

# **Prescription and Title to Moveable Property (Scotland) Bill**

**CONSULTATION**

**July 2015**

# **CONSULTATION ON PRESCRIPTION AND TITLE TO MOVEABLE PROPERTY(SCOTLAND) BILL**

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The purpose of this consultation is to seek views on the content of a draft Bill recommended by the Scottish Law Commission on Prescription and Title to Moveable Property.

## Chapter 1: Introduction

1.01 The Report on Prescription and Title to Moveable Property (Scot Law Com, No. 228, 2012) was published by the Scottish Law Commission (the Commission) following a Discussion Paper of the same title (Scot Law Com DP No. 144, 2010). It includes a proposed draft Bill which is attached to this consultation as Annex A.<sup>1</sup>

1.02 This Bill was drafted by the Scottish Law Commission rather than by the Scottish Government. Government Bills introduced into the Scottish Parliament are generally drafted by the Scottish Government's Parliamentary Counsel Office<sup>2</sup>. Therefore, the draft Bill is subject to further revision by Parliamentary Counsel on behalf of the Scottish Government before being introduced into the Parliament. The introduction of any Bill, and the precise contents of it, depends on the outcome of this consultation. Any Bill is for the next session of the Scottish Parliament.

1.03 The draft Bill has two main provisions. The first of these would introduce a general rule of positive prescription for corporeal moveable property. Under this rule, a person would gain ownership of any such property which had been in that person's possession for 20 years, dependent on certain conditions being met, in particular the person being in good faith and lacking negligence.<sup>3</sup> Thus, thieves and looters would not be able to become owners.

1.04 The second provision would allow the holders of corporeal moveable property deposited with or lent to them to become owner of that property if the owner (or the owner's successor) has not been in contact for 50 years.<sup>4</sup> This is aimed primarily at museums and other cultural institutions to let them deal with property which they hold for an owner who cannot be traced.

1.05 The draft Bill has a number of other provisions. Section 3 provides for the ownership of corporeal moveable property to be acquired by the Crown if no person possesses the property during a continuous period of 60 years.<sup>5</sup> The draft Bill also makes clear that the Crown may disclaim ownership of the property.

1.06 The draft Bill also:

- sets out how to calculate the 20, 50 and 60 year periods;<sup>6</sup>

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<sup>1</sup> The Commission's Report and Discussion Paper can be found at:

<http://www.scotlawcom.gov.uk/publications/>

<sup>2</sup> Information on the Parliamentary Counsel Office is at

<http://www.gov.scot/About/People/Directorates/parliamentarycounseloffice>

<sup>3</sup> Draft Bill, section 1. See paras 2.01 - 2.05 below for further discussion.

<sup>4</sup> Draft Bill, section 2

<sup>5</sup> Draft Bill, section 3

<sup>6</sup> Draft Bill, section 4.

- abolishes the existing rule of negative prescription that ownership of corporeal moveable property is lost if ownership is not asserted for 20 years;<sup>7</sup>
- abolishes any existing common law rule for the acquisition of corporeal moveable property by positive prescription;<sup>8</sup>
- provides that when corporeal moveable property is abandoned it becomes ownerless, and;<sup>9</sup>
- provides that it will come into force three years after Royal Assent.<sup>10</sup>

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<sup>7</sup> Draft Bill, section 5. See paras 2.01 – 2.05 below for further discussion.

<sup>8</sup> Draft Bill, section 6. See paras 2.01 – 2.05 below for further discussion.

<sup>9</sup> Draft Bill, section 7. See paras 2.31 – 2.35 below for further discussion.

<sup>10</sup> Draft Bill, section 9. For an explanation of this provision see paras 2.21 - 2.23 below.

## Chapter 2: Content of the Draft Bill

2.01 The draft Bill introduces a rule of positive prescription for corporeal moveable property. The Discussion Paper published by the Commission stated that the current law, where there is no clear rule in this area, is not fit for purpose, and leaves Scotland at a disadvantage to those countries that do have such a law.<sup>11</sup> It notes that positive prescription of title to land is regulated by the Prescription and Limitation (Scotland) Act 1973, which is based on an earlier Report by the Commission,<sup>12</sup> but that Report excluded corporeal moveables. A subsequent consultation paper in relation to corporeal moveables was issued in 1976<sup>13</sup> but no report followed.

2.02 The current law has a period of negative prescription, whereby after 20 years if the owner has not possessed an item, ownership of it is lost. At this point, it becomes the property of the Crown under the rule *quod nullius est fit domini regis* (what belongs to no-one becomes the property of the lord king).<sup>14</sup> The Crown here effectively means the state, rather than Her Majesty personally. However, the possessor to all intents and purposes becomes the owner by default at this point, though not legally.

