal disability".**
- **The Committee notes that the term is not defined in the 1973 Act and that this gives the courts flexibility about interpretation.**
- **The Committee accepts the Government's view that the Prescription (Scotland) Bill is not the appropriate place to make changes to general concepts of Scots law.**
- **However, the Committee considers that the proposition has merit and calls on the Government to give consideration to promoting a legislative opportunity to facilitate the change.**

*Delegated Powers Provisions*

- **The Committee is content with the delegated powers contained in sections 15 and 16 in principle, and with the Parliamentary scrutiny procedures which are applied to these powers.**

*Conclusion on the general principles of the Bill*

- **While this report calls on the Scottish Government to give further consideration to a number of issues ahead of Stage 2, the Committee recommends to the Parliament that the general principles of the Bill be agreed to.**

# Introduction

1. The Prescription (Scotland) Bill (“the Bill”) was introduced in the Scottish Parliament on 8 February 2018 by the Cabinet Secretary for Justice, Michael Matheson MSP.<sup>i</sup> The Bill makes a number of amendments to the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”).
2. The Delegated Powers and Law Reform Committee was designated as lead committee for Stage 1 consideration of the Bill.
3. In addition to carrying out the role of lead committee, under rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill that confer power to make subordinate legislation.
4. The Committee considered the delegated powers within the Bill and reports on these at paragraphs 295 to 298.
5. The Finance and Constitution Committee considered the Financial Memorandum to the Bill. It issued a call for evidence, however, on receiving only one response, the Committee agreed not to undertake any further consideration of the Bill.<sup>ii</sup>

## Evidence gathering

6. The Bill is a reform to a technical area of the law. However, because prescription affects a broad range of legal obligations its provisions will affect a broad spectrum of society. Accordingly, the Committee issued a call for evidence to approximately 114 organisations and promoted the call for evidence on its website and via twitter.
7. The submissions received are listed at Annex A.
8. The Committee also held oral evidence sessions on 20 and 27 March, 17 and 24 April, and 1 May. Evidence was taken from the legal profession, academics, the welfare rights sector, the Scottish Law Commission, and Annabelle Ewing MSP, the Minister in charge of the Bill. Details of the Committee’s meetings and those who gave oral evidence are listed at Annexes B and C.
9. The Committee thanks all those who informed its consideration of the Bill.

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<sup>i</sup> The Bill as introduced and the accompanying documents are available here.

<sup>ii</sup> The response from South Lanarkshire Council is available [here](#).

## Background

10. The Bill is a Scottish Law Commission Bill ('SLC Bill') under rule 9.17A of Standing Orders. This process was created in order to improve the implementation rate of Scottish Law Commission (SLC) reports. It allows for the Delegated Powers and Law Reform Committee to take the lead role in considering certain bills arising from SLC reports.
11. This is the fourth SLC Bill to be introduced and the second to be considered by the Delegated Powers and Law Reform Committee in Session 5.

## ***What is prescription?***

12. The Prescription (Scotland) Bill aims to amend the law relating to the extinction of civil rights and obligations by the passage of time. It concerns negative prescription only.
13. In practice, negative prescription establishes a time limit within which a person who is aggrieved must raise their claim in court. If the time limit is missed, the ability to pursue the claim is lost because the right or obligation is extinguished once the prescriptive period has expired.
14. Prescription in Scots law encourages people to enforce their rights promptly before it becomes too difficult for the person or organisation defending the claim to gather the appropriate evidence.
15. Delay can cause 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 lost or destroyed by individuals or organisations. Without prescription, these things could cause insurmountable difficulties for the defender.
16. Prescription is a means to offer people and organisations certainty so that they know after a certain point that they will not be sued. However, the Committee heard that prescription can sometimes 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.
17. In day to day life a wide range of legal obligations are affected by prescription, making it important in practice.

## ***The difference between negative prescription, positive prescription, and limitation***

18. For negative prescription, the 1973 Act established five year and twenty year prescriptive periods.<sup>iii</sup> The twenty year period applies to all obligations, other than those specifically excluded from it by other provisions in the 1973 Act. Five year prescription applies to those obligations on one statutory list and not to those

obligations on a second statutory list in schedule 1 of the 1973 Act. In practice, most obligations in Scots law end after five years.

19. In positive prescription, the passage of time also has a substantive impact on rights. The difference is that, once the prescriptive period has been completed, a possessor who satisfies certain conditions acquires, rather than loses, property rights.
20. Limitation establishes a time limit in which a person must raise a claim in court, but the consequences if the time limit is missed are different. The right or obligation is not extinguished. Instead there is a procedural bar to raising proceedings.
21. Prescription is also not to be confused with limitation, which, for example, applies instead of prescription for damages actions for personal injuries.
22. Prescription and limitation are very similar, both containing time limits which courts must consider. However, limitation does not completely remove a right, it 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 (for childhood abuse cases) via the Limitation (Childhood Abuse) (Scotland) Act 2017.

## ***Why has the Bill been brought forward?***

23. The SLC examined the Scots law on prescription in a February 2016 Discussion Paper. Following that consultation exercise, the SLC published its Report on Prescription in July 2017. These documents outline in depth the range of legal and practical problems stemming from the current law.
24. In March 2017 the SLC also issued a short consultation on a draft bill. The Bill, as introduced, arises from this consultation process.
25. The SLC's July 2017 report also included a draft Bill, which has been largely followed by the Bill as introduced. However, the draft provisions on forfeiture were not included and the reason for this is discussed at paragraphs 281 to 286 below.
26. The Policy Memorandum states that the policy objective of the Bill is to "increase clarity, certainty and fairness as well as promote a more efficient use of resources [...] and reduce costs for those involved in litigation and insurance."<sup>iv</sup>

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iii It should be noted that, whilst twenty and five years are the main periods in the 1973 Act, a two year and a ten year prescription apply to two specific types of legal obligation (section 8A and 22A). In addition, other statutes also provide specific prescription (and limitation) periods for certain types of obligation. Some obligations do not prescribe by virtue of schedule 3 of the 1973 Act.

iv Policy Memorandum, paragraph 4.

## What does the Bill do?

27. As noted above, the Bill, if enacted, would implement the SLC's recommendations on the law of prescription and amend the 1973 Act in relation to negative prescription only.
28. The terms 'creditor' as the person having the right and 'debtor' as the person bound by the obligation have been used in this report. However, it should be noted that prescription covers a much broader range of obligation than financial debt. Where it is appropriate, 'pursuer' and 'defender' have also been used.
29. There are three main proposals:
  - reverses the effect of a Supreme Court case (*David T Morrison and Co v ICL Plastics* (2014) see paragraphs 147 to 151 below) to return to the law, which was well established prior to that case. A requirement is also added, in regard to identity before the five year prescription period begins (section 5). This provision is considered to benefit creditors;
  - prescription would no longer be able to be interrupted, for example by raising court proceedings (sections 6 and 7). These provisions would likely benefit debtors;
  - amending the start date of twenty year prescription so that it begins with the 'act or omission' rather than at the time of 'loss or damage' (section 8). This provision would also likely benefit debtors, and
  - the introduction of a single one year extension period to allow parties to a contract to resolve a dispute without resorting to litigation (section 13).
30. In addition, section 3 creates a new general rule so that statutory obligations to pay money are subject to five year prescription. Section 3 also creates various exceptions to that general rule. Effects of these exceptions are to preserve the current law (for the obligations named in the exceptions) and to provide certainty to local authorities by clarifying the collection of council tax as an exception to the five year rule.

## Outline of provisions

31. The provisions in the Bill are explained in detail in the Explanatory Notes that accompanied the Bill on introduction. However, the Committee recognises that this is a technical area of law and the following outline description is provided as a general guide only. It should be noted that this outline does not describe all the provisions in the Bill (for example sections 9 to 11). The Explanatory Notes and the Bill should be referred to for more detail.
32. Section 1 provides two technical clarifications to the scope of five year prescription, in light of previous case law. The section relates to obligations to pay damages and obligations under the law of delict. (Delict refers to the Scots law relating to types of civil wrong, apart from breach of contract. Delict provides for a group of wrongful behaviours, in relation to which a person wronged can obtain a legal remedy in the

civil courts. It is separate from the law of contract. It includes the common law of negligence, but also specific types of delict such as defamation and occupiers' liability.)

33. Section 2 extends the scope of the five year prescription, to include certain obligations associated with contracts. Again this is a technical provision.
34. Section 3 sets out the general rule that statutory obligations to pay money are covered by five year prescription. Section 3 also excepts certain statutory obligations to pay money from the general rule. This means that, as currently in the 1973 Act, there are some statutory obligations only covered by twenty year prescription.
35. The general policy is that the five year period would apply to all statutory obligations to make payment, unless there are policy reasons to exempt them. Presently, the types of statutory obligations for payment which are covered by five year prescription, or which are not, are in detailed lists within schedule 1 of the 1973 Act. In the main, these are various types of obligations to make reparation (i.e. compensation or financial damages) to a person.

*List 1 - what is included in five year prescription*

36. 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).

*List 2 - what is not included in five year prescription*

37. 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).
38. 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.<sup>v</sup>

39. The exceptions cover taxes and duties recoverable by the Crown; council tax and business rates; sums recoverable under specified social security and tax credit legislation, and child support maintenance.
40. Section 4 aims to set out in clearer terms the effect of fraud or error by a debtor on how the five year period is calculated. A debtor's state of knowledge or a creditor's failure to make a claim would be irrelevant.
41. Section 5 reforms the 'discoverability test'. This test relates to five year prescription and the obligation to pay damages. It sets out the knowledge that a pursuer must have before the prescriptive period starts to run. This is of particular significance where damages are sought for loss or damage which was initially latent.
42. The section arises from concerns that the decision of the Supreme Court in *David T Morrison and Co v ICL Plastics* (2014) has brought forward the start of the five year period under the 1973 Act for the obligation to pay damages.
43. The proposed new test will have three strands. The creditor must be aware (or could reasonably have been expected to become aware):
  - that the loss, injury or damage has occurred;
  - that the loss, injury or damage was caused by a person's act or omission, and
  - the identity of the person who caused the loss, injury or damage.
44. Sections 6 and 7 aim to ensure that the twenty year period operates as a true 'long stop', which extinguishes an obligation. Section 6 provides that the twenty year period will no longer be able to be interrupted, for example, by raising court proceedings. However, the period may be extended where a relevant claim has been made but not finally disposed of before the end of the twenty year period. In other words, there would be the possibility of an extension to twenty year prescription to allow court cases that have started within the twenty year period to finish.
45. Section 7 contains equivalent provisions to section 6 but relating to property to which the twenty year period applies rather than types of obligation.
46. Section 8 changes the start date of the twenty year prescriptive period in relation to obligations to pay damages. Currently the start date of the prescriptive period is when the loss, injury or damage flowed from the act, neglect or default. The Bill changes this so that the period would begin on the date of the act or omission giving rise to the claim. This means that the start date of the prescriptive period may be earlier than under the 1973 Act (and will never be later).
47. Section 13 allows for the extension of prescriptive periods under certain conditions. These are so-called 'standstill agreements'. The section makes it possible to agree by contract to extend five year prescription (and twenty year prescription) once only for a period of up to one year. Their purpose is to allow the litigants time to settle their dispute out of court.

