

Final Business and Regulatory Impact Assessment

Title of Proposal

Prescription and Title to Moveable Property (Scotland) Bill ("**the Bill**")

Purpose and intended effect

• Objectives

The passage and implementation of the Bill would implement the recommendations contained in the Report by the Scottish Law Commission ("**SLC**") on Prescription and Title to Moveable Property (Scot Law Com No 228, 2012).

Its objective is to replace the present, unclear, law in relation to the effect of the passage of time on the ownership of corporeal moveable property with a clear and principled statutory regime.

The Bill proposes to make the following changes to the law:

- The existing, uncertain, law in relation to both positive and negative prescription of corporeal moveable property will be repealed;
- Ownership of corporeal moveable property will no longer be lost by negative prescription;
- There will be a new 20 year positive prescription rule for corporeal moveable property. Under this rule a person will become owner of a corporeal moveable after possessing it for 20 years in good faith;
- Separately, where no party has asserted ownership of a corporeal moveable for 60 years it will become owned by the Crown, (but the Crown will have the right to disclaim such property, as at present);
- Where a corporeal moveable has become owned by the Crown under the 60 year rule outlined above, no party may acquire title to it under the 20 year positive prescription rule;
- Where a corporeal moveable is abandoned it will become ownerless, but a finder of the property will – as at present – only gain title to it by means of the procedures outlined in Part VI of the Civic Government (Scotland) Act 1982 ("**the 1982 Act**"). So, for example, a finder of a corporeal moveable must first hand the corporeal moveable into the police in accordance with the provisions of the 1982 Act;
- A new rule will be introduced whereby when a corporeal moveable is lent by a first party to a second party and (a) the first party does not assert his ownership for 50 years and (b) the second party is no longer able to contact the first party, the second party may acquire title to the corporeal moveable. This rule does not apply where the lent property is owned by the Crown under the 60 year rule.

• Background

The law of prescription in Scotland exists to create and extinguish rights and obligations

through the passage of time. Its function is to provide certainty. There are two types of prescription – positive (also known as acquisitive) and negative. With positive/acquisitive prescription the running of time creates a right and with negative prescription the running of time extinguishes a right or obligation.

The present law, so far as relating to the ownership of corporeal moveable property (i.e. physical objects other than land), is unclear.

It is likely that the effect of s.8 of the Prescription and Limitation (Scotland) Act 1973 ("**the 1973 Act**") is to extinguish ownership of corporeal moveable property after 20 years of non-possession. Any such property would fall to the Crown by virtue of the common law rule that unowned property becomes the property of the Crown.

It is not certain whether Scots law presently allows ownership of corporeal moveable property to be acquired by positive prescription. There is common law authority (albeit highly uncertain) which suggests that possession of moveable property for 40 years creates a right of ownership. The better view is probably that no such right exists; but one cannot say with certainty.

The result of this legal uncertainty is practical uncertainty as to who is the owner of certain items of corporeal moveable property. This is particularly relevant to property which is long-lived, and whose value persists or increases with time, including works of art and objects in museum collections. A lack of certainty as to ownership may decrease the marketability of such items or, in the case of museum collections, provide a disincentive to investing resources in the cataloguing, preservation and display of items which the museum may not own.

In this area Scots law contrasts unfavourably with many other European countries which already have clear rules on prescription of moveable property.

- **Rationale for Government intervention**

The objectives can only be achieved by legislation in the Scottish Parliament.

When the SLC consulted on its Eighth Programme of Law Reform ("**the Eighth Programme**"), consultees offered substantial support for reform of this area of law to be considered.

The original rationale for including the project in the Eighth Programme was that there was a gap in this area of Scots law stemming from the uncertain nature of the existing law. Further, as the project progressed and the SLC carried out in-depth comparative research into this area, it became clear that Scots law was deficient in relation to most (if not all) other European legal systems – including England and Wales - by not having clear, distinct or equivalent rules on prescription of corporeal moveable property. The sum effect of this is that reform is required to create legal certainty in this area of law.

By increasing certainty of ownership for possessors, buyers and sellers of long-lived corporeal moveable property, the Bill, if passed would help contribute to the Scottish Government's "Wealthier and Fairer" strategic objective.

Consultation

Consultation was carried out in accordance with the SLC's established practice in conducting law reform projects.

In December 2010 the SLC published a Discussion Paper on 'Prescription and Title to Moveable Property' ("**the Discussion Paper**"). The Discussion Paper was circulated to individuals and bodies which the SLC had identified as having a likely interest in the project, and was freely available on the SLC's website. It sought the views of interested stakeholders on 23 substantive policy proposals and questions. The consultation was open for 14 weeks. A total of 21 stakeholders submitted responses to the 2010 Discussion Paper.

