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Prescription (Scotland) Bill - Stage 3

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This briefing looks at parliamentary consideration of the Prescription (Scotland) Bill prior to Stage 3. For the avoidance of doubt, this Bill does not have any connection to the prescriptions issued by doctors. Instead the Bill aims to amend the law of prescription, currently found in legislation from 1973. This area of law sets time limits, after which a wide range of legal obligations come to an end. Although a technical subject, prescription is important in practice.



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About this briefing

This briefing looks at parliamentary consideration of the [Prescription \(Scotland\) Bill](#) prior to Stage 3.

Under the current law of prescription, legal obligations (and, crucially, associated rights) usually end either after **five years** or after **twenty years**. Five years is most common in practice.

The Bill does not alter the fundamental features of the current law but it does try to address a range of specific issues which have come up in practice.

The changes proposed by the Bill which attracted most attention at Stage 1 were:

- How prescription should work in relation to **certain statutory obligations**, such as the **obligation to pay council tax** and the obligation to **pay back (reserved) social security benefits** (if you have previously been paid too much). This is covered by section 3 of the Bill.
- Section 5 of the Bill, which addresses **a controversial Supreme Court case** from 2014 ([David T Morrison & Co Limited v ICL Plastics Ltd](#)). This case related to an explosion in a Glasgow plastics factory. It altered people's understanding of what the existing law says in relation to prescription and obligations to pay damages (also known as 'compensation'). The Bill establishes a **new test** in relation to what the person raising the court action must know about the circumstances of the case, departing from the line taken in the *Morrison* case. The proposed new test was generally welcomed by those giving evidence.
- Section 13 of the Bill, which would allow people to enter into contracts extending the five year prescription period in defined circumstances (**standstill agreements**). Some who gave evidence at Stage 1 welcomed **the proposed flexibility**; others were concerned about **the economically weaker person** in any contract.

Going into Stage 3, the main area of controversy which remains is how prescription should work in relation to council tax and (reserved) social security benefits (section 3 of the Bill). The amendments at Stage 2 focused on these issues.

About the Bill

The Bill's introduction and key documents

The Prescription (Scotland) Bill ('the Bill') is a Scottish Government Bill. It was introduced in the Scottish Parliament on 8 February 2018. The [Bill and its related documents](#) are available from the Bill page on the Scottish Parliament website. The [SPICe Bill Briefing](#)¹ gives background information on the current law, what changes are proposed in the Bill and how these were received on consultation.

The Bill's provisions are based on a [2017 report](#)² by the [Scottish Law Commission](#) ('SLC'). The SLC is the independent statutory body which makes recommendations for law reform to Scottish Ministers.

The [Delegated Powers and Law Reform Committee](#) ('DPLRC') was designated the lead committee for scrutiny of the Bill at Stage 1. The Parliament's Standing Orders ([rule 9.17A](#)) allow the DPLRC to take a lead role in considering certain bills associated with SLC reports. This procedure was introduced to help with the rate of implementation of SLC reports.

A key requirement for a bill to be designated as an SLC Bill is that there must be a wide degree of consensus among key stakeholders about the need for reform and the approach recommended.³

Background to the Bill

Prescription sets time limits after which legal obligations will be extinguished. The current law is contained in the [Prescription and Limitation \(Scotland\) Act 1973](#) ('the 1973 Act').

There is no doubt that the law of prescription is a technical subject. However, equally, it is an important one in practice. A wide range of legal obligations, from a number of different policy areas, are affected by prescription.

Terminology

Prescription relates to legal obligations but it is important to remember that a person or organisation has the corresponding right. For example, when someone owes money (the obligation) another person or organisation has the right to receive payment of that debt (the right). The relationship between rights and obligations remains true even when the terms **right** and **obligation** are used in isolation from each other in this briefing.

Furthermore, there are two types of prescription - **positive** and **negative**. Positive prescription creates rights, negative prescription removes obligations (and corresponding rights). The Bill relates to negative prescription only - and is referred to simply as 'prescription' in this briefing.