2.03 Under the draft Bill, this negative prescription rule would be replaced by a 20 year positive prescription rule whereby the possessor would become the new owner in certain cases.<sup>15</sup>

2.04 The proposed 20 year positive prescriptive rule would mean that the original owner would be replaced by a new owner after 20 years where the original owner has made no attempt to assert ownership of the property and the person possessing the property is in good faith (i.e. genuinely believes that he or she is the owner) and has not acted in a negligent way. Some examples are below:

Example 1. John owns a painting. He lends it to Isabel. He subsequently forgets about the painting. 20 years pass. Ownership remains with John, as Isabel knows that it is his property and not hers.

Example 2. John owns a painting. Oscar breaks into John's house and steals the painting. Oscar possesses the painting for 20 years. Ownership remains with John because Oscar knows that it is John's painting.

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<sup>11</sup> SLC Discussion Paper paras 2.29-2.30; SLC Report, para 2.5.

<sup>12</sup> Scot Law Com No 15 (1970), available to download at <http://www.scotlawcom.gov.uk/publications/reports/1970-1979/>.

<sup>13</sup> Scottish Law Commission, *Corporeal Moveables: Usucapion or Acquisitive Prescription* (Memorandum No 30 (1976)) available to download at <http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/1970-1979/>

<sup>14</sup> SLC Report, para 2.3.

<sup>15</sup> Draft Bill, sections 1 and 5.

Example 3. Same facts as Example 2 but immediately after the theft Oscar gives the painting to Peter. Peter knows that it has been stolen. The painting remains owned by John.

Example 4. Same facts as Example 3, but this time Peter is in good faith as he does not know that the painting is stolen and does not act in a negligent way when he purchases. If Peter then possesses the painting for 20 years in good faith and without negligence throughout that period then he becomes owner at the end of it.

2.05 The Commission Report argues that this new rule would increase certainty of ownership by clarifying the practical assumption that the possessor is the owner and that this in turn would increase the marketability of long-life moveable assets as well as having a positive economic benefit.<sup>16</sup> It also notes that Scotland is out of line with most other countries in not having a rule of positive prescription for corporeal moveables.

**Question 1: Should a period of positive prescription for corporeal moveables be introduced? Please give reasons.**

**Question 2: Is a 20 year period suitable for positive prescription for corporeal moveables? Please give reasons.**

### **Prescription Period and Protection for Cultural Items**

2.06 The question of special protection for items of cultural importance was discussed in the Commission Report. It quotes the definition of a cultural object contained in the Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (93/7/EEC). The Commission notes that this definition is subject to some criticism because of its complexity and uncertainty. In the Discussion Paper, the Commission quotes the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.<sup>17</sup>

2.07 In its consultation, the Commission found a wide difference in opinion between those in favour and those against a special rule for cultural property. However, the Commission ultimately recommended that the difficulty of defining the items which are “cultural”, as well as the subjectivity of the definitions, outweighed the countervailing benefits of having a special rule.<sup>18</sup>

2.08 To compensate for not having further protection for cultural items, the Commission recommended a comparatively longer period for positive prescription – 20 years – than many other legal systems have. Thus, for example, in England and Wales the equivalent rule is six years. In some countries, the standard period is shorter and then there is an exception made for cultural items.<sup>19</sup> In addition, the Commission propose further protections

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<sup>16</sup> SLC Report, paras 2.12 - 2.15.

<sup>17</sup> SLC Discussion Paper, para 4.11.

<sup>18</sup> SLC Report, para 3.16.

<sup>19</sup> SLC Discussion Paper, Part 5.

for the owner of the property. The person seeking to acquire ownership by prescription would require to be (a) in good faith and (b) act without negligence both at the moment when possession is acquired and throughout the 20-year period. Thus, for example, if significant cultural assets were stolen the publicity attendant on the theft would make good faith non-negligent acquisition impossible. The proposed rule also contrasts with the rule on positive prescription for acquisition of land. There the period is ten years and good faith and lack of negligence are not required, although there are now certain other safeguards introduced by the Land Registration etc. (Scotland) Act 2012.

## The Holocaust

2.09 A particular potential concern here, as is mentioned in the partial Equality Impact Assessment at Annex C, is whether there could be a particular impact of the proposals on certain groups in society. There might be, for example, concerns about property looted from the Jewish Community during the Nazi era (1933 – 1945). It may be that an item has been looted, bought in good faith and without negligence by an individual or institution, who then after 20 years can claim the item as their own. However, this might not prevent another person or institution claiming that the item morally belongs to them. There could be concerns in relation to both the proposed 20 year positive prescriptive rule and the proposed 50 year rule, discussed below, for acquiring lent or deposited property.