Prior to the publication of the Discussion Paper the SLC set up a consultation advisory group ("**the Advisory Group**") consisting of 5 legal and antiquarian experts. Ongoing discussions and opinions on areas of policy and law were exchanged with the Advisory Group at various stages before, during and after the publication of the Discussion Paper. This 'advisory group' method of pre-consultation discussion is used on most law reform projects to ensure that the content of consultations benefits from a range of opinions before it is published for wider public consultation.

During the consultation period the SLC also held a symposium on the project (in association with Edinburgh University) at which a number of property law experts presented papers on the project. A number of consultees, as well as other interested parties, attended this symposium. A critique was offered of the SLC's proposal, together with a sharing of ideas. The symposium helped gather consultee views and formulate the SLC's policy in relation to the project.

Almost all consultees were in favour of reform of the law and, in particular, the introduction of a rule on positive prescriptive of corporeal moveable property. No consultees, other than a single Court of Session Judge, were opposed to the option of reform of the law. Certainty and bridging the current gap in the law were routinely given as positive reasons for reform.

- **Within Government**

The SLC received a response to the Discussion Paper from the Queen's and Lord Treasurer's Remembrancer ("**the QLTR**"). The QLTR is responsible for property (including corporeal moveable property) that has fallen to the Crown. As the Crown representative closest to the practical effects of this area of law (in particular treasure trove), detailed discussions with the QLTR were necessary. The SLC had ongoing correspondence with the QLTR which helped to formulate the policy underlying the Bill, particularly in relation to treasure trove. Rules dealing with this area are now expressly included in the Bill.

- **Public Consultation**

The Discussion Paper was open for general public consultation, and freely available on the SLC website. No responses to the consultation were received from members of the general public (other than those in their capacity as legal academics, students or practitioners). This may reflect the nature of the topic (being one which is likely to have less effect on the general public than it will have, for example, on the Crown or Museums & Galleries sector).

The preponderance of consultation responses (12 in total) were received from legal academics or practitioners. This helped the SLC to formulate policy in relation to difficult areas such as legal rules relating to cultural property.

- **Business**

Prescription and title to corporeal moveable property is not an area with which business in general is likely to be overly concerned. However, as noted above, many objects of corporeal moveable property (particularly artefacts and artwork) are long-lived and through time have increased in value.

In relation to this a response to the Discussion Paper was received from the Art Loss Register. The Art Loss Register is an online-based service where users can (a) register items or artwork which have been stolen or (b) carry out a search to check whether an item they are purchasing has been registered as stolen. Although essentially a private enterprise, the Art Loss Register is seen by many in the art world as providing an essential service in combating and preventing the proliferation of stolen artwork. The proposals in the Bill do not make any express provision for cultural property (a class of which most pieces of artwork are considered to be) and it is not anticipated that any of the proposals in the draft Bill will have an impact on the business or operation of the Art Loss Register or other similar ventures.

Seven responses to the Discussion Paper were received from bodies such as museums and galleries (or representatives of such). As this formed a third of all consultees, this indicated to the SLC that any proposals would have an important impact on this sector. In response to this the SLC met with a representative of Museums Galleries Scotland (the membership body for all museums and galleries in Scotland) to seek further views on the proposals.

Options

Option 1 – Do nothing

Under this option the draft Bill would not be introduced and the existing rules in relation to negative prescription and positive prescription of corporeal moveable property would remain. The uncertainty outlined above would persist and the benefits discussed below would not be realised.

Option 2 – Introduce the draft Bill

Under this option the recommendations outlined in the Report and implemented through the draft Bill would be introduced, realising the changes to the law listed under "Objectives" above.

- **Sectors and groups affected**

The Bill will effect a change in the general law of property in Scotland. In theory it would be capable of impacting upon anyone in Scotland, since almost everyone in Scotland owns or possesses corporeal moveable property in some form or another. The principal sectors affected, however, will be the Crown and the museums/galleries sector.

The Crown, and in particular the QLTR, will be affected by the abolition of the effect of the *quod nullius est fit domini regis* rule inasmuch as abandoned corporeal moveable property will no longer fall to the Crown. However, the SLC's understanding, following discussions with the QLTR, is that it was normally only in respect of treasure trove that the Crown actually claimed its title to abandoned corporeal moveable property. So far as treasure trove is concerned, the Crown's position will be protected by the introduction of the new 60 year prescriptive period in favour of the Crown. Moreover, the Bill will not

affect the Crown's right to treasure trove which vests prior to its coming into force. The effect of the abolition of this rule will therefore be minimal.