48. Section 14 concerns the burden of proof and provides for the creditor to prove that the obligation or right has not been extinguished. It deals with the situation where a question arises as to whether a legal obligation (and associated right) has been extinguished. It states that it is for the creditor to prove that it has not been extinguished. (This is referred to as the “burden of proof” falling on the creditor.)

## General aims and objectives of the Bill

49. All those who responded to the Committee's call for evidence and who gave oral evidence to the Committee agreed that the Bill was necessary. Indeed, a requirement for a wide degree of consensus amongst key stakeholders is a criterion under the Parliament's Standing Orders for designating this Bill as an SLC Bill.
50. Brodies stated in their [written evidence](#) that they were "satisfied with the general approach adopted in the Bill and welcome the proposed reforms." The RIAS also stated in their [written evidence](#) that they "have no concerns regarding the overall approach taken in this Bill, given the restricted scope of this particular reform of the law."
51. However, the Govan Law Centre qualified their welcome. Mike Dailly said, "The bill is welcome and I think that it does good things but it could do a lot more good things if only the committee could suggest some amendments."<sup>vi</sup> The main issues raised by the Govan Law Centre relate to sections 3, 8, and 13 and are discussed later in this report.

### Recommendation

52. **The Committee notes that stakeholders are generally content that the Bill is a welcome reform to the law relating to negative prescription.**

53. The Bill's objective to provide clarity and legal certainty was also welcomed. Malcolm Combe and Dr Andrew Simpson stated in their [written evidence](#), "In our opinion, the Bill will increase clarity, certainty and fairness. Logically that should result in a more efficient use of resources, reducing costs for those involved in litigation and, presumably, those involved in insurance."
54. Shepherd and Wedderburn, in their [written evidence](#), agreed, "the Bill will improve clarity, certainty and fairness" and "overall resources will be more efficient and costs reduced." Furthermore, "It is likely that advising clients on potential prescription will be less complex whilst still not straightforward."
55. The Minister for Community Safety and Legal Affairs, Annabelle Ewing MSP ("the Minister"), stated:
- ” The policy objectives behind the bill are to ensure that there is clarity, certainty and fairness in the approach to prescription and, in turn, to bring the issues of legal certainty very much to the fore. Of course, all such matters are balancing acts, but it is hoped that, through the hard work of the Scottish Law Commission, working in tandem with many stakeholders during its consultation process, people will consider that the bill has struck a balance between the respective interests of the creditor and the debtor while recognising that the overall objective to be secured is that of providing legal certainty, which is of benefit to wider society.<sup>vii</sup>

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<sup>vi</sup> [Official Report](#) , 24 April 2018 col 18.

<sup>vii</sup> [Official Report](#), 1 May 2018 col 2.

## **Recommendations**

- 56. The Committee welcomes the greater certainty this Bill provides for the users of the law.**
- 57. The Committee recognises that the Bill aims to achieve an overall balance between the rights and obligations of creditors and debtors. In particular, the Committee considered this overall balance when deliberating the effects of sections 3, 5, and 8 as discussed later in this report.**

# The Consultation Process: Scottish Law Commission and Scottish Government

58. Bills introduced by the Scottish Government as SLC Bills are preceded by a comprehensive consultation exercise carried out by the SLC. A more limited and targeted consultation is then carried out by the Scottish Government. One of the key requirements for a bill to be designated as an SLC Bill is that there must be a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended.<sup>viii</sup>
59. As noted in paragraphs 23 to 26 above, the proposals in this Bill arise from a SLC discussion paper and report on negative prescription.
60. The Scottish Government wrote to key stakeholders in September 2017 highlighting its intention to take forward the Bill and inviting comments.<sup>ix</sup>
61. The Committee questions whether these consultations had sufficiently engaged the welfare rights sector. In particular, the Committee was interested to know whether welfare rights organisations had been consulted given the exception for council tax and certain social security benefits and tax credits.<sup>x</sup>
62. The Committee sought to clarify this issue with the SLC and the Scottish Government at its meeting on 20 March 2018.
63. At that meeting, the SLC explained in detail its consultation strategy for both its February 2016 discussion paper and its July 2017 report. This had involved a seminar for interested people (such as professional and business interests), and the information obtained had then been used to formulate the proposals for the February 2016 discussion paper. This paper was issued to around 110 people directly and made available on the SLC website and through Twitter. At the request of the Committee, the Minister provided that list.<sup>xi</sup> It includes individuals and academics as well as professional, business, and industry sectors:
- Local authorities
  - Equality and Human Rights Commission
  - Welfare rights organisations (specifically Citizens Advice Scotland and Money Advice Scotland)
  - UK and Scottish Government departments
  - Construction, insurance, banking, shipping, and aviation industry sectors
  - Professional business organisations

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viii [Letter](#) from the Minister for Community Safety and Legal Affairs to the Scottish Law Commission, 17 January 2018.

ix [Letter](#) from the Minister for Community Safety and Legal Affairs to the Scottish Law Commission, 17 January 2018.

x [Official Report](#), 20 March 2018 cols 2 to 4.

- Legal profession (representing both pursuers and defenders).

64. The Committee heard that the SLC's July 2017 report and draft bill arose from the responses received to its 2016 discussion paper. That report was also drawn to the specific attention of various stakeholders, including local authorities, government departments, insurance companies, business interests, and professionals. The SLC indicated that it did not think it had specifically written to welfare rights organisations at this time.<sup>xii</sup>
65. The Committee also heard that the Scottish Government's targeted consultation to key stakeholders had involved similar organisations (a list can be found in the [Official Report](#) of 20 March 2018 col 3) but had not specifically targeted welfare rights organisations.
66. The Minister indicated that the Government's consultation exercise process had been open to all organisations and individuals to respond: "We are keen to have as wide a consultation as possible. Individual stakeholders are absolutely free to make their views known".<sup>xiii</sup>
67. The Committee was concerned that the technical nature of the law on prescription had made the SLC and Scottish Government consultations less visible to the welfare rights sector than to other sectors. To this end, the Committee wrote to the Justice Committee seeking its views on whether there was a gap in the SLC's consultation process where reform of the law impinged on wider policy considerations.<sup>xiv</sup> The Justice Committee responded that it had nothing further to add to the Committee's deliberations on this issue.<sup>xv</sup>
68. As part of its stage 1 scrutiny process, the Committee took evidence from the Govan Law Centre and Citizens Advice Scotland and also received written evidence from the [Child Poverty Action Group](#) (CPAG) and [Alan McIntosh](#) (a financial advice practitioner).
69. The Minister stated that she was pleased with the Committee's evidence session with the welfare rights sector and noted the "wide reach" of the Committee's stage 1 enquiry.<sup>xvi</sup>

## Recommendations

70. **The Committee notes that welfare rights organisations appeared on the list of consultees to the SLC's February 2016 discussion paper.**

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xi [Letter](#) dated 11 May 2018 from the Minister for Community Safety and Legal Affairs to the Convener

xii [Official Report](#) , 20 March 2018 col 4.

xiii [Official Report](#) , 1 May 2018, col 4.

xiv [Letter](#) to the Justice Committee 10 May 2018.

xv [Letter](#) from the Justice Committee 16 May 2018.

xvi [Official Report](#), 1 May 2018 col 5.

71. **The Committee notes the response from the Justice Committee on the SLC consultation process.**
72. **The Committee notes that its Stage 1 scrutiny process for this Bill had reached a different audience to that of the SLC and Scottish Government consultations, particularly in relation to the welfare rights sector. The issues unpacked by the Committee's Stage 1 enquiry relating to the welfare rights sector are discussed in this report.**
73. **Accordingly, the Committee recommends that the SLC review its consultation processes with a view to giving policy considerations a greater level of attention when deliberating on law reforms.**

## Specific provisions with in the Bill

74. As previously noted, key stakeholders support the approach taken in the Bill. However, concerns have been expressed about certain provisions. The Committee explored these concerns in detail.

### Section 3: the five year rule and exceptions

75. Under the 1973 Act, five year prescription applies to those obligations on one statutory list and not to those obligations on a second statutory list ([the 1973 Act](#), schedule 1, paragraphs 1 and 2). This has made the law complex, particularly as the lists have been heavily amended over the years.
76. Section 3 of the Bill would extend five year prescription to all statutory obligations to pay money. However, it also sets out certain exceptions which would remain within the scope of twenty year prescription.
77. The exceptions proposed in the Bill are:
- taxes and duties recoverable by HMRC and Revenue Scotland,
  - council tax and non-domestic rates (also called business rates) as well as sums connected with enforcement of these obligations;
  - the obligation to pay child maintenance; and
  - sums recoverable under legislation relating to social security benefits and tax credits reserved to the UK Government, including the recovery of overpayments.
78. These exceptions were developed through the SLC consultation process and the [Policy Memorandum](#) sets out the reasons for making these exceptions (see paragraphs 20 to 23).<sup>xvii</sup>
- The obligation to pay taxes and duties recoverable by HMRC and Revenue Scotland are not subject to the five year prescription and this is also the position in England and Wales (paragraph 20).
  - The Department for Work and Pensions (DWP) proposed exceptions for recovery of reserved social security overpayments and social security debt, tax credit overpayments and child maintenance debt. The Policy Memorandum states that, “According to the 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 Policy Memorandum states “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.”<sup>xviii</sup> The Policy Memorandum notes that the Social Security (Scotland) Bill<sup>xix</sup> makes provision for future devolved social security overpayment obligations to prescribe after five years (paragraph 21).

- A number of local authorities 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 (paragraph 22).
79. Malcolm Combe and Dr Andrew Simpson said in their [written evidence](#) that the rationale behind the exceptions is the split between public and private obligations to pay money:
- ” The distinction drawn in the SLC Report between statutory rights of a private-law nature, which should be subject to the five-year negative prescription, and statutory rights of a public-law nature, seems to provide a satisfactory basis for drawing the distinction in relation to most exceptions to the general rule.
80. Dr Eleanor Russell said that the Bill rationalises the law because a “catch-all for all statutory obligations to make payment will also obviate the need for repeated updating of legislation as new schemes appear on the statute book, so it is very much to be welcomed.”<sup>xx</sup> She explained that there are some obvious omissions from the lists in the 1973 Act and that section 3 of the Bill will “plug a lot of gaps.”<sup>xxi</sup>
81. However, in its [written evidence](#), South Lanarkshire Council warned that such a catch-all might have unintended consequences and offered care home costs as an example where costs may be ongoing for longer than five years thus resulting in local authorities instituting legal proceedings to recover the debt. Alan McIntosh (financial advice practitioner) also queried the exceptions in his [written evidence](#).
82. Witnesses from the legal profession made the point that the exceptions in section 3 represented policy choices. For example, John Paul Sheridan (Law Society of Scotland) said: “The vast bulk of the exemptions are not because of any legal or logical reason for the debt to be treated any differently.”<sup>xxii</sup>
83. The difference between five year and twenty year prescription may not be as stark as it first appears. This is because the five year period can be repeatedly interrupted, for example by part payment of a debt (and the Bill has no plans to change this). When the period is interrupted a new five year period begins. Furthermore, where a successful court action results in a court order (for example, a summary warrant), this would be subject to its own twenty year period.

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<sup>xvii</sup> [SPICe Briefing: Prescription \(Scotland\) Bill](#), p. 14.

<sup>xviii</sup> [Policy Memorandum](#), paragraph 21. The Committee understands that there is no concept of prescription in English law. There is a six year limitation period in relation to taking court action. The Committee understands that the DWP usually “offsets” previous debts against current entitlement to social security benefits. There is no limit in England to how long they can do this.