Prescription should not be confused with the similar concept of **limitation**. Limitation also sets time limits. However, it does not completely remove a right, it just prevents a person raising court proceedings based on the right. It applies, for example, instead of prescription where there is a court action for damages for personal injuries. Limitation was recently reformed (for childhood abuse cases) via the [Limitation \(Childhood Abuse\)\(Scotland\) Act 2017](#).

Issues about prescription often come up in the context of court cases so some court-based terminology is useful too when considering the Bill. In Scotland the person starting court proceedings is usually called **the pursuer** (or **the claimant** in some contexts). The person on the other side is the **defender**.

The current law

Under the 1973 Act, some obligations are subject to **five year prescription** (section 6 and schedule 1). The **twenty year prescription** applies to all obligations other than those specifically excluded from it (sections 7 and 8). Some obligations are **never extinguished** by prescription (schedule 3).

Because the twenty year prescription is so long, it is usually the five year prescription which is relevant.

Both the five year and the twenty year prescriptive period begin **when an obligation becomes enforceable**.

For the obligation to pay damages, the **state of knowledge** of the person suing about the circumstances of the case is relevant in determining the start point (1973 Act, section 11(3)). The pursuer must know of the fact that they have suffered loss, injury or damage for the prescriptive period to start. Sometimes in cases associated with the construction of buildings the problem may not be detectable until years after that construction (so-called 'latent damage').

On the other hand, the twenty year period functions as a kind of **long stop** or **absolute cut-off** point. It takes no account of the person's state of knowledge, for example, whether they knew their legal right existed.

For both five year prescription and twenty year prescription the running of the relevant time period can be **interrupted**. One of the main ways this happens is by **starting court proceedings**. A new period of prescription begins to run from the date of interruption.

Twenty years and five years are the main time periods in the 1973 Act. However, two year prescription and ten year prescription apply to two specific types of obligation (1973 Act, section 8A and 22A).

Other statutes also provide specific prescription (and limitation) periods for certain types of obligation.

The policy behind prescription

Prescription exists to incentivise people to enforce their rights through the courts promptly, **without delay**. Delay causes the quality of evidence available in the court case to deteriorate. For example, witnesses may have died or be untraceable. Vital documents may have been destroyed.

Scots law also favours **legal certainty**. Prescription supports this by providing a point after which a person or organisation should be able to plan their affairs and resources knowing they will not face court proceedings.

Prescription can cause **harsh results in some individual cases**. The policy justification is that the public interest considerations discussed above should take priority over some difficult individual outcomes.

What the Bill would do

The Bill does not contain a comprehensive package of reforms. Instead the aim is to address **specific issues which have arisen in practice**. Key parts of the Bill are summarised below.

Five year prescription

Section 1-3

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

Section 3 of the Bill would extend the five year prescription to **all statutory obligations to pay money**. However, it also sets out **certain exceptions** which remain within the scope of twenty year prescription. These include ones relating to council tax and (reserved) social security benefits.

There were Stage 2 amendments relating to section 3, [considered later in this briefing](#).

Section 5

This important section relates to the **obligation to pay damages** (compensation). Section 5 sets out a new test in relation to what the pursuer would have to know about the circumstances of his or her case before the five year prescriptive period would start.

The new test departs from the line taken in the controversial 2014 UK Supreme Court case of [David T Morrison & Co Limited v ICL Plastics Ltd](#)⁴ ('the Morrison case'). This would benefit pursuers in certain types of cases.

On consultation, and at Stage 1, section 5 was **generally welcomed** by the construction and insurance industries and the legal profession that support these sectors.

Section 5 is considered in more detail in the [SPICe Bill Briefing](#)

Twenty year prescription

Section 6 and 7

These sections say the running of the twenty year period would **no longer be able to be interrupted**, for example, by starting court proceedings. However, there would be the possibility of **an extension** to twenty year prescription to allow litigation which has started (and was ongoing) to finish.

A technical issue was raised by the Faculty of Advocates during Stage 1 relating to section 7. This was [addressed by a Scottish Government amendment at Stage 2](#).

Section 8

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

The date of the last act or omission will never be later – and may sometimes be much earlier – than the date of loss or damage. To that extent this would benefit defenders.

