

PREScription (SCOTLAND) BILL

INFORMAL CONSULTATION ON WORKING DRAFT 1 MARCH – 31 MARCH 2017

Introduction

1. The Scottish Law Commission's project on aspects of the law of prescription is in its final stages. Following the feedback on the suggested policy set out in the Discussion Paper which was published in February 2016, we are currently adjusting a draft Bill which, if implemented, would give effect to that policy. A working draft of that Bill has been posted on our website, with explanatory notes, to seek any further views of consultees before the draft Bill is finalised and published with a report this summer. Whilst most of the policy remains as set out in the Discussion Paper, the Commission has developed its thinking in certain respects and draws these developments to your attention below. It has also adopted a suggestion made by a respondent on a technical aspect of the law of prescription which was not dealt with in the Discussion Paper. We would very much welcome your views on these or any other points covered by the draft Bill by **31 March**.

2. *Please note that* information about the current consultation, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may also (i) publish responses on our website (either in full or in some other way such as reformatted or summarised); and (ii) attribute comments and publish a list of respondents' names. For further details on the project please see our project page.

Five-year prescription

3. Sections 1-5 of the draft Bill deal with the five-year prescription provided for in section 6 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), as read with schedule 1 of that Act. Only if an obligation falls within the scope of paragraph 1 of schedule 1 of the 1973 Act, and is not excluded by anything in paragraph 2 of that schedule, is it potentially subject to the five-year prescription. We would draw to your attention section 3 of the draft Bill which deals with statutory obligations to make a payment.

Statutory obligations to make a payment

4. The proposal put forward in the Discussion Paper, and supported by respondents, was that, as a default rule, the 1973 Act should provide that rights and obligations *of all kinds* arising under any enactment should prescribe under the five-year prescription. The potential breadth of such an addition, particularly in the context of public-law duties, has however caused us to reconsider. We have concluded that our initial proposal was too broad. Whereas it is defensible in the context of private-law rights and obligations that happen to have a statutory rather than common-law basis, we are concerned that it might result in a risk of that policy encroaching onto the limitless statutory powers and duties that arise in the public sphere. Accordingly, we have concluded that this provision should be limited to statutory obligations to make a payment. We think that this would still be a valuable reform.

5. Section 3 of the draft Bill brings within the scope of the five-year prescription all statutory obligations to make a payment in so far as they neither fall within any other sub-

paragraph of paragraph 1, nor are excluded. There would be no effect on statutory obligations to make a payment which are subject to their own statutory provisions on time-limits. A statutory obligation to make a payment should be interpreted broadly so as to include any statutory obligation to pay something or to repay something. For example, this would include obligations to repay sums recoverable under Part 3 of the Social Security Administration Act 1992.

6. Subsection (3)(b) sets out further exceptions to the application of the five-year prescription. Obligations to pay taxes and duties recoverable by HM Revenue and Customs and Revenue Scotland, and any relative interest or penalty, will not be subject to the five-year prescription. As observed in the Discussion Paper, this reflects the current law as interpreted by the courts. Such an exception also exists in English law by virtue of the Limitation Act 1980, section 37(2)(a). Similarly, an exception is made for obligations underlying proceedings for forfeiture under the customs and excise Acts or for forfeiture of a ship. Again, this aligns Scots law with the equivalent English law, namely the Limitation Act 1980, section 37(2)(b) and (c).

7. *Council tax and business rates:* Although it is not a change in policy from that set out in the Discussion Paper, we would point out that there is no exception in the draft Bill in relation to obligations to pay council tax and business rates as it is considered that there is no valid policy reason to make such an exception. Such obligations, as statutory obligations to make a payment, would be subject to the five-year prescription in terms of the draft Bill. This would be a change in the law which would bring Scots law into line with the law in England and Wales where such obligations are extinguished after 6 years (which is the period of limitation in English law equivalent to the five-year period of prescription in Scots law).

20-year prescription

Ensuring a true long-stop

8. Sections 6 to 8 of the draft Bill make provision in relation to the 20-year prescription in sections 7 and 8 of the 1973 Act. The current approach allows what should be “long-stop” measures to be perpetuated; the periods of prescription can be interrupted and, if that occurs, a new prescriptive period of 20 years begins. This is contrary to one of the key characteristics of a long-stop prescription which is that it should cut off a right of action clearly and absolutely after a defined period. The Discussion Paper, in relation to section 7, proposed that the 20-year period of prescription should not be capable of interruption by a relevant claim or relevant acknowledgment; and where a relevant claim is made during the prescriptive period, that that period should be extended until such time as the claim is disposed of finally. This was supported by respondents and is provided for in section 6 of the draft Bill. Although it was not proposed in the Discussion Paper, for consistency, section 7 of the draft Bill sets out the same approach in relation to the other 20-year period of negative prescription for which the 1973 Act provides (in section 8), namely that regarding the extinction of other rights relating to property.

9. The Commission has developed its thinking further. For completeness and clarity, both section 6 and 7 of the draft Bill provide that, in the situation where a relevant claim has been made within the prescriptive period but has not been determined by the end of that period with the result that “final disposal” has not yet occurred, the prescriptive period will come to an end on the date on which the proceedings in which the claim is made come to an end. See the draft Bill, section 6(2) and new (3)(b)(ii) and (4)(b), and section 7 and new

(1A)(b)(ii) and (1B)(b). Section 12 of the draft Bill sets out the various circumstances in which a relevant claim will be taken to be disposed of finally.

Miscellaneous

Clarifying the effect of the making of a relevant claim on the running of prescription

10. Section 11 of the draft Bill stems from a suggestion by a respondent to the Commission's Discussion Paper although the topic was not raised in the paper. We are grateful to him for the suggestion. For periods of prescription which are amenable to interruption, in terms of section 6 or 8A of the 1973 Act, section 11 of the draft Bill clarifies the effect of the making of a relevant claim on the running of prescription. The current law on this matter is uncertain. On one view, the interruption of prescription takes place at an instant (the date when the relevant claim is made) from which prescription immediately begins to run again; on another view, the interruption of prescription endures until the claim has been dealt with finally.

11. The effect of the new provision is that the making of a relevant claim will interrupt the running of the five-year prescription, and the 2-year prescription (which applies, in terms of section 8A of the 1973 Act, to extinguish obligations to make contribution between wrongdoers) until the claim is disposed of finally. Only at that point will a fresh prescriptive period begin to run. The various circumstances in which a relevant claim will be taken to be finally disposed of are set out in section 12 of the draft Bill.