



Law Society  
of Scotland

# Consultation Response

Scottish Law Commission call for views on the draft  
Prescription (Scotland) Bill

March 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest,<sup>1</sup> a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Scottish Law Commission's call for views on the draft Prescription (Scotland) Bill. This response has been prepared on behalf of the Law Society by members of our Obligations Law Sub-Committee.

## General Comments

We are wholly supportive of the Scottish Law Commission's review of this area of law. For many years in Scotland we consider that parties have been exposed to unnecessary legal costs due to the absence of standstill agreements and therefore the need for protective proceedings to be raised. This, and other issues, has been exacerbated by the UK Supreme Court decision in *David T Morrison & Co Ltd v ICL Plastics Ltd*,<sup>2</sup> which has led to considerable uncertainty surrounding the commencement date for prescriptive periods. It seems to us that many actions are currently being raised to avoid a time-bar argument that could otherwise be dealt with out of court.

In our previous submission<sup>3</sup> we considered that there is much wasted time and expense in raising protective proceedings against parties which would be unnecessary were the starting date for the

<sup>1</sup> Solicitors (Scotland) Act section 1

<sup>2</sup> [2014] UKSC 48, 2014 SC (UKSC) 222

<sup>3</sup> <https://www.lawscot.org.uk/media/852290/obl-slc-discussion-paper-on-prescription.pdf>

prescriptive period clearer and an ability to postpone the period by use of standstill agreements. Currently the costs are borne by commercial parties, individuals' insurers and the public purse by the use of judicial resources.

## **5 year negative prescription**

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We support sections 1 to 5 for the reasons set out below; more detailed commentary can also be found in our previous response.<sup>4</sup>

### **S1 Obligations to pay damages and delictual obligations**

The Law Society welcomes the amendment to Schedule 1 of the 1973 Act to include obligations arising from delict. In our previous response we noted that this was the logical approach to ensure that causes of action would not persist when a party had arranged their affairs because they believed the claim had prescribed.

### **S2. Obligations related to contract**

We support the inclusion of rights and obligations in Schedule 1 of rights and obligations relating to the validity of a contract.

### **S3. Statutory obligations**

This section appears to strike a fair balance in response of the recovery of statutory debts.

In our previous response we supported the view that the 1973 Act should be the default position in the absence of alternate statutory provision and that it should provide for rights and obligations arising under statute to prescribe under the five-year prescription.

We also concluded that while there might be political reasons for excluding eg council tax or business rates, we could not see any logical or legal reason by that ought to be the case. We are therefore content that these have been included within the five year negative prescription period under the bill.

<sup>4</sup> See above

## Section 4 Effect of fraud or error on computation of prescriptive period

In our previous response we supported amending section 6(4) so that the prescriptive period would not run against a creditor not to raise proceedings, regardless of whether the debtor had done so innocently or otherwise.

### S5 Start Point of prescriptive period for obligations to pay damages

We support the replacing “act, neglect or default”, with the words “act or omission” which we consider to be a clearer formulation.

We welcome the alteration of subsection (3) and alteration of subsection (3A) which produces a fairer and more logical result than the current law. The bill therefore would remedy the situation where the potential claimant was not aware of one of the three key elements which would need to be known for a claim to succeed. In practical terms the absence of any one of those - the defender, the awareness of loss and awareness of act or omission - would make drafting an action problematic.

## 20-year negative prescription

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Sections 6 to 8 provide a genuine long stop to prescriptive period and would deal with the mischief identified in the original discussion paper.

### S6 Extinction of obligations by prescriptive period of 20 years

We welcome the introduction of the rule that a relevant claim or acknowledgement should not re-start the prescriptive clock.

In our previous response we raised concerns that disposal of the case would be unclear unless clarification were given as to the precise meaning of the term. We posed the following questions in our previous response:

- Would ‘disposal’ mean final order of the court, or expiry of any appeal period against that final order?
- If it is intended to keep the claim live only for the duration of the proceedings, would provision be made for inadvertent disposal such as by failure of representation resulting in decree in absence?

We consider that the elaboration of the term ‘final disposal’ under section 12, as currently drafted, satisfies this requirement for clarity as to the meaning of ‘final disposal’ and welcome the resulting clarity as to when the period comes to an end.

## **Section 7 Extinction of rights relating to property by prescriptive period of 20 years**

See comments on section 6

## **Section 8 Start point of prescriptive period for obligations to pay damages**

We supported the view that the starting date for the long-stop prescriptive period should be the date of the offender's act or omission or the last such date where more than one occurred.

We noted in our previous response that a difficulty might arise with designating the starting date as the defender's (last) act or omission in cases of ongoing breach.

We agree that it should not matter whether the creditor is aware that the act or mission that caused the loss, injury or damage is actionable in law.

## **Miscellaneous**

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**Sections 9-12 clarify the law on the implications of interruption and will assist in resolving the existing questions on that.**

### **S9 Saving for other statutory provisions about prescription of limitation**

We have no concerns with this provision.

### **S10 Definition of "relevant claim"**

We have no concerns with this provision.

### **Section 11 Prescriptive periods under sections 6 and 8A: interruption by relevant claim**

See above.

### **Section 12 Definition of "final disposal" of relevant claim**

We welcome the clarification of the definition of final disposal. See also comments on section 6.

### **Section 13 Restrictions on contracting out**

This section deals in what appears to be an effective way with the absence of standstill agreements which should reduce the requirement to raise protective proceedings.

## **S 14 Burden of proof**

Section 14 provides helpful clarity in the burden of proof in various scenarios although we are not aware of the burden of proof having caused a particular issue in practice under the current law. In our previous response we stated a provisional view that the burden of proof should continue to rest on the pursuer (as the default position) but with the option of asking the court to consider the defender to lead in appropriate cases.

**We have no particular comments on sections 15 to 17.**

**For further information, please contact:**

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