Miscellaneous

Sections 10 and 11

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

Section 13

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

Consideration at Stage 1

For Stage 1 scrutiny the DPLRC took evidence at its meetings on:

- [Tuesday 20 March 2018](#) (Scottish Government's Bill Team/SLC) ⁵
- [Tuesday 27 March 2018](#) (legal profession) ⁶
- [Tuesday 17 April 2018](#) (academics; Royal Incorporation of Architects in Scotland) ⁷
- [Tuesday 24 April 2018](#) (welfare rights sector) ⁸
- [Tuesday 1 May 2018](#) (Minister for Community Safety and Legal Affairs) ⁹

The DPLRC published its [Stage 1 Report](#) ¹⁰ on 14 June 2018. As well as reporting on the general principles of the Bill, its consideration of the delegated powers in the Bill form part of this report (paras 295 to 298).

The [Finance and Constitution Committee](#) considered the [Financial Memorandum to the Bill](#). ¹¹ It issued a call for evidence, however, on receiving only [one response](#), ¹² the Committee agreed not to undertake any further consideration of the Bill.

The Stage 1 report

The key points of the DPLRC's [Stage 1 report](#) are as follows:

- The DPLRC **supported the general principles of the Bill**, noting that those that had given evidence at Stage 1 were generally content with these. It welcomed the increase in certainty that the Bill would provide to users of the law.
- The DPLRC wanted **the Scottish Government to further consider several issues in advance of Stage 2** (some of which are explained in later bullet points).
- The DPLRC recognised that the SLC had taken steps to consult with the welfare rights sector. However, the Committee observed that its scrutiny process seemed to have reached a different audience. In light of this, the DPLRC recommended that **the SLC review its consultation process**.
- The report acknowledged the range of views associated with **the exceptions in section 3 of the Bill**. These concerns focused on exceptions relating to council tax and business rates and certain (reserved) social security benefits and tax credits. **The Committee did not reach agreement on the appropriateness of these exceptions**.
- The DPLRC **supported section 5**, a key provision in the Bill on five year prescription (relating to the *Morrison* case). The DPLRC wanted clarification from the Scottish Government on how the new test in section 5 would work where more than one person was potentially responsible for the loss caused.
- The DPLRC was **convinced by the arguments in favour of section 8** of the Bill (which relate to a new start point for twenty year prescription).

- The DPLRC considered the interaction between **twenty year prescription and conveyancing cases**. It recommended that some associated issues might form part of the [Public Audit and Post-Legislative Scrutiny Committee's future work on land registration](#). The DPLRC also called on the Scottish Government to consider alternative remedies for conveyancing cases harshly affected by prescription.
- The DPLRC welcomed the Scottish Government's intention to consider, in advance of Stage 2, **a technical issue raised by the Faculty of Advocates** in relation to section 7 of the Bill.
- The DPLRC thought there was merit in the introduction of 'standstill agreements' (section 13). It welcomed the Minister's commitment to consider whether **additional safeguards were necessary** to protect the economically weaker person in the agreement. The DPLRC also acknowledged these safeguards might raise further issues, including **increased costs**.

Response to the Stage 1 report

The Scottish Government's [response](#) to the Stage 1 report¹³ was published on 21 June 2018. Key points in the response include:

- The Scottish Government provided **further detail on section 5** of the Bill and the situation where there was more than one person potentially responsible for the loss caused. (It confirmed that different prescriptive periods might run for different defenders.)
- At a future date, the Scottish Government will **publish guidance** designed for members of the public on the effect of prescription in conveyancing cases.
- If considered necessary, a **Scottish Government amendment** would be brought forward at Stage 2 in relation to section 7 of the Bill. This would address the Faculty of Advocates' technical point in relation to section 7.
- The Minister was **not persuaded additional safeguards were necessary** in relation to standstill agreements (section 13).

The Stage 1 debate

The [Stage 1 debate](#) took place on 27 June 2018. One of the main topics covered was the merits of some of the exceptions contained in section 3 of the Bill. Other topics touched on included the nature of the DPLRC's scrutiny of the Bill; the new approach in section 5 of the Bill and the SLC's consultation process.

Several DPLRC members commented that they had initially thought the Bill was technical in nature but had subsequently found the policy issues raised by the Bill interesting and important. Other members cautioned against going too far into the wider policy considerations raised by the Bill.