2.10 However, the safeguards in the Commission's proposed rules, in particular the good faith and without negligence requirements, will significantly restrict the circumstances under which title could be acquired to looted property.

2.11 In addition the Scottish Government has no intention, through this proposed Bill, of changing arrangements already in place for the restitution of objects spoliated in the Nazi era.

2.12 There is a UK Spoliation Advisory Panel, which resolves claims from people, or their heirs, who lost property during the Nazi era, which is now held in UK national collections<sup>20</sup>.

2.13 The UK Parliament has also enacted the Holocaust (Return of Cultural Property) Act 2009. The purpose of the 2009 Act is to give the governing bodies of certain national museums an additional power to return an object to a person who claims it, where this follows a recommendation by the Spoliation Advisory Panel, even if the museum now legally owns it. The 2009 Act can only be used until 2019<sup>21</sup>.

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<sup>20</sup> Information about the UK Spoliation Advisory Panel is at <https://www.gov.uk/government/groups/spoliation-advisory-panel>

<sup>21</sup> There was an independent review of the Spoliation Advisory Panel earlier this year: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/415966/SAP\\_-\\_Final\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415966/SAP_-_Final_Report.pdf) Paragraphs 6.73 to 6.78 discuss the “sunset clause” in the 2009 Act. The UK Government response to the independent review is at

2.14 The specific provision at UK level on objects spoliated in the Nazi era reflects the systematic programme which the Nazis carried out from 1933 to 1945 for the forced transfer of works of art and other cultural objects.

2.15 In terms of legal ownership of items looted in the Nazi era, there may be little that could be achieved by any provision in Scots prescription law. The spoliation of art during the Nazi era did not take place in Scotland, although the objects concerned may now be located in Scotland. As a result, questions of legal ownership may have fallen to the law in other jurisdictions, rather than being determined by the law in Scotland.

**Question 3: Are any further provisions on prescription needed in this proposed Bill to reflect that objects might have been looted during the Nazi period or during other periods in history when injustice occurred as a consequence of the rule of law not being applied properly? If so what provisions are needed?**

### **Time outside Scotland**

2.16 One area which is not covered in the Report is whether time outside Scotland counts. For example, if Alison buys a ring which has been lost by Julie, and then spends 5 years working in France before returning to Scotland, do those 5 years in France count toward the total 20 years or not? It may seem from Alison's point of view that it evidently does, and practicality would support that. However, from Julie's point of view, these 5 years in France may make it extremely difficult for her to track down the ring which has been lost, and by the end of those 5 years she may have given up searching.

2.17 As currently drafted, time outside Scotland would count, as it is not specifically stated that only time in Scotland is to be counted.

**Question 4: Should time outwith Scotland be counted toward the total time period needed for positive prescription for corporeal moveable property? Please explain your answer.**

### **Treasure Trove**

2.18 Recommendation 8 in the Commission's report ensures that the Crown's right to Treasure Trove is protected from the proposed 20 year positive prescription rule.<sup>22</sup> This recommendation reflects the positive effect on the general public of the Crown's right to Treasure Trove because treasure

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/415962/Govt\\_Response\\_to\\_SAP\\_Review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415962/Govt_Response_to_SAP_Review.pdf) This noted that "The end of the 2009 Act raises many questions for Government and for the future of the Panel and it is clearly important that a strategy is developed for considering this, taking account of the complexities you have noted, as well as views from stakeholders".

<sup>22</sup> SLC Report, para 3.22.

trove items are generally allocated to museums on payment of an *ex gratia* payment to the finder.<sup>23</sup>

2.19 The Government will consider whether an amendment needs to be made to the draft Bill regarding the position of the finder, in the event of the Crown disclaiming an item which is viewed as Treasure Trove.

### **Stray Animals**

2.20 The question of how stray animals are dealt with is covered by the Commission. They asked whether consultees thought that the current law – whereby stray dogs and other domestic animals are subject to a positive prescription period of 2 months<sup>24</sup> - was satisfactory. The response was limited and the Commission recommended no changes in the existing rules in this area in relation to animals.<sup>25</sup> Therefore, the Government is not proposing any changes in relation to animals.