<sup>xix</sup> Now the Social Security (Scotland) Act 2018.

<sup>xx</sup> [Official Report](#) , 17 April 2018 col 3.

<sup>xxi</sup> [Official Report](#) , 17 April 2018 col 3.

<sup>xxii</sup> [Official Report](#) , 27 March 2018 col 2.

## ***Exception for council tax and non-domestic rates***

84. The Committee explored the exception relating to council tax in detail.
85. There appeared to be some uncertainty under the current law about the prescription period relating to council tax and business rates debts. Under the current law council taxes and business rates are probably only covered by twenty year prescription. There is no decided case on the point, leading to some uncertainty in practice.<sup>xxiii</sup>
86. The Law Society of Scotland, in its [written evidence](#), regarded the exception for council tax and business rates as “unfair” and gave a number of reasons to support its position including: that non-payment of council tax attracts a high penalty charge so that the value of the debt grows over time, and situations where people in good faith believe that they have paid their council tax yet are chased for the debt many years later, particularly in situations where joint and several liability applies.
87. The Law Society also cited the discrepancy in prescriptive periods between Scotland (twenty years, as proposed in the Bill) and six years in England and Wales, as difficult to justify.
88. The Committee explored these points in its evidence sessions.
89. Jill Clark (the Scottish Government’s Bill Team Leader) stated that the Bill “basically maintains the status quo.”<sup>xxiv</sup> She explained that the SLC had been persuaded to except council tax and non-domestic rates by the arguments put forward by local authorities that they “faced difficulty in collecting those taxes when they fell due, as well as in collecting arrears of tax from previous years.”<sup>xxv</sup>
90. Mike Dailly (Govan Law Centre) agreed with the Law Society that a twenty year prescription period for council tax was “unfair”.<sup>xxvi</sup> He said that the position in Scotland should equate with the six-year period in England and Wales and offered a compromise position whereby the statutory obligations proposed to be excepted should be subject to five year prescription with an exceptional circumstances test to establish whether there had been deliberate behaviour on behalf of the debtor to create delay in enforcing the debt.<sup>xxvii</sup>
91. However, he said that:
- ” The ideal situation would be a five-year prescription for everything. If we are not going to have that, it cannot be right to have exceptions for 20 years for all the different categories, because that will not fulfil the Scottish Government’s aim of achieving simplicity, fairness and clarity.”<sup>xxviii</sup>

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<sup>xxiii</sup> [SPICe Briefing](#), *Prescription (Scotland) Bill* p 15.

<sup>xxiv</sup> [Official Report](#), 20 March 2018 col. 4.

<sup>xxv</sup> [Official Report](#), 20 March 2018 col. 4.

<sup>xxvi</sup> [Official Report](#), 24 April 2018 col. 3.

<sup>xxvii</sup> [Official Report](#), 24 April 2018 col. 3.

<sup>xxviii</sup> [Official Report](#), 24 April 2018 cols 3 and 4.

92. Mike Holmyard (Citizens Advice Scotland) also believed that the position was unfair and cited problems with obtaining sufficient and adequate evidence from both the debtor and from local authority collection systems:

” Our advisers encounter issues where they talk to clients about council tax debts that are 15 or 18 years old and the client has no recollection of whether the debt has been paid and cannot get bank statements dating back to that time.<sup>xxix</sup>

93. He said that the way in which council tax is collected exacerbates the difficulties debtors have in understanding their council tax debt:

” Our advisers see clients who have built up council tax debts over 10, 11 or 12 years, apparently without the council having taken any previous action to collect those debts. [...] The clients cannot understand how the council apparently goes from inaction to drastic action that will have an impact on any property that they own. A five-year prescriptive period would force all creditors actively to try to enforce their debt, which would perhaps put off the need for things such as sequestration by councils.<sup>xxx</sup>

94. The Committee also explored the position of joint and several liability in relation to the recovery of council tax debts.<sup>xxxi</sup> Joint and several liability involves a creditor being able to pursue a debtor for the whole debt.<sup>xxxii</sup> This would mean that a person may have paid ‘their share’ of council tax only to be sued many years later for their flatmates’ or ex-partner’s shares.<sup>xxxiii</sup> The Law Society raised this issue in its [written evidence](#).

95. The Minister stated that some local authorities had made representations to the SLC arguing that public policy considerations for them were the same as those that governed HMRC and Revenue Scotland.<sup>xxxiv</sup> Furthermore, the position in relation to the six year period in England and Wales did not take into account the securing of liability orders which can be enforced without limit of time.<sup>xxxv</sup> Liability orders in England and Wales are similar to summary warrants in Scotland with certain differences. In summary, a local authority in England has six years to obtain a liability order in relation to council tax debt. If they do this, they have an unlimited time to pursue the debt. A local authority in Scotland likely has twenty years to obtain a summary warrant. Once a summary warrant has been issued, they have an additional twenty years to pursue the debt.)<sup>xxxvi</sup>

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xxix [Official Report](#) , 24 April 2018 col 4.

xxx [Official Report](#) , 24 April 2018 col 11.

xxxi [Official Report](#) , 24 April 2018 col 6.

xxxii [Official Report](#) , 1 May 2018 col 6.

xxxiii This issue arose again during the Committee’s consideration of the discoverability test in section 5 (see paragraphs 145 to 177 below).

xxxiv [Official Report](#) , 1 May 2018 col 6.

xxxv [Official Report](#) , 1 May 2018 cols 6-7.

96. The Minister reiterated the point that the twenty year period for council tax and business rates (also known as non-domestic rates) maintained the status quo.<sup>xxxvii</sup>
97. On the issue of joint and several liability in relation to the recovery of council tax debts, the Minister said that, “Joint and several liability is a general principle of Scots law. The Bill sits alongside Scots law and does not change the rules of joint and several liability.”<sup>xxxviii</sup>
98. The Committee recognised that there appeared to be some larger policy considerations involved in the exception for council tax and non-domestic rates that impinged on the remit of the Parliament’s Local Government and Communities Committee and wrote to that Committee accordingly.<sup>xxxix</sup>
99. That Committee responded by indicating that it had not undertaken any work nor sought any views on the issues raised and suggested that this Committee may wish to explore the issues further.<sup>xl</sup>
100. The Committee also wrote to COSLA and SOLAR seeking their views on how councils across Scotland currently treat the recovery of council tax and business rates debt and the preference of local authorities in relation to the proposed exceptions to the five year prescriptive period.<sup>xli</sup>
101. SOLAR [responded](#) by reiterating its clear preference for a twenty year period “to allow time and reduce costs to gather the debt.”
102. COSLA [responded](#) by supporting the approach taken in the Bill:

” COSLA is fully supportive of the recommendation by the Scottish Law Commission that Council Tax or non-domestic rates and any surcharge, fees, expenses or other sum recoverable in connection with its enforcement should be excluded from the 5-year negative prescription period.
103. However, it should be noted that that due to the timescale in which this response was required, COSLA states that the response has not been politically endorsed.
104. COSLA sets out in detail the importance of local taxation to local authorities and states that a five year prescription period would have “significant consequences financially and in terms of the social contract between citizens and their local authority area.”
105. COSLA also raises the possibility that it may have implications for the collection of the water and sewage charge carried out by local authorities on behalf of Scottish Water.

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xxxvi The Minister provided some additional information on the difference between the debt recovery process in England and Wales and in Scotland in relation to liability orders and summary warrants. That letter is available [here](#).

xxxvii [Official Report](#) , 1 May 2018 col 9.

xxxviii [Official Report](#) , 1 May 2018 col 13.

xxxix [Letter](#) to the Local Government and Communities Committee, 10 May 2018.

xl [Letter](#) from the Local Government and Communities Committee, 23 May 2018.

xli Letters to [COSLA](#) and [SOLAR](#), 3 May 2018.

## **Recommendations**

106. **The Committee notes that the Scottish Government regards the exception for council tax as reflecting the status quo.**
107. **The Committee also notes the response from SOLAR reiterating the preference of local authorities for the proposed exception in the Bill.**
108. **The Committee notes the response from COSLA and welcomes the clear explanation of the public policy landscape in relation to the collection of council tax. The Committee notes COSLA's support for the exception from the five year prescription rule but also notes that this response was not politically endorsed.**
109. **The Committee also notes the points raised by the Law Society of Scotland, Govan Law Centre, and Citizens Advice Scotland in regard to the recovery of council tax debts.**
110. **The Committee is mindful that there are public policy arguments for the exception. The Committee is also mindful of the arguments made that applying a twenty year prescription period to council tax is perceived by some witnesses to be unfair.**
111. **The Committee did not reach agreement as to whether the exception to council tax and business rates was appropriate. The Committee therefore recommends that the Scottish Government provides further rationale for excepting council tax and business rates from the five year rule in advance of Stage 2.**
112. **The Committee nevertheless agreed, in advance of Stage 2, to write to all 32 local authorities to ask how many council tax and business rates debts are still outstanding after five years and how many times local authorities have had to make use of the twenty year prescription period to seek payment of such debts.**
113. **The Committee also agreed in advance of Stage 2, to write to the Scottish Law Commission seeking an explanation for its decision to include council tax and business rates as an exception in section 3 when the draft bill at consultation stage had not included that exception.**

## ***Exception for certain social security benefits and tax credits***

114. The Committee examined the proposed exception relating to certain social security benefits and tax credits in detail.
115. In particular, the Committee explored the divergence of approach in relation to reserved and devolved social security benefits in Scotland. This divergence is a result of the way in which section 3 of the proposed Bill interacts with section 66 of the Social Security (Scotland) Act 2018. The combined effect of the two provisions

is that five year prescription would apply to devolved social security benefits but twenty year prescription would apply to reserved social security benefits.<sup>xlii</sup>

116. The position is complicated by the different methods of recovering tax credit or social security overpayment in England and Wales.<sup>xliii</sup> Overpayments may be recovered by court action (to which a six year time limit applies) or by deduction from ongoing benefits (to which there is no associated time limit). By contrast, under the proposed Bill, overpayments of reserved benefits in Scotland would be subject to twenty year prescription whatever method of recovery is used.<sup>xliv</sup>
117. The Child Poverty Action Group (CPAG) set out in its [written evidence](#) its disagreement to the exception for reserved social security benefits and tax credits on the basis of the different prescriptive periods in operation in England and Wales and in Scotland: “CPAG in Scotland believes that the five year prescription period for social security benefits and tax credits would offer a better alignment with the law of England and Wales and the proposed legislation for devolved benefits.”
118. Mike Holmyard (Citizens Advice Scotland) said that the divergence would make the social security system complicated for its users: “It will not make sense to someone who is claiming a Scottish benefit and a United Kingdom benefit that they can be pursued after five years for one debt but not for another. Consistency is needed.”<sup>xlv</sup>
119. Mike Dailly (Govan Law Centre) provided an example where the twenty year period affects someone collecting their state pension for the first time but discovers that it is less than anticipated:

” because there has been a deduction for overpayment of benefit many years previously, or for repayment of a social fund loan. Many people cannot remember having claimed the benefit; they had claimed it for a short time and then got into work and worked all the way to retirement age. In the meantime, the overpayment or social fund loan was festering away and not being dealt with.<sup>xlvi</sup>

120. He said that the issue was one of fairness:

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<sup>xlii</sup> [SPICe Briefing](#), *Prescription (Scotland) Bill*, p 16.