The general principles of the Bill were agreed to by the Parliament.

Consideration at Stage 2

The DPLRC debated the Stage 2 amendments at [its meeting](#) on 25 September 2018.

There were a small number of amendments focused on a couple of policy issues.

Section 3 of the Bill: the exceptions to the main rule

Section 3 of the Bill, which **alters the scope of five year prescription**, was the subject of amendments at Stage 2.

These amendments were the main focus of the debate at Stage 2.

Background

Under the current law five year prescription applies to those obligations on one statutory list and not to those obligations on a second statutory list (1973 Act, schedule 1, paras 1 and 2). If the obligation does not appear on the first list, the assumption is that it is only affected by twenty year prescription.ⁱ

For further detail on the lists, see the [SPICe Bill Briefing](#)

What the Bill says

Section 3 of the Bill attempts to simplify this part of the law and make it more principled.

Section 3 says five year prescription applies to **all statutory obligations to pay money**. Section 3 also sets out **exceptions** which would remain within the scope of twenty year prescription. These include:

- **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 statutory **child maintenance**
- sums recoverable under legislation relating to **(reserved) social security benefits and tax credits**, including the recovery of overpayments.

(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.)

ⁱ The twenty year period applies to all obligations, other than those specifically excluded from it by other provisions in the 1973 Act.

Reaction to the proposals

The exception for council tax and business rates and the exception for (reserved) social security payments and tax credits was considered in detail at Stage 1.

[COSLA](#) (along with [Society of Local Authority Lawyers and Administrators in Scotland](#)) **argued in favour of the exception for council tax and business rates**. For example, COSLA (who provided a detailed response to the DPLRC) said a five year prescription period would have "significant consequences financially and in terms of the social contract between citizens and their local authority area."¹⁴

On the other hand, the [Law Society of Scotland](#), [Govan Law Centre](#) and [Citizens Advice Scotland](#) argued the exception was **unfair for various reasons**. For example, Citizens Advice Scotland highlighted the potential difficulty for the debtor of trying to obtain bank statements to prove the debt had been paid after, for example, 15 or 18 years.¹⁵

In relation to the exception for (reserved) social security benefits, one of the key issues explored was the proposed divergence of approach in relation to reserved and devolved benefits in Scotland. **Five years** applies to **devolved benefits** (Social Security (Scotland) Act 2018, section 66) but, because of the proposed exception in the Bill, **twenty years** would continue to apply to **reserved benefits**.

For [Child Poverty Action Group](#), [Govan Law Centre](#) and [Citizens Advice Scotland](#) this divergence was undesirable, for reasons including unfairness to debtors¹⁶ and increased complexity.¹⁷ On the other hand, the [Department of Work and Pensions](#) (DWP), who also provided detailed written evidence to the DPLRC, argued in favour of the exception in the Bill. It said that five year prescription would reduce the DWP's ability to recover public money and could erode some of the safeguards it has in place to protect its customers from harsh or excessive recovery rates.¹⁸

Stage 1 Report recommendations and the Scottish Government response

As noted earlier in this briefing, the DPLRC **did not reach agreement** on the merits of these exceptions in its Stage 1 Report (recommendations 111 and 144).

The DPLRC agreed to **write to the thirty two local authorities** to ask for information about their outstanding council tax and business rates debts (recommendation 112). In this regard, see [the collated responses](#).

In its [response to the Stage 1 Report](#), the Scottish Government made various points in relation to the exception for council tax and business rates. For example, as it had done at Stage 1,¹⁹ it supported the exception as maintaining "the generally understood status quo".^{ii 20} The Minister also commented:

ii The SLC covered this point in its [Report on Prescription](#) (at para 2.29). It said that, while it is generally assumed that taxes payable to local authorities fall within the scope of twenty year prescription, there is no decided case on this point. Therefore it was "at least possible" that they are in fact within the scope of the five-year prescription.

“ Local taxes are a vital source of income for local authorities, in the same way that other taxes are vital sources of income for the Scottish and UK Governments and, as the SLC recommended, I would not wish to differentiate the treatment of local taxation obligations from all other tax obligations.”

Scottish Government, 2018²¹

(The DPLRC did not ask the Scottish Government to comment further on the exception for benefits and tax credits and so it did not cover this topic in its response.)

Stage 2 amendments

| Purpose of amendment | Result |
|--|--|
| <p>Amendments 3 and 4, in the name of Mark Griffin MSP, would have removed the exception for certain (reserved) social security benefits and tax credits from section 3.</p> <p>This would have meant that, under the new regime, five year prescription applied to relevant debts, not twenty year prescription.</p> | <p>Amendment 3 was moved and, no member having objected, withdrawn.</p> <p>Amendment 4 was not moved.</p> |
| <p>Amendments 5, 6 and 7, in the name of Neil Findlay MSP, would have removed the exception for council tax from section 3.</p> <p>Five year prescription would have applied to relevant debts, instead of twenty year prescription.</p> | <p>Amendments 6 and 7 were disagreed to by division.</p> <p>Amendment 5 was moved and, no member having objected, withdrawn.</p> |

Section 7 of the Bill: interruptions and extensions

Section 7 of the Bill was the subject of a technical amendment at Stage 2.

Background

At present, the time period associated with twenty year prescription can be **interrupted**. This includes by someone starting court proceedings (and various other types of proceedings) in respect of the obligation in question. These proceedings are known as a **relevant claim** (1973 Act, sections 7 and 8).ⁱⁱⁱ

Once interrupted, the twenty year period has no opportunity to restart from the same point. Instead an entirely new twenty year period starts from the date of the interruption.

What the Bill says

The Bill contains a new approach to **interruptions to twenty year prescription** (sections 6 and 7).

ⁱⁱⁱ The twenty year prescription set out in section 7 of the 1973 Act (which was not the subject of Stage 2 amendments) can also be interrupted by the debtor acting in such a way as to show he or she believes the debt still exists ('a relevant acknowledgement').

Section 7 of the Bill focuses on the twenty year prescription which applies to **certain property rights** relating to land and buildings. These property rights include servitudes – specific rights over a neighbour’s land, such as rights of way.

Section 7 of the Bill says this type of prescription would **no longer be able to be interrupted** by a relevant claim.

Section 7 also describes what should happen if court proceedings have been started but not finished when the twenty year period ends. Specifically, it says **the twenty year period can be extended** until the legal claim has been finally disposed of and there is no possibility of further appeal (sections 7 and 12).

Reaction to the proposals

The general idea that twenty year prescription should not be able to be interrupted was well received at Stage 1, as it had been during earlier consultation on the proposals.

However, the Faculty of Advocates said the part of section 7 relating to a possible extension of the twenty year period would **not work well for property rights such as servitudes**. This point relates to how different types of court order are treated by the law of prescription.

Sometimes when a court grants an order at the end of a successful court action, such as one ordering someone to pay a sum of money, this court order takes the place of the original source of the obligation to pay the money. Consequently, this new obligation has its own twenty year prescriptive period which starts to run from the date of the order.

This is not the case with other types of court orders, including those recognising the existence of a servitude. Consequently, for servitudes (under section 7) the Faculty said a court might declare that a servitude existed, only for that right to be extinguished (by prescription) at the end of the court action.^{22 23} Dr Eleanor Russell, a legal academic, agreed with the Faculty's analysis.²⁴

Stage 1 Report recommendations and the Scottish Government response

The **Scottish Government** acknowledged the Faculty of Advocates' concerns during Stage 1.

In its [Stage 1 Report](#) the DPLRC welcomed the Scottish Government’s intention to consider them in advance of Stage 2.

In its [response to the Stage 1 Report](#) the Scottish Government committed to bringing forward a relevant amendment at Stage 2 (should it decide one was necessary).

Stage 2 amendment

Scottish Government **Amendment 1** (to section 7 of the Bill) covers the situation when someone is successful in court proceedings associated with recognising **certain types of property right**. For example, when someone obtains a court order which declares a servitude right exists.

Amendment 1 says that the property right is to be treated as having been exercised or enforced when the claim was made (in court). As a result, a **new twenty year prescriptive period would run from this point**, preventing the scenario described the Faculty of Advocates.

The amendment was agreed to without division.

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