### **Transitional Period**

2.21 The draft Bill also considers transitional issues.

2.22 The Commission's Report considered whether time before the new law came into force should count towards the proposed new 20 year positive prescriptive period. If only time after the new rule became law counted towards the 20 years, possessors would have to wait 20 years for their ownership to be recognised. If, however, the legislation recognised any 20 year period ending after the legislation became law current owners (those who have lost possession, but not ownership) would be disadvantaged as items lost just under 20 years before would only have a short period (possibly of as little as a single day) to be found and reclaimed.<sup>26</sup> Both of these options were seen as unacceptable.

2.23 Therefore, the Commission recommended a middle option, which was also used for the 1973 Act (which entitles people to become owners of land after a 10 year prescriptive period).<sup>27</sup> The draft Bill allows for a 3 year transition period before the legislation would come into force. This would enable the new legislation to be publicised and allow any outstanding claims of ownership to be settled before the new 20-year positive prescription period could be completed.

**Question 5: Should the proposed 3 year transition period be used?  
Please give reasons for your answer.**

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<sup>23</sup> SLC Report, para 3.21.

<sup>24</sup> SLC Report, paras 3.42 - 3.47.

<sup>25</sup> SLC Report, para 3.47.

<sup>26</sup> SLC Report para 3.48.

<sup>27</sup> SLC Report, para 3.49.

## **Lent and Deposited property**

2.24 As outlined above, the general rule of positive prescription recommended by the Commission requires the possessor to be in good faith i.e. to believe genuinely that the property is his or hers. However, such a rule would not assist a long-term holder of property who knows that someone else owns the property but cannot get in touch with that person. The draft Bill therefore allows the holder of property lent to or deposited with them to acquire ownership of that property where the property has been held for at least 50 years and the original owner (or successor) is untraceable.<sup>28</sup>

2.25 This would be advantageous for museums and other cultural institutions as it would allow them to take ownership of items which they have held as part of their collection for a lengthy period and where they are unable to trace the owner. The Bill's proposals would allow the item to become part of the collection permanently, or for the item to be disposed of in the appropriate way, such as through transfer to a museum with a more suitable collection or by disposal.

2.26 The draft Bill also addresses the fact that people who do not actually own an item of moveable property may lend it to institutions.<sup>29</sup> The Commission was informed that items can come to the museums or other institutions via lawyers or from representatives of defunct societies, often where there is no certain owner. (Although the Commission understands that in more recent years the accession policies of museums have become stricter). Alongside this, museums and other cultural institutions were particularly supportive of this rule in their responses to the Commission's Discussion Paper and at a seminar on the draft Bill for the cultural sector.

2.27 There may be concerns about some circumstances where the item is deposited or lent without the knowledge of the owner – for example, by a thief – where this rule might make it easier for museums to gain ownership of items at the expense of the owner. However, modern museum practice would ensure the provenance of an item that was being loaned to the collection would be thoroughly checked. In the seminar on the draft Bill for the cultural sector it was noted that even without a legal obligation to return an item lent to a museum which would, through this process, become the museum's property many individuals felt there was a moral obligation to see the item returned to the owner if they produced evidence which demonstrated their legitimate claim.

2.28 The period of 50 years balances the need for a period to protect the owner and the need for certainty for bodies such as museums and art galleries.<sup>30</sup>

2.29 As well as the 50 year period, there are other protections for the owner. First, any contact from the owner (or successor) within those 50 years

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<sup>28</sup> SLC Report, paras 4.6 - 4.14 and recommendations 28 and 29.

<sup>29</sup> Draft Bill, section 2(1)(a).

<sup>30</sup> SLC Report, para. 4.14 and recommendation 29.

restarts the prescriptive clock. In other words, 50 years would need to run from the time of the latest contact with the owner for the holder to acquire the right to become owner. Secondly, the holder must try to trace and contact the owner and exercise reasonable diligence in doing so.<sup>31</sup>

2.30 As with the general rule of positive prescription outlined above, there may be support for excluding certain cultural items from the rule for lent or deposited property, but once again such exclusion would require a satisfactory definition of “cultural items” to be formulated.

**Question 6a: Should holders of lent or deposited property acquire ownership after 50 years?**

**Question 6b: Should there be a special rule here for cultural items and, if so, how should “cultural items” be defined?**

**Question 7: Do you believe that the protections – time period, expectation of diligence in tracing owners etc. are sufficient? If not, what would you like to see introduced?**

### **Abandoned property**

2.31 The draft Bill also introduces new rules on abandonment.<sup>32</sup> As the law stands, abandoned moveable property becomes the property of the Crown – meaning that every day the Crown currently becomes the theoretical owner of, for example, tonnes of litter, from cigarette ends to abandoned cars.<sup>33</sup>

2.32 Under the draft Bill, abandoned property would become ownerless, instead of falling to the Crown. The Crown would also be able to disown property, just as an individual could. As such, the Crown would no longer automatically become owner of abandoned movable property which is abandoned, or has not been possessed by anyone for 60 years.

2.33 At this point, the draft Bill could simply have provided that abandoned property would immediately become owned by a finder. However instead it requires the finder to report the find to the police or another specified person under Part 6 of the Civic Government (Scotland) Act 1982 (or any similar law) and that the finder can become owner of the abandoned property under the 1982 Act (or similar law). Under the 1982 Act if abandoned property is not claimed the chief constable can offer the abandoned property to the finder, although the chief constable has other options including selling the property.<sup>34</sup>

2.34 The 1982 Act provisions are based on the premise that it is difficult for a finder to differentiate between lost and abandoned property. For example, if Alison leaves her umbrella on the bus, has she done so due to forgetfulness or has she decided to leave it there? And how would Rebecca, who finds it

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<sup>31</sup> SLC Report, paras 4.18 and 4.19.

<sup>32</sup> Draft Bill, section 7.

<sup>33</sup> SLC Report, para 5.2.

<sup>34</sup> SLC Report, para 5.7.

later, know? Since abandonment requires a physical and mental act of abandonment, the single act of leaving the umbrella on the bus does not constitute abandonment – but if Alison did so consciously, then it does.<sup>35</sup> The Commission had a further concern that if there were no duty to report to the police, then some individuals charged with theft might claim in defence that they believed the property to be abandoned, when in fact they intended to steal it.<sup>36</sup>

2.35 The draft Bill therefore provides for abandoned property to become ownerless, and for the finder to be able to become owner of the abandoned property in accordance with the 1982 Act provisions (or similar laws).<sup>37</sup>

**Question 8: Should the proposals in the draft Bill on how a finder may acquire abandoned property be enacted? Please give reasons for your answer.**

### **Intellectual Property**

2.36 Chapter 6 of the Commission's Report discusses intellectual property and negative prescription. It notes that intellectual property rights are typically governed by statute and have fixed time limits. For example, there is specific provision on copyright in sections 12 to 14 of the Copyright, Designs and Patents Act 1988. However, the 1973 Act has no specific provision setting out that it is subject to any time limits laid down in other legislation.

2.37 As a result, the Commission recommended that the 1973 Act should be amended so that it does not apply to any right for which a time period is provided by any other enactment (whether passed before or after the coming into force of the Commission's proposed amendment.)

2.38 Before legislating on this recommendation, the Scottish Government would need to consider further whether it would be within the legislative competence of the Scottish Parliament to do so. The Commission discuss this point in paragraph 6.6 of their Report and reach the view that Westminster legislation would be required because although the recommendation is stated in general terms the primary purpose of the provision is to clarify the law as regards intellectual property rights, a reserved area of the law

2.39 The Scottish Government have discussed this with the Commission, and have decided that consideration of this recommendation should be deferred pending further discussion of the way forward.

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<sup>35</sup> SLC Report, para 5.3.

<sup>36</sup> SLC Report, para 5.8.

<sup>37</sup> Draft Bill, section 7.

### **Extra Commercium**

2.40 The issue of items which are *extra commercium* (not susceptible to private ownership) has been considered by the Government. Items which are *extra commercium*, such as court records or burgh Charters, are not subject to positive prescription. The Government does not intend this to change as a result of this Bill.

## **Chapter 3: Conclusion**

3.01 In line with usual practice, Impact Assessments have been prepared. The Commission prepared a Business and Regulatory Impact Assessment or BRIA and the Scottish Government has prepared a partial Equality Impact Assessment or EQIA.

3.02 The Government does not consider that the following Impact Assessments are required:

- Strategic Environmental Assessment (SEA)
- Privacy Impact Assessment (PIA)
- Children's Rights and Wellbeing Assessment (CRWIA)

3.03 If a Bill is introduced into the Scottish Parliament, the Government, in accordance with Parliamentary Standing Orders, will prepare the following Accompanying Documents:-

- A Policy Memorandum (the rationale for the Bill is outlined in the material produced by the Commission and will be drawn on for any Policy Memorandum)
- A Financial Memorandum (this will be drawn from the BRIA produced by the Commission)
- Explanatory Notes to the Bill (the Commission have already prepared Explanatory Notes for the draft Bill)

3.04 As the draft Bill currently stands, a Delegated Powers Memorandum would not be needed as the draft Bill has no powers for ministers to make secondary legislation.

### **Question 9: Do you have any comments on the Impact Assessments?**

3.05 The Government would be grateful for any further comments you may have.

### **Question 10: Do you have any other comments?**

Family and Property Law  
Justice Directorate  
Scottish Government

July 2015

# **ANNEX A: Draft Bill on Prescription and Title to Moveable Property**

Note: This draft Bill includes Explanatory Notes. The references in the Explanatory Notes to recommendations and to paragraph numbers are to recommendations and paragraph numbers in the Commission's report. In accordance with usual practice, no explanation is provided when the section of the Bill is self-explanatory.

## **Prescription and Title to Moveable Property (Scotland) Bill** [DRAFT]

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# Prescription and Title to Moveable Property (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to make new provision for Scotland as respects the acquisition of ownership of corporeal moveable property by positive prescription; and for connected purposes.

## **1 Acquisition of corporeal moveable property by prescription: general**

- (1) A person (“A”) acquires ownership of corporeal moveable property if—
  - (a) for a continuous period of 20 years A possesses the property peaceably and without judicial interruption,
  - (b) throughout that period A—
    - (i) believes that A is owner of the property, and
    - (ii) intends to possess the property as owner, and
  - (c) A has not been negligent in having so believed throughout that period.
- (2) Where during that continuous period a person (“S”) becomes A’s successor, then S acquires ownership of the property provided that—
  - (a) the provisions of subsection (1) are satisfied in respect of so much of the continuous period as preceded the succession,
  - (b) for the remainder of the continuous period S possesses the property peaceably and without judicial interruption,
  - (c) throughout that remainder S—
    - (i) believes that S is owner of the property, and
    - (ii) intends to possess the property as owner, and
  - (d) S has not been negligent in having so believed throughout that remainder.
- (3) If during that continuous period a person (“SS”) becomes S’s successor, then subsection (2) applies to SS as it applies to S except that for the purposes of that application the reference in that subsection to “the provisions of subsection (1)” is to be construed as a reference to the provisions of subsections (1) and (2); and so on in relation to subsequent successors.
- (4) For the purposes of subsections (1) to (3), peaceable possession of the property is not lost by virtue only of A, S, SS or a subsequent successor being dispossessed of it provided that—
  - (a) the dispossession is involuntary on the part of A, S, SS or the subsequent successor, and
  - (b) within one year after the dispossession, either—
    - (i) the property is restored to A, S, SS or the subsequent successor, or
    - (ii) proceedings which result in such restoration are commenced.

- (5) In subsections (1)(a) and (2)(b), “judicial interruption” has the same meaning as in sections 1 to 3 of the Prescription and Limitation (Scotland) Act 1973 (c.52).
- (6) This section is subject to sections 3(2) and 4(1).

#### NOTE

**Section 1** implements Recommendations 1 (paragraph 2.15), 2 (paragraph 2.16), 3 (paragraph 3.3), 4 (paragraph 3.6), 5 (paragraph 3.11), 6 and 7 (paragraph 3.20), 8 (paragraph 3.22), and 12 - 17 (paragraphs 3.29 – 3.32).

**Subsection (1)** creates a new rule for the acquisition of ownership of corporeal moveable property (ie physical things other than land). In order to acquire ownership of a thing under section 1, a person ("A") must possess it peaceably and without judicial interruption. A must possess in good faith throughout the prescriptive period: that is, A must believe that he or she is the owner of the object and intend to possess the object as owner. A will not acquire ownership if A is negligent in believing that he or she is the owner: to this extent, the test of good faith is objective (see paragraphs 3.4 – 3.6). The requirements that possession be peaceable and without judicial interruption are the same as for the positive prescription of ownership of land in terms of section 1(1)(a) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"); for the reasons discussed at paragraphs 3.27 – 3.29, and in contrast to the rule for ownership of land, there is no requirement that the possession be "open".

Where an item of corporeal moveable property changes hands during the prescriptive period, successors in possession may benefit from their predecessors' periods of possession. So if SS acquires possession from S, who acquired possession from A, then, provided that between them they satisfied the requirements mentioned in subsection (1), SS will obtain ownership of the object on the expiry of 20 years. **(Subsections (2) and (3)).**

Prescription under section 1 requires a 20 year period of continuous possession. **Subsection (4)** establishes a limited exception where the possessor of an object is involuntarily dispossessed of it (as, for example, by a thief). Any such period of dispossession will not interrupt the prescriptive process provided that possession is restored, or proceedings resulting in the restoration of possession are commenced, within one year.

**Subsection (5)** provides that "judicial interruption" has the same meaning as in sections 1 to 3 of the 1973 Act, ie "the making in appropriate proceedings, by any person having a proper interest to do so, of a claim which challenges the possession in question." (1973 Act, section 4(1)).

**Subsection (6)** notes that section 1 is subject to sections 3(2) and 4(1). The 20 year positive prescription does not apply to any property owned by the Crown by virtue of the rule in section 3(1) or any property owned by the Crown and of which the Crown acquired ownership, prior to the coming into force of section 3, by virtue of the rule *quod nullius est fit domini regis* (what belongs to no-one becomes property of the lord king) or the doctrine of *ultimus haeres* (section 3(2)). The aim of this exclusion is to protect the Crown's right to treasure trove (see paragraphs 3.21 – 3.22). Where section 1 does apply, the 20 year period may include time which occurs before the commencement of the Act (section 4(1)).

## 2 Acquisition of lent or deposited corporeal moveable property

- (1) Where—
  - (a) a person (“L”) lends corporeal moveable property (whether or not property owned by L) to another person (“M”), deposits it with M or otherwise places it in M’s possession or custody,

- (b) for a continuous period of 50 years M possesses, or has custody of, the property, and
- (c) at no time during that period is ownership of the property asserted by—
  - (i) L, or any successor of L, or
  - (ii) in a case where some person other than L or a successor of L owns the property, that other person,

then if M is unable, exercising reasonable diligence, to locate or communicate with the owner of the property, M acquires ownership of the property on electing to acquire it.

- (2) Where during that continuous period a person (“S”) becomes M’s successor, then provided that—
  - (a) the provisions of subsection (1) are satisfied in respect of so much of the continuous period as preceded the succession,
  - (b) for the remainder of the continuous period—
    - (i) S possesses or has custody of the property, and
    - (ii) M does not possess or have custody of it, and
  - (c) at no time during that remainder is ownership of the property asserted by—
    - (i) L, or any successor of L, or
    - (ii) in a case where some person other than L or a successor of L owns the property, that other person,

if S is unable, exercising reasonable diligence, to locate or communicate with the owner of the property, S acquires ownership of the property on electing to acquire it.

- (3) If during that continuous period a person (“SS”) becomes S’s successor, then subsection (2) applies to SS as it applies to S (except that, for the purposes of the application, the reference in paragraph (a) of subsection (2) to “the provisions of subsection (1)” is to be construed as a reference to the provisions of subsections (1) and (2) and the reference in paragraph (b)(ii) of subsection (2) to “M” as a reference to M or S); and so on in relation to subsequent successors.
- (4) Subsections (5) to (7) apply for the purposes of subsections (1) to (3).
- (5) M’s holding the property on behalf of L (or of L’s successors) does not of itself constitute an assertion of ownership by L (or by L’s successors).
- (6) Assertion of ownership must include communication with M (or with M’s successors).
- (7) Possession or custody of the property is not lost by virtue only of M, S, SS or a subsequent successor being dispossessed of it (or of it being taken from the custody of M, S, SS or the subsequent successor) provided—
  - (a) that the dispossession (or taking) is involuntary on the part of M, S, SS or the subsequent successor, and
  - (b) that, within one year after the dispossession (or taking), either—
    - (i) the property is restored to M, S, SS or the subsequent successor, or

- (ii) proceedings which result in such restoration are commenced.
- (8) Any agreement, in so far as it purports to deprive this section of effect, or to limit or otherwise alter its effect, is null.
- (9) This section is subject to sections 3(2) and 4(1).

NOTE

**Section 2** implements the recommendations in Chapter 4 by establishing a new rule in relation to lent or deposited property which permits the holder to acquire ownership after a continuous period of 50 years if the owner of the property cannot be traced.

**Subsection (1)** provides that where a person ("L") lends an item of corporeal moveable property to another ("M") or otherwise places it in M's possession or custody, and where M holds that item for a continuous period of 50 years without any assertion of ownership being made by the owner, by L or by any successor of L, then if M is unable, exercising reasonable diligence, to contact the owner, M may choose to become the owner of the property. An assertion of ownership must include communication with M (subsection (6)); this could be something as simple as a letter, an email or a telephone call (see paragraph 4.18). The principal target of this provision is museums and galleries, whose collections may include objects of uncertain ownership (see paragraphs 4.6 – 4.13 and Recommendation 28). Paragraph (b) refers to both possession and custody. The distinction depends upon the holder's state of mind: where the holder has no intention to hold for that party's own use, merely custody and not possession is held (paragraphs 4.15 – 4.16 and Recommendation 30). The original owner of the property is protected by the requirement that 50 years must have passed without any assertion of ownership and by the requirement that the holder of the property exercise reasonable diligence in attempting to contact the owner before acquiring ownership (paragraphs 4.17 – 4.20 and Recommendations 31 and 32). As noted in paragraph 4.19, what constitutes reasonable diligence will depend upon the nature and value of the object: the more unusual and valuable the item, the more diligence will be required in attempting to contact the owner.