<sup>xliii</sup> 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. [SPICe Briefing](#), *Prescription (Scotland) Bill* p 13.

<sup>xliv</sup> The Committee understands that the six year limitation period does apply to the DWP’s ability to take court action to pursue a debt (section 36(11) of the Limitation Act 1980). However, the DWP have a number of other ways of recovering social security overpayments, such as deducting from ongoing entitlement. The six year limitation period does not apply to these forms of recovery. Because there is no principle of prescription in English law, the DWP can recover using these methods forever. In Scotland, the DWP has 20 years to start deductions from benefits. However, it can probably continue ongoing deductions forever.

<sup>xlv</sup> [Official Report](#), 24 April 2018 col 6.

<sup>xlvi</sup> [Official Report](#), 24 April 2018 col 7.

” If somebody who receives social security benefits thinks that they have suffered an injustice [...] they normally have a month to seek a mandatory reconsideration [...]. The UK social security system is utterly geared towards a fairly restrictive position, whereby people have very little time to challenge anything. However, in the bill we are providing for a 20-year prescription period when it comes to reserved benefits. This is completely unfair and inequitable.<sup>xlvi</sup>

121. He recognised that the Scottish Parliament cannot legislate for areas reserved to the UK Parliament but said that “we should maximise what we can do with the powers that we have to bring about uniformity in prescription.”<sup>xlvi</sup>

122. The Department of Work and Pensions (DWP) set out in its [written evidence](#) its debt recovery policies and procedures. The DWP indicated that it places emphasis on the need to balance its duty to collect debt owed to the public purse and to avoid financial hardship to debtors:

” DWP has a duty to protect public funds and collect such debt wherever it is reasonable and cost effective to do so. The high level policy is to collect debt as quickly and cost effectively as possible without causing undue financial hardship to debtors.

The avoidance of undue hardship is underpinned by a range of legislative and policy measures that limit the recovery options available and more importantly the rate of recovery.

123. The DWP explained its Repayment Negotiation Framework (RNF) in which the level of recovery is reduced on account of the individual circumstances of the debtor:

” The RNF can result in a further reduction of our recovery potential and increases the length of time over which a debt will be repaid.

The Department is totally committed to retaining the RNF and other policies aimed at reducing the burden of repayment amongst our customers and avoiding undue hardship especially for vulnerable customers. They are a key part of our welfare responsibilities.

124. The DWP noted that the length of time taken to recover a debt does not increase the amount of the debt as interest is not added to any outstanding debt.

125. The DWP argued to retain the proposed exception in section 3:

” The recovery of DWP benefit debt will often take longer than five years to recover due to the possibility of higher priority debts, multiple debts and the welfare considerations that limit recovery rates. The application of the five year prescription would reduce our ability to recover public money and could erode some of the safeguards we have in place to protect our customers from harsh or excessive recovery rates.

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<sup>xlvi</sup> [Official Report](#) , 24 April 2018 col 7.

<sup>xlvi</sup> [Official Report](#) , 24 April 2018 col 8.

126. The Committee explored arguments for this exception with the Scottish Government.
127. Jill Clark (the Scottish Government’s Bill Team Leader) stated that, in regard to the exception for social security benefits and tax credits reserved to the UK Government: “The bill provides for maintenance of the status quo for the DWP – it was 20 years before and it remains 20 years.”<sup>xlix</sup> She explained that the Social Security (Scotland) Act 2018 would allow “obligations to make payments to Scottish ministers for recovery of devolved social security payments made in error will prescribe after five years.”<sup>l</sup> She noted that the difference “is probably a natural consequence” of devolution.<sup>li</sup>
128. The Minister explained that the exceptions had not changed from what was already allowed for in the 1973 Act. Section 3, she said, “simply restates the status quo of the 20-year negative prescription in Scotland with regard to taxes, social security benefits and maintenance payments.”<sup>lii</sup>
129. The Minister pointed out that “the Scottish Government does not have any jurisdiction over policy decisions concerning the operation of reserved benefits.” The Minister emphasised: “I do not want to put such vulnerable people in a worse position as far as reserved benefits are concerned, as that would be extremely unhelpful.”<sup>liii</sup> Therefore, she “must look at what the DWP has said, because it is in control of the matter.”<sup>liv</sup>
130. In regard to the divergence of prescriptive periods and the complexity this would cause for those using the social security system, the Minister stated that the Scottish Government “propose to take a different approach from the one that the DWP takes to how repayment takes effect and the grounds on which it can be sought.”<sup>lv</sup>
131. Again, the Committee recognised that there appeared to be some larger policy considerations involved in the exception for social security benefits and tax credits that impinged on the remit of the Parliament’s Social Security Committee, specifically on the creation of different prescriptive periods for devolved and reserved social security benefits and the impact of debt recovery policies. The Committee wrote to that Committee accordingly.<sup>lvi</sup>
132. The Social Security Committee sought information from the Minister for Social Security on the Government’s policy position in regard to the application of the five year prescriptive period for devolved benefits.

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<sup>xlix</sup> [Official Report](#) , 20 March 2018 col 5.

<sup>l</sup> [Official Report](#) , 20 March 2018 col 5.

<sup>li</sup> [Official Report](#) , 20 March 2018 col 5.

<sup>lii</sup> [Official Report](#) , 1 May 2018 col 6.

<sup>liii</sup> [Official Report](#) , 1 May 2018 col 7.

<sup>liv</sup> [Official Report](#) , 1 May 2018 col 7.

<sup>lv</sup> [Official Report](#) , 1 May 2018 col 7.

<sup>lvi</sup> [Letter](#) to the Social Security Committee, 10 May 2018.

133. In her letter, (see footnote 57 below), the Minister responded by explaining that the application of the five year period corresponds to the SLC's recommendation that the general rule should be that statutory obligations to make payments should be subject to short negative prescription (ie five years).
134. In addition, in that letter, the Minister also explained that where a person "has received assistance he or she should not [...]" is an obligation based on redress of unjustified enrichment." Such obligations, under Scots law, are subject to the five year prescriptive period. Therefore, applying the five year prescriptive period to devolved social security benefits would be consistent with the general principles of Scots law.
135. The Minister confirmed, in her letter, that the Government is content with the approach taken in the Social Security (Scotland) Act 2018 in light of the provisions in the Prescription (Scotland) Bill.<sup>lvii</sup>
136. The Committee also considered that the Parliament's Equalities and Human Rights Committee may wish to consider the broader equalities and human rights aspects of the prescription periods set out in the Bill and accordingly wrote to that committee.<sup>lviii</sup>
137. That Committee **responded** that whilst it could see merit in undertaking further examination of these particular issues, it would appear that the majority of the emergent issues engage the remits of other parliamentary committees who have a more direct interest in social security policy and council tax (the Social Security and Local Government and Communities committees respectively). In addition, it advised that the Committee's work programme is unlikely to allow for any substantive inquiry to be undertaken.

### Recommendations

138. **The Committee notes the Equalities and Human Rights Committee's response.**
139. **The Committee is grateful for the evidence provided to it on the impact this divergence in approach may have. In particular, the Committee is grateful for the evidence provided by the welfare rights sector, which highlighted some issues that had not been in the foreground during the previous consultation periods.**
140. **The Committee welcomes the explanation provided by the Minister for Social Security on the Scottish Government's approach to recovering overpayments of social security benefits.**
141. **The Committee also welcomes the explanation provided by the Department for Work and Pensions in regard to its debt recovery policies and its recognition that there is a need to balance recovering money owed to the public purse and the impact on vulnerable people.**

<sup>lvii</sup> [Letter](#) from the Minister for Social Security to the Convener of the Social Security Committee, 23 May 2018.

<sup>lviii</sup> [Letter](#) to the Equalities and Human Rights Committee, 10 May 2018.

142. **The Committee is keen to ensure that it does not increase the financial hardship for vulnerable people and, in doing so, notes that the debt recovery policies of the Department of Work and Pensions take into account the need to recover debt over a long period of time to mitigate any such financial hardship.**
143. **The Committee acknowledges that the devolution of certain aspects of social security benefits has brought them under the jurisdiction of Scots law and this, therefore, creates a divergence of approach.**
144. **The Committee did not reach agreement as to the different prescriptive periods that would apply to devolved and reserved benefits.**

## Section 5: the discoverability test

145. Section 5 sets out a new test to determine when five year prescription starts in relation to the obligation to pay damages. The Policy Memorandum states that the treatment of claims for latent damage is a key issue and was highlighted through the judgement of the UK Supreme Court in the *David T Morrison v ICL Plastics* (2014) case (the “Morrison case”).<sup>lix</sup>
146. 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.<sup>lx</sup>

### ***The impact of the David T Morrison v ICL Plastics case***

147. Prior to the Morrison case, it was thought that section 11(3) of the 1973 Act meant that the five year prescription 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.
148. The pursuer did not have to know the identity of the defender, although in practice often did.
149. The Morrison case reversed understanding of section 11(3). The Supreme Court said 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.
150. This decision caused particular concern amongst those who deal with cases associated with latent damage, such as in the construction and insurance industries.

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<sup>lix</sup> “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.” [Policy Memorandum](#), paragraph 12.

<sup>lx</sup> [SPICe Briefing](#), *Prescription (Scotland) Bill* p 17.

151. The Policy Memorandum states that the Supreme Court decision may produce harsh outcomes for pursuers and cites *Gordon's Trustees* as one such example.<sup>lxi</sup>

### ***The options***


152. The SLC consulted on whether reform was needed as a result of the Morrison case, in particular it asked what knowledge the pursuer should be required to know for the five year prescription period to start.
153. The SLC put forward four options:
- Option 1: knowledge of the fact of the loss (apart from minor changes, keeping the law as described in the Morrison case);
  - Option 2: knowledge of the facts (a) of the loss and (b) of the act or omission which caused it (going back to the law as previously understood before the Morrison case);
  - Option 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 is now contained in section 5 of the Bill and was the option recommended by the SLC), and
  - Option 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.
154. The Policy Memorandum states that the majority of the respondents to the SLC's consultation agreed that the discoverability test should be revisited. Options 3 and 4 were the most popular. The SLC recommended option 3 on the basis that it was the fairest.<sup>lxii</sup>

### ***Section 5: the new discoverability test***

155. Section 5 of the Bill therefore now has three strands:
- the creditor must be aware that loss, injury or damage has occurred;
  - that the loss, injury or damage was caused by a person's act or omission, and
  - the identity of that person.
156. In its [written evidence](#), Brodies stated that, "The changes made to the discoverability test by s5 represent a reasonable compromise between the pre-Morrison and post-Morrison interpretation of the law."
157. Witnesses to the Committee also endorsed the new test:
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<sup>lxi</sup> *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. [Policy Memorandum](#), paragraph 35.

<sup>lxii</sup> [Policy Memorandum](#), paragraph 38.

- Dr Russell pointed out that it is a fair approach despite favouring pursuers: “Option 3 will favour pursuers or creditors, but other proposals in the bill will favour defenders. We must look at the overall balance of fairness in the scheme as a whole.”<sup>lxiii</sup>
  - David Wedderburn (RIAS) agreed with the new test because it will give legal certainty to those who are likely to be affected: “That will not only allow people to make provision but will mean that professional indemnity insurance – PII – cover is a little more certain for the insurance industry.”<sup>lxiv</sup>
  - Mike Dailly (Govan Law Centre) was supportive of the new test: “What the bill does in section 5 – option 3 – is pure common sense.”<sup>lxv</sup>
158. Dr Simpson said that the test asks, “Would someone who had exercised reasonable diligence have known those things? That is what causes the prescription to run in relation to obligations to pay damages.”<sup>lxvi</sup>
159. The Committee explored the policy benefit of adding the third strand to the discoverability test.
160. David Johnston QC (SLC) explained that the identity criterion would avoid the need for pursuers to sue everyone involved in a contract just in case the claim prescribes. That, he said, “is wasteful of resources for the parties, the insurers and also for the courts.”<sup>lxvii</sup> The new test will mean that:
-  For each relevant person – that is, each party that might be sued – you need to be able to tick all three boxes: defect; act or omission; and identity. Once you have done that, the time will start to run, and you have five years in relation to each of those people.”<sup>lxviii</sup>
161. Robert Howie, QC (Faculty of Advocates) said that, “The result [of the new test] is that the time for prescription will start running a lot later than it does now. The faculty was of the view that that was no bad thing.”<sup>lxix</sup>
162. The Faculty had “a marginal preference for the second option”. However, “if it seems proper to Parliament to legislate for the identity of the person to be known, we would not complain about that.”<sup>lxx</sup>
163. John Paul Sheridan (Law Society of Scotland) said that “generally insurers favoured retaining the decision in Morrison”. However, the Society took a “neutral view”.<sup>lxxi</sup> He added that, “The general view among members of the society’s obligation committee was that the prescriptive period should be extended because the

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<sup>lxiii</sup> [Official Report](#), 17 April 2018 col 5.

<sup>lxiv</sup> [Official Report](#), 17 April 2018 col 5.

<sup>lxv</sup> [Official Report](#), 24 April 2018 col 12.

<sup>lxvi</sup> [Official Report](#), 17 April 2018 col 6.

<sup>lxvii</sup> [Official Report](#), 20 March 2018 col 8.

<sup>lxviii</sup> [Official Report](#), 20 March 2018 col 9.

<sup>lxix</sup> [Official Report](#), 27 March 2018 col 6.

<sup>lxx</sup> [Official Report](#), 27 March 2018 col 7.

decision in Morrison was unfair and harsh and the position should be returned to what it had been previously.”<sup>lxxii</sup>

164. The Committee also explored the possibility that the new test might increase the complexity in the law in some situations, including where several defenders were joint and severally liable.<sup>lxxiii</sup> These issues had been highlighted by the Law Society of Scotland in its [written submission](#) in which it had suggested that the Bill was not clear in circumstances relating to complex cases where there may be difficulties in identifying the correct defender. The Law Society queried whether different prescriptive periods might run for different defenders in certain circumstances.
165. Dr Russell said that the wording of section 5 allowed for the “clear possibility of a different terminus or starting date in respect of the different obligations owed by each debtor.”<sup>lxxiv</sup> She also said that “time will not run in relation to the obligation owed by the right defender unless the constructive awareness provision can be engaged.”<sup>lxxv</sup>
166. The Minister addressed the point of joint and several liability in regard to the new discoverability test and reiterated, “there would be different start dates from which the prescriptive periods would start to run.”<sup>lxxvi</sup>
167. The Minister clarified the position in a subsequent [letter](#) to the Committee, stating that the Bill “does not alter the way that ‘joint and several’ responsibility currently operates”.
168. In addition, the Minister provided further clarification to a specific point raised by the Committee. This point involved how the test in section 5 would operate in a complex situation where the debtors were jointly and severally liable but where the second debtor was identified at a later stage than the first debtor. The Minister’s response is included at Annex A.
169. Dr Simpson offered some additional comment on the topic in further [written evidence](#) provided to the committee. He addressed a separate issue about how long wrongdoers have to claim against each other:
- ” if the pursuer secures satisfaction of his debt from one defender who is jointly and severally liable, what is the effect of the prescriptive periods on the liability of the others? To that question I think I’ve found a fairly straightforward answer. Claims for relief against fellow wrongdoers are subject to a two-year prescriptive period under s.8A of the 1973 Act.
170. The Committee also considered the change in the wording from “act, neglect or default” by the defender (which currently appears in the 1973 Act) to an “act or omission”.

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<sup>lxxi</sup> [Official Report](#) , 27 March 2018 col 8.

<sup>lxxii</sup> [Official Report](#) , 27 March 2018 col 8.

<sup>lxxiii</sup> Paragraph 94 above explains the concept of joint and several liability.

<sup>lxxiv</sup> [Official Report](#) , 17 April 2018 col 10.

<sup>lxxv</sup> [Official Report](#) , 17 April 2018 col 10.

<sup>lxxvi</sup> [Official Report](#) , 1 May 2018 col 14.

171. This wording change had received support during the SLC's consultation, although the Faculty of Advocates had commented that the change could risk an increase in litigation in relation to the meaning of the new wording.
172. Dr Russell nevertheless agreed with the change in wording, citing the "symmetry and consistency" this would bring across related legislation.<sup>lxxvii</sup>

### Recommendations

173. **The Committee notes the impact the Supreme Court's decision in regard to the Morrison case had on the law relating to prescription.**
174. **The Committee therefore agrees that section 5 contributes to the overall objective of the Bill to provide legal certainty.**
175. **The Committee also notes that the new discoverability test tips the balance in favour of the pursuer and that whilst it makes the law a little more complex, this complexity is offset by fairness.**
176. **The Committee notes that the additional strand to the discoverability test requiring identity lengthens the period before prescription begins to run and that this would mean that the wrongdoer would be exposed to the risk of liability for longer. However, the legal certainty it provides could help the insurance industry and practitioners.**
177. **The Committee nevertheless recommends that the Scottish Government provide further clarification, ahead of Stage 2, on how the test would operate in situations of joint and several liability. In particular, that the Scottish Government provide further clarification on how the third strand of the test will operate in relation to the knowledge of the identity of a particular defender.**

## Section 8: the new start date for twenty year prescription

178. Section 8 proposes a new start date for twenty year prescription.
179. The Policy Memorandum states that almost all respondents to the SLC consultation agreed with 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.<sup>lxxviii</sup>

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<sup>lxxvii</sup> [Official Report](#), 17 April 2018 col 7.

<sup>lxxviii</sup> [Policy Memorandum](#), paragraph 45.

180. One means by which the concept of prescription can be analysed in policy terms is to assess whether it strikes that fair balance.

### ***The current law***

181. Section 7 of the 1973 Act sets out a twenty year prescription rule for most types of legal obligation. Section 8 of the 1973 Act describes a similar twenty year prescription rule for certain rights relating to property.
182. Under the current law, 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.
183. 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.

### ***The changes proposed in the bill***

184. The new section 8 proposes 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. If there was more than one act or omission, it would be the last date of the act or omission. It is the date the act or omission stopped if the failings in question were ongoing (continuing) ones.
185. Unlike the changes for five year prescription, this proposed change would be a shift in the law in favour of the defender because the new start point would be much earlier than under the 1973 Act.
186. The objective of this change is 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 that he or she could not be sued.

### ***Examples of the effect of the proposed change in the law***

187. The SPICe Briefing sets out an example of the effect of this proposed change.<sup>lxxix</sup>

#### ***The current legislation***

Under the current legislation, the 1973 Act, 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.

#### ***The proposed change***

However, under the proposed change to the law, in 2021 a building was constructed with sub-standard foundations, which nobody could reasonable 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 which 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 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.

188. The Committee explored: the policy behind the change; whether the proposed earlier start date would result in more harsh cases (ie rights being extinguished before any claim had been made), and the language associated with the proposed change, particularly how an 'omission' would be identified.

### ***Policy underlying the new start date and harsh cases***

189. Craig Connal, QC (Pinsent Masons) said that in other jurisdictions prescription periods can be less than twenty years. He supported the twenty year period: "If you have a simple rule, once everybody knows that they can gear themselves up".<sup>lxxx</sup>
190. Alan McIntosh, in his [written evidence](#), queried the twenty year long stop and suggested that a shorter prescription period of 10 or 15 years would be more appropriate.
191. Dr Russell pointed out that the proposed new start date would be "significantly earlier" particularly in construction cases.<sup>lxxx</sup> She acknowledged that it may be harsh to the creditor but that there was a balance to be struck: "There must be a final cut-off point so that people are not being sued 36, 37 or 38 years down the line."<sup>lxxxii</sup>
192. There was agreement amongst witnesses from the legal profession and from academics who appeared before the Committee that the legal certainty provided by the proposed change was a welcome reform.
193. Robert Howie QC, stated that the Faculty of Advocates was:
- ” fairly firmly of the opinion that securing certainty was an advantage and that tying the prescription to the act or omission was wiser than trying to tie it to loss, because loss would simply mean that the date one starts from bounds off father into the future.<sup>lxxxiii</sup>

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<sup>lxxix</sup> [Policy Memorandum](#), paragraph 45.

<sup>lxxx</sup> [Official Report](#) , 27 March 2018 col 25.

<sup>lxxxi</sup> [Official Report](#) , 17 April 2018 col 11.

<sup>lxxxii</sup> [Official Report](#) , 17 April 2018 col 11.

<sup>lxxxiii</sup> [Official Report](#) , 27 March 2018 col 12.

194. However, John Paul Sheridan (The Law Society of Scotland) qualified his support by stating that, “if such certainty is deemed to be good, then yes, it is a good idea.”<sup>lxxxiv</sup>
195. One issue that such legal certainty raised was the possibility that the prescription period would extinguish a right before a creditor had an opportunity to pursue a claim. The issue of harsh cases was discussed by the Committee, particularly in relation to a petition relating to conveyancing currently before the Parliament’s Public Petitions Committee (the “Paterson case”).
196. Iain Drummond (Shepherd and Wedderburn) favoured the approach being taken and did not “believe that lots of cases will fall foul of the new slightly shorter period.”<sup>lxxxv</sup>
197. However, there would, of course, be some harsh cases as highlighted by Fenella Mason (Burness Paul): “It is harsh and difficult, but we have talked around and around it, and we have come back to the same position, which is that we have to draw a line somewhere.”<sup>lxxxvi</sup>
198. She pointed out that evidence deteriorates as time passes and that “after 20 years, record and witnesses cannot be found, people will have died and people will have left the company, so it becomes incredibly difficult to pursue an action. Overall, the change is the right thing to do.”<sup>lxxxvii</sup>
199. Robert Howie QC (Faculty of Advocates) said :
- ” If you have any line drawn in the sand to show the point beyond which your rights are extinguished, there is always some poor soul who will find himself in some case on the wrong side of that line through no fault of his own, and there is nothing that human power can do about that.”<sup>lxxxviii</sup>
200. Dr Russell suggested that there is a wider public interest in providing finality to the existence of obligations because it prevents the courts from becoming “clogged up” with claims for which the evidence is irretrievable.<sup>lxxxix</sup>
201. However, Mike Dailly (Govan Law Centre) questioned whether the objective of balancing the needs of pursuers and defenders in the Bill was necessary: “When you drill down, it is about equity.”<sup>xc</sup> He considered that section 6, which prevents the twenty year period from being interrupted, would be sufficient.
202. Mike Dailly suggested that the solution to harsh cases involving solicitors in conveyancing cases would be for the Law Society to introduce a system of strict liability.<sup>xci</sup> He advised the Committee that the Scottish Government had

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<sup>lxxxiv</sup> [Official Report](#) , 27 March 2018 col 12.

<sup>lxxxv</sup> [Official Report](#) , 27 March 2018 col 24.

<sup>lxxxvi</sup> [Official Report](#) , 27 March 2018 col 25.

<sup>lxxxvii</sup> [Official Report](#) , 27 March 2018 col 25.

<sup>lxxxviii</sup> [Official Report](#) , 27 March 2018 col 18.

<sup>lxxxix</sup> [Official Report](#) , 17 April 2018 col 14.

<sup>xc</sup> [Official Report](#) , 24 April 2018 col 14.

<sup>xci</sup> That is to say a liability that does not involve negligence or intent to harm.

commissioned a review of the legal profession. “Strict liability”, Mike Dailly suggested, “is long overdue”.<sup>xcii</sup>

203. The Minister addressed the issue of balance in the Bill and reiterated her view that the Bill strives to achieve “a fair balance between the interests of both sides to a claim, and also of the importance of looking at the overall picture of legal certainty”.<sup>xciii</sup> She said that such balance “enhances legal certainty and allows fidelity.”<sup>xciv</sup>
204. The Minister also said that tying the prescriptive period to the ‘act or omission’ was important to ensure that the twenty year period operated as a firm long stop because tying the period to loss “would elongate the process quite considerably”.<sup>xcv</sup>
205. The Minister addressed the issue of harsh cases. She acknowledged that “any system in which there is a hard cut-off date” will result in harsh cases.<sup>xcvi</sup> The Minister was aware of the Paterson case and, whilst recognising that the solution to any such situation did not arise in the law of prescription, suggested the possibility that improvements may be made around the practice rules relating to the functions of the Registers of Scotland.
206. The Committee also sought information from the Registers of Scotland on a possible solution to the issues raised by the Paterson case in relation to its functions. The exchange of correspondence between the [Committee](#) and the [Registers of Scotland](#) can be found here.

## Recommendations

207. **The Committee recognises that the new start date for twenty year prescription, like any hard deadline, will result in some harsh cases at the margins.**
208. **However, the Committee was persuaded by the argument that evidence deteriorated considerably after twenty years and may be irretrievable thus resulting in difficulties for the pursuer in compiling a case where many years have elapsed.**
209. **Furthermore, the Committee agrees that legal certainty provided comfort to defenders who would have greater clarity on when their legal obligation would be extinguished and allow them to arrange their affairs accordingly.**
210. **The Committee also takes into account that the judiciary would have difficulty doing justice to parties concerned where there was limited good quality evidence.**

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<sup>xcii</sup> [Official Report](#), 24 April 2018 col 16.

<sup>xciii</sup> [Official Report](#), 1 May 2018 col 17.

<sup>xciv</sup> [Official Report](#), 1 May 2018 col 17.

<sup>xcv</sup> [Official Report](#), 1 May 2018 col 17.

<sup>xcvi</sup> [Official Report](#), 1 May 2018 col 17.

211. **The Committee acknowledges that it is for the Law Society of Scotland to introduce a system of strict liability for solicitors in conveyancing cases. The Committee will therefore write to the Law Society to seek clarification of its position and will also seek the view of the Scottish Government.**
212. **However, in view of the evidence the Committee heard in relation to the operation of prescription and conveyancing, the Committee calls on the Scottish Government to consider what alternative courses of action there are to remedy conveyancing cases that are harshly affected by prescription.**
213. **The Committee recommends that the Public Audit and Post-Legislative Scrutiny Committee consider the use of land registration procedures in relation to conveyancing issues as part of any scrutiny of the Land Registration etc. (Scotland) Act 2012.**

### ***Omissions and ongoing breaches***

214. The Committee understood that some concern had been expressed during the SLC consultation about how this proposed change would operate in situations where the fault was an omission (rather than an act) and where there was an ongoing situation, a continuing breach.
215. The SLC acknowledged that under the current law, the date when the omission took place has to be identified:  

” Typically, you can say that it took place when it becomes impossible for it to be remedied – that is, you have to do something by a certain date or it becomes impossible to do it. That is often the date that you identify as the date that an omission occurred, as a matter of law.”<sup>xcvii</sup>
216. The SLC did not think that the wording would introduce a new problem.<sup>xcviii</sup>
217. Robert Howie, QC (Faculty of Advocates) advised that the Faculty was concerned about distinguishing between “nothing happening any longer and an omission carrying on?”<sup>xcix</sup> However, he acknowledged that it may be an unsolvable issue.<sup>c</sup>
218. David Christie (Robert Gordon University), in his [written evidence](#), illustrated the issues around identifying the point at which an omission stops so that an end date for prescription can be plotted in relation to construction projects.
219. Dr Russell said that the term “act or omission” was familiar to the courts: “It is nothing new and nothing which the courts have not previously grappled.”<sup>ci</sup>

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<sup>xcvii</sup> [Official Report](#), 20 March 2018 col 11.

<sup>xcviii</sup> [Official Report](#), 20 March 2018 col 11.

<sup>xcix</sup> [Official Report](#), 20 March 2018 col 11.

<sup>c</sup> [Official Report](#), 20 March 2018 col 11.

220. The Minister confirmed that “those are terms of art of Scots law”<sup>cii</sup>.

### Recommendation

221. **The Committee agrees that the language used in relation to omissions and ongoing breaches would be familiar to courts and those who used the law.**

## Sections 6, 7 and 12: interruptions and extensions

222. Under the 1973 Act, the twenty year prescription period (and the five year prescription period) can be interrupted by someone starting court proceedings to pursue a relevant claim and by the person bound by the obligation acknowledging that the obligation still exists (a relevant acknowledgement).
223. In this situation ‘interruption’ means that 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 interruption.
224. Broadly speaking, this means that the twenty year period can be halted by legal proceedings in the event of a relevant claim, and by a written statement or an act that shows the person thinks the obligation still exists, such as partly paying off a debt due.
225. Section 6 of the proposed Bill would amend the 1973 Act so that the main type of twenty year prescription could no longer be interrupted and therefore halted by a relevant claim or a relevant acknowledgement.
226. Section 7 of the proposed Bill would amend the specific type of twenty year prescription which applies to certain rights relating to property so it cannot be interrupted by a relevant claim.
227. The Bill states that the twenty year period can be extended until the legal claim has been finally disposed of and there is no possibility of further appeal.
228. Section 12 defines ‘final disposal’ of a relevant claim.

### ***Section 6: Obligations: twenty year prescriptive period and extension***

229. The Committee explored the proposal that the twenty year period should no longer be subject to interruption and the suggestion that it should be paused rather than extended. By which is meant that the period should still be interrupted but that it should restart not from the beginning but from where it left off. The Committee also considered whether allowing the twenty year period to be extended for an indefinite period (ie until legal proceedings have been disposed of) would undermine the objective of creating a firm long stop.

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ci [Official Report](#) , 17 April 2018 col 12.

cii [Official Report](#) , 1 May 2018 col 18.

230. David Johnston QC (SLC) explained the rationale for the proposal: “prescription is meant to cut off old or stale claims, but clearly that does not apply if someone is actively pursuing a claim when the 20-year cut-off period arrives.”<sup>ciii</sup>
231. He indicated that the SLC had considered pausing the period rather than extending it (as suggested by Brodies) but pointed out that in a situation where legal proceedings took five years to conclude then that would mean “in effect a 25-year prescriptive period.” The SLC concluded that extending the period to allow legal proceedings to complete was preferable.<sup>civ</sup>
232. David Johnston acknowledged that the provision relied in part on the courts managing cases so that they “do not allow them to drag on indefinitely.”<sup>cv</sup>
233. Douglas McGregor (Brodies) explained that their concern had been that rights might prescribe during litigation but they were now content that this concern is dealt with elsewhere in the Bill.<sup>cvi</sup>
234. Dr Russell supported the proposed extension stating that interruptions “are simply inconsistent with the concept of a long-stop prescription.”<sup>cvii</sup>
235. David Wedderburn (RIAS) added that allowing an extension in such specific circumstances would give certainty for retiring architects so that they would know which contracts have not yet expired and can arrange professional indemnity insurance accordingly.<sup>cviii</sup>
236. The Minister stated that she did not “think that any particular impact is likely to fall on the operation of the Scottish Courts and Tribunals Service as a result of the provision.”<sup>cix</sup>
237. The Minister explained that the extension was tight so that the twenty year period can be extended “only until such time as the claim is disposed of or the proceedings are brought to an end”.<sup>cx</sup> The Minister said this “would ensure that extensions will be limited”.<sup>cx</sup>

## Recommendation

238. **The Committee notes the views on the extension of the twenty year period to allow legal proceedings to finish and recognises the logic to the view.**

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ciii [Official Report](#), 20 March 2018, col 11.

civ [Official Report](#), 20 March 2018, cols 11-12.

cv [Official Report](#), 20 March 2018, col 12.

cvi [Official Report](#), 27 March 2018 col 27.

cvii [Official Report](#), 17 April 2018 col 14.

cviii [Official Report](#), 17 April 2018 col 15.

cix [Official Report](#), 1 May 2018 col 18.

cx [Official Report](#), 1 May 2018 col 18.

cxii [Official Report](#), 1 May 2018 col 19.

## ***Section 7: twenty year prescription and property rights***

239. The main type of twenty year prescription is found in section 7 of the 1973 Act. However, there is also a specific type of twenty year prescription relating to certain property rights (section 8 of the 1973 Act).
240. Section 8 of the 1973 Act relates to land and buildings and other types of property. An example of a property right which is within the scope of section 8 is the right to cross a neighbour's land under a servitude right of access. Section 7 of the proposed Bill states that this type of prescription can no longer be interrupted but there is the possibility of an extension to allow ongoing litigation, or other proceedings, to finish.
241. The Faculty of Advocates suggested that the proposed approach in section 7 did not work well for property rights like servitudes. The Faculty's reasoning is set out in its [written evidence](#).
242. Robert Howie QC explained that, "Prescription must not be allowed to stop continuing property rights simply by saying that they continue until an action finishes and then are apparently somehow prescribed at the end of the action."<sup>cxii</sup> He was concerned that the section as drafted would lead to the position that:
- ” if the outcome [of the legal proceedings] is that there is a servitude right, why has it been declared that they have a servitude right when, apparently under the bill, that right has automatically been prescribed now that the 20-year period has passed?<sup>cxiii</sup>
243. Dr Russell agreed and said that, "It seems anomalous that, if a person litigates about a right of servitude that they have not actually exercised for 19 years, it should prescribe after the 20-year period has elapsed on conclusion of the proceedings."<sup>cxiv</sup>
244. The Minister indicated that the Government acknowledges the concerns raised and is reflecting on the wording of the section.

### **Recommendation**

245. **The Committee welcomes the Government's intention to consider the concerns raised and calls on it to respond to the issue ahead of Stage 2.**

## ***Section 12: final disposal***

246. The Committee noted that Brodies had raised concerns in its [written evidence](#) in regard to section 12 of the Bill, which defines 'final disposal' in court proceedings.

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cxii [Official Report](#) , 27 March 2018 col 13.

cxiii [Official Report](#) , 27 March 2018 col 13.

cxiv [Official Report](#) , 17 April 2018 col 16.

247. Brodies states that the proposed section 12 does not allow for the possibility that a court or other body will grant leave or permission to appeal late or will allow an appeal to be lodged late. They explain that potential drafting issues with section 12 will impact on the effectiveness of other key sections, such as section 6.
248. The Minister indicated that the Government recognised the concerns raised by Brodies and would reflect on the matter. She indicated that the Government was not averse to amending the Bill, if necessary.