The museums/galleries sector will be the sector most affected by the draft Bill, in particular the introduction of the new rule relating to lent property. It is anticipated (from the indications given during consultation) that this sector will benefit both financially and legally from the increased certainty of title that the new rule will bring to objects lent to this sector.

- **Benefits**

Option 1

Option 1 brings with it no benefits. The law in relation to prescription of corporeal moveable property will remain unclear and certain sectors will continue to suffer from the uncertainty of title that the current law creates. The Crown will continue to gain title to property which it does not want.

Option 2

The main benefit that option 2 would bring would be the legal certainty of a modern statutory scheme. As underlined at various points during this assessment, the current law is unclear as to whether title to corporeal moveable property can be gained through positive prescription or indeed lost by negative prescription. Option 2 would clarify the legal framework, removing any uncertainty.

Option 2 would also bring benefit, in particular to the museums/galleries sector, through the new rule on lent property. This would bring certainty of title to items which had been lent or deposited with, for example, museums but where the original owner had disappeared. There would be associated cost and time (i.e. time not having to be spent by museums attempting to track down the original owner) savings for this sector.

- **Costs**

Option 1

Option 1 would have no cost implications. However with the law remaining in an uncertain state there may be future costs in the form of litigation required to resolve disputes.

Option 2

It is not anticipated that there would be any significant cost implications with the introduction of option 2. Implementation of the Bill would not require any financial input, nor would the change in law cause any increases in costs in this area. There may in fact be incidental cost savings in that there would be no litigation required to test what the law is.

The Crown rights in relation to property such as treasure trove are preserved, and so no cost implications would arise in this area.

Scottish Firms Impact Test

No Impact Test was carried out. The proposals bridge a gap in the existing law and are

of general effect. It is therefore anticipated that they will bring benefits to all parties - both members of the public and businesses - as opposed to one particular sector, market or industry. Further, it is not anticipated that the proposals will have any significant cost implications for any markets or industries. The Discussion Paper specifically asked consultees for information as to the value of the property held by them where the legal title is presently uncertain. The Discussion Paper also asked consultees for their assessment of the risk and likely cost of dealing with any dispute which might arise as to their ownership of such property. No consultee felt able to supply such information. Nor did any consultee suggest that the proposals in the Discussion Paper were likely adversely to affect their business.

Competition Assessment

It is not anticipated that the Bill would have any impact upon competition.

- There are no markets which will be particularly affected by the proposals. The proposals apply to all individuals, bodies and businesses in Scotland. Similarly, there are no products which will be particularly affected by the proposals. The proposals apply to all corporeal moveable property in Scotland.
- The proposals will not introduce any restrictions on competition in any markets.
- The proposals have no effect – directly or indirectly - on the limit or range of suppliers of any moveable property. They do not, even indirectly, have the effect of awarding exclusive rights to any suppliers. They have no effect on procurement rules.
- The proposals have no effect on the ability of suppliers to compete, nor do they have any effect on the channels used or geographic areas in which suppliers can operate.
- The proposals do not reduce the incentive of suppliers to compete in any way. They have no effect – either positive or negative – on exchange of information in relation to prices, costs, sales or outputs.
- In summary, the proposals do not – either directly or indirectly - have the effect of distorting competition.

Test run of business forms

The Bill prescribes no new business forms and therefore there is no requirement to carry out a test run.

Legal Aid Impact Test

It is not anticipated that the proposals in the Bill will have any impact on legal aid or the legal aid fund.

Enforcement, sanctions and monitoring

The Bill does not require public enforcement and imposes no sanctions.

Enforcement of the rules contained in the Bill would be by means of private litigation by the affected parties, in the same way as under the present law.

Implementation and delivery plan

The coming into force of the Bill (if passed by Parliament) will be delayed by three years from the date of Royal Assent to allow parties (1) to enforce title to any corporeal

moveable property which may be in danger of being lost by prescription; and (2) to formalise any arrangements as regards lent/deposited property. A delay of three years is the same timescale used by the 1973 Act and is deemed sufficient to allow parties to set their affairs in order.

Post-implementation review

The operation of the reformed law will be kept under review by the Scottish Law Commission as part of its ongoing consideration of the need for law reform, as reflected in its 5-yearly programmes of law reform.

Summary and recommendation

Dismiss Option 1

Option 1 is to maintain the status quo and introduce no new legislation. This would leave the current law (outlined above) in an uncertain state. It is submitted that this is not a desirable outcome.

Recommend Option 2

It is recommended that option 2 – introduction of a new Prescription and Title to Moveable Property Bill – be adopted, for the various reasons outlined above.

Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

James Dundas Young

Acting

Chairman, Scottish Law Commission

Date: *16th April 2012*

Scottish Government Contact point:

