

Prescription (Scotland) Bill

Financial memorandum

Introduction

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Prescription (Scotland) Bill ("the Bill"), introduced in the Scottish Parliament on 8 February 2018.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 26-EN);
- a Policy Memorandum (SP Bill 26-PM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 26-LC).

3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament. Further information and detail on the likely impact of the Bill on business is set out in the Business Regulatory Impact Assessment as published by the Scottish Law Commission.¹

4. The doctrine of prescription serves a vital function in the civil justice system. Negative prescription sets time-limits for when obligations (and rights), such as obligations under a contract, are extinguished. The policy objective of the Bill is to change the law of negative prescription to address certain issues which have caused or may cause difficulty in practice. These changes are designed to increase clarity, certainty and fairness as well as

¹https://www.scotlawcom.gov.uk/files/4414/9978/5372/Business_and_Regulatory_Impact_Assessment_-_Report_on_Prescription_Report_No_247.pdf

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promote a more efficient use of resources, (such as pursuers being less likely to require to raise court proceedings to preserve a right), and reduced costs for those involved in litigation and insurance.

5. This financial memorandum refers to creditors (those holding rights) and debtors (those subject to a correlative obligation). Scots law, like many legal systems, recognises that it is fair, in certain circumstances, for a creditor to lose a legal right with the passage of time. Prescription is justified by a number of policy considerations. There are clear benefits to bringing actions early; in particular delay may adversely affect the quality of justice. Evidence may deteriorate or be lost, including witnesses dying or becoming incapacitated. It may be unfair for a debtor to have an action raised against them long after the circumstances that gave rise to it having passed. It is reasonable that debtors should be able to organise their affairs and resources on the basis that, after a definite period of time, their obligation is extinguished. The public interest also lies in disputes being resolved as quickly as possible. Considerations of legal certainty justify, as a general rule, a cut-off beyond which obligations are extinguished and therefore claims may not be litigated. Prescription is an essential part of balancing individual interests on one hand and serving the wider public interest on the other. This means that there will be individual cases where prescription appears to operate harshly to extinguish a creditor's right, however, in the wider interests of fairness, justice and certainty, prescription needs to strike a fair balance overall.

6. The Bill implements the recommendations contained in the Scottish Law Commission's Report on Prescription (SLC No 247) which was published in July 2017.² The Bill amends the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

The Bill

7. By way of an overview, the Bill will:
- extend the scope of the five-year prescription in a number of respects (sections 1 -3);

² Scottish Law Commission Report on Prescription, December 2017
https://www.scotlawcom.gov.uk/files/3414/9978/5138/Report_on_Prescription_Report_No_247.pdf

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- reform the so-called discoverability test in section 11(3) of the 1973 Act relating to the state of knowledge of a creditor in cases of latent damage (section 5);
- set the start date of the 20-year prescriptive period in relation to claims for damages as the date of the act or omission giving rise to the claim (section 8);
- ensure that the 20-year prescriptive periods are not amenable to interruption (sections 6 and 7);
- allow parties to agree an extension to the five-year prescription period and the two-year prescription periods but only for a limited period and subject to certain other conditions (section 13);
- clarify that the burden of proof as to whether a right has prescribed or not falls on the creditor (section 14);
- makes other miscellaneous changes to the law on negative prescription (remaining sections).

Financial implications

8. There are no notable financial or resource implications. Those pursuing or defending claims for the enforcement of an obligation or right will have the benefits of increased certainty, clarity and fairness and a more efficient use of resources (such as pursuers being less likely to require to raise court proceedings to preserve a right), and reduced costs for those involved in litigation and insurance. Creditors will be less likely to require to launch protective writs; correspondingly, debtors will be less likely to have to incur costs in investigating claims, intimating them to insurers and seeking legal advice in relation to claims that turn out to have no merit.

9. Increased clarity on how and when negative prescription applies to a creditor's right or a debtor's obligation is likely to reduce the number of disputes and consequential litigation and it will enable professional advisers to advise their clients more clearly. Parties will be able to agree that prescription would not run for a specified period while the parties carry out further investigations and seek to negotiate an end to their dispute. Such agreements could prevent the need for arbitration or litigation, and the consequent use of resources which resort to such procedures involves. Insurers too will benefit from the increased clarity which will enable them to offer policies for appropriate periods at appropriate premiums.

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10. Since one of the effects of the Bill is to expand the range of rights and obligations to which prescription applies, it might have an adverse effect on creditors who do not act in time to save their rights from prescription. Since the Bill also postpones the start of the prescriptive period in certain circumstances, there may be an adverse effect on debtors who are exposed to possible claims for longer than they would previously have been. These effects can be mitigated by allowing a suitable interval to elapse before commencement, so that creditors and debtors are prepared for the change in the law and, where possible, can take steps to protect their positions. The key consideration has to be that the system overall achieves a fair balance and takes account of the general public interest which the Bill achieves.

Costs to the Scottish administration

11. The proposals are not thought to have the potential to result in any costs to the Scottish Administration other than those associated generally with the enactment of any new legislation, for example, printing and publication and these are regarded as routine running costs rather than being attributable to the Bill. Provisions in section 3 which set the scope of the five-year prescription period exclude obligations to pay tax from the five-year prescription regime which will otherwise catch statutory obligations to make payments. This maintains the current position for Revenue Scotland (which forms part of the Scottish Administration) in relation to recovery of tax and no impact is therefore expected as a result of this reform.

Costs on local authorities

12. The Scottish Government does not anticipate any costs related to the proposals to be borne by local authorities. On the contrary, where local authorities find themselves involved in litigation, they are likely to benefit from the increased clarity and certainty that the changes in the Bill will bring, thereby allowing them to use their resources more efficiently. Provisions in section 3 of the Bill which set the scope of the five-year prescription period excludes obligations to pay council tax and business rates from the five-year prescription regime. This maintains the current position and no impact is therefore expected on local authorities as a result of this reform.

Costs on other bodies, individuals and businesses

13. No significant cost implications are anticipated to result from the commencement of the Bill, other than the costs which will be borne by law firms in making their staff aware of the changes to the law affected by the Bill. However, these types of cost result from any reform of the law. In the case of the Bill, the Scottish Government believes that these costs would be very small.

14. The Bill puts forward a package of reforms that does not single out any particular sector or group, nor does it exclusively favour creditors or debtors. The Bill is capable of impacting upon any person or body in Scotland (including professional advisers and the courts) involved in the enforcement of an obligation or right where there are issues of how the law on negative prescription applies. In relation to claims for latent damage, the Bill amends section 11 of the 1973 Act to postpone the start of the prescriptive period until the creditor knows (actually or constructively) of the facts (a) of the loss, (b) the act or omission that caused it, and (c) the identity of the person that caused it. The aim here is to address the balance of fairness as between creditors and debtors. The principal sectors likely to be affected would be architects, surveyors, engineers, builders and similar professionals. Solicitors, accountants and others who give advice which may have consequences for their clients years after the advice was given may also be affected. Public utilities and the insurance industry would be affected too. As noted above, since one of the effects of the Bill is to expand the range of rights and obligations to which prescription applies, it might have an adverse effect on creditors who do not act in time to save their rights from prescription. Since the Bill also postpones the start of the prescriptive period in certain circumstances, there may be an adverse effect on debtors who are exposed to possible claims for longer than they would previously have been. These effects can be mitigated by allowing a suitable interval to elapse before commencement, so that creditors and debtors are prepared for the change in the law and, where possible, can take steps to protect their positions. The key consideration is that the system overall achieves a fair balance and takes account of the general public interest which the Bill achieves.

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