### Recommendation

249. **The Committee welcomes the Government's intention to consider the concerns raised and calls on it to respond to the issue ahead of Stage 2.**

## Section 13: standstill agreements: five year prescription

250. Section 13 of the 1973 Act prohibits agreements in a contract to lengthen, or entirely remove, one of the statutory periods of prescription. There is also some uncertainty as to whether contractual agreements to shorten the statutory period are also prohibited by section 13 of the 1973 Act.
251. Section 13 of the proposed Bill would substitute the current section 13 and would allow contracts that extend the five year period to be competent where certain conditions are met.<sup>cxv</sup> These conditions 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; and
  - the extension should be limited to one year, with no further extensions allowed.
252. The new section 13 would, therefore, allow some types of 'standstill agreements' to be valid.
253. 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.
254. The new section 13 also makes clear that an agreement in a contract to remove or shorten a statutory period of prescription in the 1973 Act would be invalid.<sup>cxvi</sup>

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<sup>cxv</sup> This would also apply to two-year prescription (found in section 8A of the 1973 Act) which applies in a limited set of circumstances.

<sup>cxvi</sup> It should be noted that the new section 13(4) covers two year prescription, five year prescription, and twenty year prescription (sections 6, 7, 8 and 8a of the 1973 Act).

255. The Committee explored the proposed contracting out and standstill agreements allowed by the new section 13 of the proposed Bill in light of the concerns that had arisen during the SLC consultation on the possibility of increased complexity in the law; the possibility of increased litigation about the contracts resulting in increased costs, and delay in the resolution of disputes.
256. Other concerns arose during the Committee's evidence sessions, including:
- the risk of abuse of such agreements by the economically stronger party (inequality of arms);
  - it would disturb the balance in the Bill between the rights of pursuers and defenders;
  - the prescriptive period should be capable of suspension as well as extension,
  - the effect on contractual limitation clauses, which are often entered into in order to minimise risk; and
  - that additional safeguards should be put in place (eg the agreement must be in writing (as recommended by the Faculty of Advocates in its [written evidence](#)) and the debtor must have taken legal or money advice before entering into any such agreement (as recommended by the Govan Law Centre).
257. David Johnston QC (SLC) explained the SLC's thinking about allowing standstill periods. He said that the SLC had considered it "inappropriate" for parties to a contract to be able to change the prescriptive period because this would undermine clarity and simplicity of the proposed system as provided for in the Bill.<sup>cxvii</sup> Furthermore, it would favour the party in the stronger bargaining position.
258. He said that the Bill seeks to give parties to a contract an alternative to raising proceedings by allowing a certain amount of time for them to resolve the dispute.
259. John Paul Sheridan (Law Society of Scotland) did not speak against standstill periods but did suggest that there was no reason for the standstill period to be restricted to a single year. He said that allowing a longer period would also serve the objectives of allowing parties to resolve a dispute and to prevent parties incurring costs by raising court proceedings.<sup>cxviii</sup>
260. David Christie, (Robert Gordon University), in his [written evidence](#), said (from a construction law perspective) that restricting standstill agreements to one extension for one year "might impede the ability of parties to use the full range of alternative dispute resolution processes available."
261. Robert Howie QC (Faculty of Advocates) said that the Faculty favoured "tight restrictions [...] if you were to allow them at all."<sup>cxix</sup> He put forward various arguments against standstill agreements, including:
- that they could be abused by the economically stronger party;

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cxvii [Official Report](#), 20 March 2018 col 12.

cxviii [Official Report](#), 27 March 2018 col 14.

cxix [Official Report](#), 27 March 2018 col 14.

- that they could become an excuse for procrastination, particularly if more than one extension is allowed, and
  - that it would upset the balance of the Bill between the interests of pursuers and defenders.
262. He suggested that “you may be producing something worse to cure a minor problem by allowing anything other than the tightest of rules on standstill agreements.”<sup>CXX</sup>
263. The Committee heard views in favour of standstill agreements during which suggestions for additional safeguards to prevent the inequality of arms were put forward.
264. Dr Russell supported the proposed new section 13: “It is in everyone’s best interests to avoid the need for adversarial litigation.”<sup>CXXi</sup> She said that the safeguards built into the Bill (a standstill agreement cannot be entered into in advance, can only be entered into once, and can only be for a single year) are to prevent agreements being abused or used as a delaying tactic.<sup>CXXii</sup>
265. David Wedderburn (RIAS) agreed with the safeguards in the Bill, “because if they were not there the powerful part of the contract would set in and start extending the prescriptive period without restrictions. The safeguards will lead to fairness.”<sup>CXXiii</sup>
266. Mike Dailly (Govan Law Centre) and Mike Holmyard (Citizens Advice Scotland) agreed that, if standstill agreements were to be allowed then the consumer should be protected. Mike Dailly suggested that this could be achieved by requiring the consumer to have taken advice from a solicitor or accredited money adviser.<sup>CXXiv</sup>
267. Douglas McGregor (Brodies) agreed with the SLC’s proposal and that the option of contracting out should only be available in relation to section 6 and 8A under the 1973 Act (ie the five year prescription period and the two prescription periods respectively).<sup>CXXv</sup>
268. However, he raised the possibility of also allowing a suspension of the prescriptive period as a means to avoid problems in the future that an extension would create because the parties would need to know the start and end dates of any period of extension.<sup>CXXvi</sup>
269. Craig Connal QC (Pinsent Masons) agreed with Brodies suggestion of allowing the possibility of the suspension of the prescriptive period and with the Law Society’s comment on allowing a longer period than one year. He did not agree with the Faculty’s view that the system was open to abuse.<sup>CXXvii</sup>
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CXX [Official Report](#) , 27 March 2018 col 16.

CXXi [Official Report](#), 17 April 2018 col 16.

CXXii [Official Report](#), 17 April 2018 col 16.

CXXiii [Official Report](#), 17 April 2018 col 17.

CXXiv [Official Report](#), 24 April 2018 col 17.

CXXv [Official Report](#) , 27 March 2018 col 28.

CXXvi [Official Report](#) , 27 March 2018 col 29.

270. Fenella Mason (Burness Paull) agreed with the introduction of standstill agreements and raised a further issue about parties shortening the prescriptive period: “The commercial reality is that parties need to be able to price for risk, and the big infrastructure jobs that we see, they will accept around a 12-year period.”<sup>CXXViii</sup> She said that the proposed Bill should not “intefere with the freedom to contract.”<sup>CXXix</sup>
271. Iain Drummond (Shepherd and Wedderburn) said that a one year limit for standstill agreements would “undermine” their utility.<sup>CXXX</sup> He suggested that “the tendency would be to not use them and to raise proceedings in a protective way, as happens at the moment.”<sup>CXXXi</sup>
272. He also agreed with Fenella Mason about contractual limitation clauses and suggested that the proposed section 13 should be “clarified so that it specifically says that contractual limitation clauses are not intended to be struck down by the provision.”<sup>CXXXii</sup>
273. The Minister stated that the proposed section 13 was a means to balance legal certainty with the creditor’s requirements to reach an agreement. She said that the safeguards were in place in order to focus the standstill agreement provision on resolving disputes.<sup>CXXXiii</sup>
274. In regard to the evidence the Committee heard about the inequality of arms, the Minister regarded the proposal in section 13 as striking the right balance between respective interests.<sup>CXXXiv</sup>
275. The Minister was cautious that the additional safeguard - that parties should be required to consult a solicitor - may create an inequality of arms situation.<sup>CXXXv</sup> However, she committed to reflecting further on the issue.
276. The Minister was not persuaded by the suggestion that the prescriptive period should be capable of suspension as well as extension.<sup>CXXXvi</sup>
277. The Minister also stated that she was clear that contractual limitation clauses would not be affected by the Bill: “There is no intention to impact on contractual limitation clauses. I feel that is clear in the bill.”<sup>CXXXvii</sup>

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CXXvii [Official Report](#) , 27 March 2018 col 29.

CXXviii [Official Report](#) , 27 March 2018 col 30.

CXXix [Official Report](#) , 27 March 2018 col 30.

CXXX [Official Report](#) , 27 March 2018 col 30.

CXXXi [Official Report](#) , 27 March 2018 col 31.

CXXXii [Official Report](#) , 27 March 2018 col 31.

CXXXiii [Official Report](#) , 1 May 2018 col 21.

CXXXiv [Official Report](#) , 1 May 2018 col 22.

CXXXv [Official Report](#) , 1 May 2018 col 22.

CXXXvi [Official Report](#) , 1 May 2018 col 22.

CXXXvii [Official Report](#) , 1 May 2018 col 22.

## **Recommendations**

- 278. The Committee is persuaded that the proposed standstill agreements in the new section 13 have merit.**
- 279. However, the Committee also recognises the argument that standstill agreements may be abused by the economically stronger party.**
- 280. The Committee acknowledges that the additional safeguard that parties should be required to consult a solicitor or accredited money adviser before entering into such a contract might create further issues, such as cost. Therefore, the Committee welcomes the Minister's commitment to reflect further on the issue.**

# Other issues

## Forfeiture

281. The draft Bill on which the SLC consulted contained proposals for a specific exception to five year prescription for forfeiture, mirroring the legislation that applies to England and Wales.
282. The Policy Memorandum states that:
- ” 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.”<sup>cxxxviii</sup>
283. In their [written evidence](#), Malcolm Combe and Dr Simpson had expressed unease that the proposed exception had not been included in the Bill.
284. The Committee explored with the Minister why this provision had not been included in the Bill as introduced. In particular, the Committee was concerned that the general exception relating to taxes will not cover all situations in which forfeiture is used in practice and that removal of the specific exception takes away the opportunity to clarify how prescription applies to forfeiture more generally.
285. The Minister stated that the exception was “deemed unnecessary to include the specific exception, from a legal perspective.”<sup>cxxxix</sup> However, the Minister committed to reflecting further on the issue.

### Recommendation

286. **The Committee welcomes the Minister’s commitment to reflect on the matter.**

## Language in the 1973 Act

287. Section 6(4) of the 1973 Act states that the five year prescriptive period will not run while the creditor is under a “legal disability”. Section 15(1) defines legal disability to include “unsoundness of mind” (and any period when the creditor was under age). Case law has then developed what “unsoundness of mind” means.
288. Dr Russell suggested that it might be appropriate to use the Bill to update the language in the 1973 Act where it says a form of legal disability is “unsoundness of mind”. She pointed out that such language today is considered to be “insulting and offensive”.<sup>cxl</sup> She suggested that section 1(6) of the Adults with Incapacity

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<sup>cxxxviii</sup> [Policy Memorandum](#), paragraph 23.

<sup>cxxxix</sup> [Official Report](#), 1 May 2018 col 13.

(Scotland) Act 2000 (which defines “incapable” and “incapacity”) would be a more useful test.

289. The Committee wrote to the Parliament’s Equalities and Human Rights Committee on this point.<sup>cxli</sup> The Committee responded as detailed in paragraph 137 above.
290. The Minister said that “unsoundness of mind” is a general concept of Scots law and that this bill would not be an appropriate place to make such a change: “The bill deals with the negative prescription rules as they apply to the general principles of Scots law. If one wants to amend those other principles, it seems to me that the bill is not the best way to do that, especially if we take into account the unintended consequences to which that could give rise.”<sup>cxlii</sup>

### Recommendations

291. **The Committee agrees that the term “unsoundness of mind” is not now an appropriate phrase to include in the definition of “legal disability”.**
292. **The Committee notes that the term is not defined in the 1973 Act and that this gives the courts flexibility about interpretation.**<sup>cxliii</sup>
293. **The Committee accepts the Government’s view that the Prescription (Scotland) Bill is not the appropriate place to make changes to general concepts of Scots law.**
294. **However, the Committee considers that the proposition has merit and calls on the Government to give consideration to promoting a legislative opportunity to facilitate the change.**

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cxl [Official Report](#), 17 April 2018 col 19.

cxli [Letter](#) to the Equalities and Human Rights Committee, 10 May 2018.

cxlii [Official Report](#), 1 May 2018 col 23.

cxliii [Official Report](#), 1 May 2018 col 24.

## Delegated powers provisions

295. In addition to carrying out the role of lead committee, under rule 9.6.2 of Standing Orders, the Committee is required to consider and report upon any provisions in the Bill which confer power to make subordinate legislation. The Committee may also consider and report on any provision in such a Bill conferring other delegated powers.
296. The Committee considered the delegated powers provisions in the Bill at Stage 1 at its meeting on 6 March 2018. The only powers provisions are the ancillary provisions in section 15 and the commencement powers in section 16. In relation to section 15, the Committee asked the Scottish Government why the ancillary powers are required in addition to the Bill's reforms, when it appears that no such powers have been included within the statutory rules on prescription from 1973 onwards.
297. In the Scottish Government's response (letter of 22 March 2018), it is explained that the Government considers that, in a Bill of this size and complexity, it is now standard practice to include this type of ancillary provision, whereas that might not necessarily have been the case at the time when the Prescription and Limitation (Scotland) Act 1973 was drafted. The Committee is content that the powers in section 15 may be necessary, to avoid further primary legislation to make ancillary provisions.

### Recommendation

298. **The Committee is therefore content with the delegated powers contained in sections 15 and 16 in principle, and with the Parliamentary scrutiny procedures which are applied to these powers.**

# Financial Memorandum

299. As noted earlier in this report, the Finance and Constitution Committee issued a call for evidence on the Bill, and received a single response from [South Lanarkshire Council](#). It therefore did not undertake any further consideration of the Bill.
300. The Financial Memorandum itself does not anticipate any new costs arising from the Bill.

# Policy Memorandum

301. The Committee is content with the Policy Memorandum provided in support of the Bill.

# Conclusions on the general principles of the Bill

302. The Committee agrees with the Bill's aim to increase clarity, certainty and fairness to the law on negative prescription and considers that the Bill as drafted generally meets this aim.
303. The Committee also recognises that there are wider policy considerations in the Bill, particularly in relation to welfare rights, that stretched the designation of this draft legislation as an SLC Bill. It is therefore grateful to the four parliamentary committees who responded at short notice to the Committee's questioning on some of these wider policy areas.

## Recommendation

304. **While this report calls on the Scottish Government to give further consideration to a number of issues ahead of Stage 2, the Committee recommends to the Parliament that the general principles of the Bill be agreed to.**

# Annex A

## INDEX OF WRITTEN EVIDENCE

### **Correspondence from the Minister for Community Safety and Legal Affairs**

[Letter to the Scottish Law Commission \(laid before the Parliament on 17 January 2018\)](#)

[Letter to the Convener following the Minister's evidence session on 1 May 2018](#)

[Further letter to the Convener following the Minister's evidence session on 1 May 2018](#)

### **Correspondence from the Convener**

[Letter to the Minister for Community Safety and Legal Affairs of 10 May 2018](#)

[Letter to the Convener of the Equalities and Human Rights Committee](#)

- [Response from the Convener of the Equalities and Human Rights Committee](#)

[Letter to the Convener of the Justice Committee](#)

- [Response from the Convener of the Justice Committee](#)

[Letter to the Convener of the Local Government and Communities Committee](#)

- [Response from the Convener of the Local Government and Communities Committee](#)

[Letter to the Convener of the Social Security Committee](#)

- [Response from the Convener of the Social Security Committee](#)

### **Submissions received to the Call for Evidence**

[Brodie's LLP](#)

[Child Poverty Action Group \(CPAG\)](#)

[Faculty of Advocates](#)

[Combe and Simpson, School of Law, University of Aberdeen](#)

[Shepherd and Wedderburn LLP](#)

[Royal Incorporation of Architects in Scotland \(RIAS\)](#)

[South Lanarkshire Council](#)

[David Christie, Robert Gordon University](#)

[Law Society of Scotland](#)

[Supplementary written evidence from Craig Connal QC](#)

[SOLAR \(Society of Scottish Local Authority Lawyers & Administrators in Scotland\)](#)

Alan McIntosh

Department for Work and Pensions

Additional information provided by Dr Andrew Simpson

### **Additional correspondence**

Letter from the Clerk to Registers of Scotland seeking their views on the relationship between negative prescription and property law

- Response from Registers of Scotland

Letter from the Clerk to COSLA seeking their views on how councils across Scotland currently treat debt relating to council tax and non-domestic rates

- Response from COSLA

Letter from the Clerk to SOLAR seeking their views on how councils across Scotland currently treat debt relating to council tax and non-domestic rates

- Response from SOLAR

### **Correspondence in relation to the Delegated Powers Memorandum**

Committee questions on the delegated powers provisions at Stage 1

Scottish Government response to the Committee's questions

# Annex B

## EXTRACTS FROM MINUTES OF THE DELEGATED POWERS AND LAW REFORM COMMITTEE

### 6th Meeting, 2018 (Session 5) Tuesday 27 February 2018

**Decision on taking business in private:** The Committee agreed to take item 4 in private.

**Prescription (Scotland) Bill (in private):** The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed (a) to issue a call for written evidence on the Bill; (b) a list of targeted stakeholders and communications strategy; (c) the timetable for Stage 1 consideration; and (d) to delegate to the Convener responsibility for arranging to pay expenses to witnesses under the SPCB witness expense scheme. The Committee also agreed to hold a discussion in private at the end of each meeting on the oral evidence heard and to consider all draft reports on the Bill in private.

### 7th Meeting, 2018 (Session 5) Tuesday 6 March 2018

**Decision on taking business in private:** The Committee agreed to take item 6 in private.

**Prescription (Scotland) Bill (in private):** The Committee considered the delegated powers provisions in this Bill at Stage 1 and agreed to ask questions of the Scottish Government in writing on certain powers within the Bill.

### 10th Meeting, 2018 (Session 5) Tuesday 20 March 2018

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Jill Clark, Head of Civil Law Reform Unit, Justice Directorate; Neel Mojee, Solicitor, Scottish Government Legal Directorate, Scottish Government; David Johnston QC, Commissioner; Gillian Swanson, Project Manager, Scottish Law Commission.

**Prescription (Scotland) Bill (in private):** The Committee agreed to defer consideration of the evidence heard to a future meeting.

### 11th Meeting, 2018 (Session 5) Tuesday 27 March 2018

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

John Paul Sheridan, Obligations Committee, Law Society of Scotland; Robert Howie QC, Faculty of Advocates;

and then from—

Douglas McGregor, Brodies LLP; Craig Connal QC, Pinsent Masons; Fenella Mason, Head of Construction and Projects, Burness Paull LLP; Iain Drummond, Shepherd and Wedderburn.

**Prescription (Scotland) Bill (in private):** The Committee considered the evidence it heard earlier in the meeting.

### 12th Meeting, 2018 (Session 5) Tuesday 17 April 2018

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Dr Andrew Simpson, Senior Lecturer, School of Law, University of Aberdeen; Dr Eleanor Russell, Senior Lecturer in Law, Glasgow Caledonian University; David Wedderburn OBE, Forensic Architect, Royal Incorporation of Architects in Scotland (RIAS).

**Prescription (Scotland) Bill (in private):** The Committee agreed to defer consideration of the evidence it heard and to consider the written evidence it has received at a future meeting.

#### **13th Meeting, 2018 (Session 5) Tuesday 24 April 2018**

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Mike Dailly, Solicitor Advocate & Principal Solicitor, Govan Law Centre; Mike Holmyard, Money Advice Consultant, Citizens Advice Scotland.

**Prescription (Scotland) Bill (in private):** The Committee considered the evidence it heard.

#### **14th Meeting, 2018 (Session 5) Tuesday 1 May 2018**

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Annabelle Ewing, Minister for Community Safety and Legal Affairs; Jill Clark, Head of Civil Law Reform Unit, Justice Directorate; Michael Paparakis, Civil Law Policy Manager, Civil Law Reform Unit; Neel Mojee, Solicitor, Constitution and Civil Law, Scottish Government.

**Prescription (Scotland) Bill (in private):** The Committee considered the evidence it heard earlier in the meeting and agreed to seek additional information in writing from COSLA and SOLAR.

#### **16th Meeting, 2018 (Session 5) Tuesday 8 May 2018**

**Prescription (Scotland) Bill (in private):** The Committee considered the themes that have arisen following its evidence gathering on the Bill. It agreed to write to a number of parliamentary committees to highlight issues that emerged during that process. It also agreed to seek to extend the Bill's Stage 1 deadline so that the Committee may consider any responses received to these letters.

#### **21st Meeting, 2018 (Session 5) Tuesday 5 June 2018**

**Prescription (Scotland) Bill (in private):** The Committee considered responses from a number of parliamentary committees on themes that have arisen following evidence gathering on the Bill and agreed to consider a draft Stage 1 report at its next meeting.

# Annex C

## INDEX OF ORAL EVIDENCE

### **10th Meeting, 2018 (Session 5) Tuesday 20 March 2018**

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Jill Clark, Head of Civil Law Reform Unit, Justice Directorate; Neel Mojee, Solicitor, Scottish Government Legal Directorate, Scottish Government; David Johnston QC, Commissioner; Gillian Swanson, Project Manager, Scottish Law Commission.

### **11th Meeting, 2018 (Session 5) Tuesday 27 March 2018**

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

John Paul Sheridan, Obligations Committee, Law Society of Scotland; Robert Howie QC, Faculty of Advocates;

and then from—

Douglas McGregor, Brodies LLP; Craig Connal QC, Pinsent Masons; Fenella Mason, Head of Construction and Projects, Burness Paull LLP; Iain Drummond, Shepherd and Wedderburn.

### **12th Meeting, 2018 (Session 5) Tuesday 17 April 2018**

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Dr Andrew Simpson, Senior Lecturer, School of Law, University of Aberdeen; Dr Eleanor Russell, Senior Lecturer in Law, Glasgow Caledonian University; David Wedderburn OBE, Forensic Architect, Royal Incorporation of Architects in Scotland (RIAS).

### **13th Meeting, 2018 (Session 5) Tuesday 24 April 2018**

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Mike Dailly, Solicitor Advocate & Principal Solicitor, Govan Law Centre; Mike Holmyard, Money Advice Consultant, Citizens Advice Scotland.

### **14th Meeting, 2018 (Session 5) Tuesday 1 May 2018**

**Prescription (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Annabelle Ewing, Minister for Community Safety and Legal Affairs; Jill Clark, Head of Civil Law Reform Unit, Justice Directorate; Michael Paparakis, Civil Law Policy Manager, Civil Law Reform Unit; Neel Mojee, Solicitor, Constitution and Civil Law, Scottish Government.