**Subsections (2) and (3)** provide for successors of the original holder of the property to benefit from the rule (paragraphs 4.23 – 4.24 and Recommendation 34).

**Subsection (5)** clarifies the meaning of an "assertion of ownership" by providing that M's holding the property on behalf of L or L's successors does not of itself constitute an assertion of ownership by L or L's successors. If this were not the case, then M could never acquire ownership under the rule in subsection (1): subsection (5) merely makes explicit something that would have to be inferred in order for subsection (1) to be effective.

**Subsection (6)** provides that assertion of ownership must include communication with M (or with M's successors) (paragraph 4.20 and Recommendation 31).

**Subsection (7)** provides for a limited exception to the requirement that possession or custody be continuous. Where possession or custody is lost involuntarily (as, for example, where the object is stolen) the running of the 50 year period will not be interrupted provided that the property is restored, or proceedings resulting in such restoration are commenced, within one year. This is substantially the same rule as applies in relation to the 20 year positive prescription established by section 1.

**Subsection (8)** prevents parties from contracting out of section 2. To allow contracting out would be to defeat the purpose of the section, which is to provide a solution to the question of ownership in cases where the lender or depositor can no longer be contacted (and could not, therefore, enforce any provision of the original contract of loan or deposit). The way for the lender or

depositor to stop the rule from applying is to keep in contact with the holder at least once every 50 years (paragraph 4.22, Recommendation 33).

**Subsection (9)** notes that the section is subject to sections 3(2) and 4(1). The 50 year rule does not apply to any property owned by the Crown by virtue of the rule in section 3(1) or any property owned by the Crown and of which the Crown acquired ownership, prior to the coming into force of section 3, by virtue of the rule *quod nullius est fit domini regis* (what belongs to no-one becomes property of the lord king) or the doctrine of *ultimus haeres* (section 3(2)). The aim of this exclusion is to protect the Crown's right to treasure trove (see paragraphs 3.21 – 3.22). Where section 4 does apply, the 50 year period may include time which occurs before the commencement of the Act (section 4(1)).

### 3 Acquisition of ownership by Crown

- (1) The Crown—
  - (a) acquires ownership of corporeal moveable property if a continuous period of 60 years elapses during which no person possesses the property, but
  - (b) may disclaim ownership of the property.
- (2) Neither section 1 nor section 2 applies to property owned by the Crown by virtue of—
  - (a) subsection (1), or
  - (b) (in a case where ownership was acquired before the coming into force of this section) any of the following—
    - (i) negative prescription together with the rule *quod nullius est fit domini regis*,
    - (ii) abandonment together with that rule,
    - (iii) the doctrine of *ultimus haeres*.
- (3) This section is subject to section 4(1).

#### NOTE

Under the pre-existing law, the Crown acquires title to corporeal moveable property which is abandoned, or in respect of which the 20 year negative prescription in section 8 of the 1973 Act has run, by virtue of the rule *quod nullius est fit domini regis* (what belongs to no-one becomes property of the lord king). Section 5 amends the 1973 Act to prevent rights of ownership in corporeal moveable property from negatively prescribing under section 8 of that Act, while section 7(1) and (3) provide that corporeal moveable property, on being abandoned by its owner, becomes ownerless rather than falling to the Crown under the *quod nullius* rule.

**Section 3** compensates for these changes by introducing a new means by which the Crown may become the owner of lost or abandoned property (paragraphs 3.35 – 3.41). **Subsection (1)(a)** establishes a 60 year period of non-possession positive prescription in favour of the Crown: where no person possesses an item of corporeal moveable property during a continuous period of 60 years, the Crown acquires ownership (Recommendation 21). **Subsection (1)(b)** makes it clear that the Crown may disclaim ownership of property acquired under paragraph (a) of that subsection, just as it may under the pre-existing law. **Subsection (2)** is aimed at protecting the Crown's ownership of treasure trove against the new rules established by sections 1 and 2. Neither of these rules will enable a person to acquire ownership of property which is owned by the Crown and which the Crown acquired under **subsection 1** or by any of the means listed in paragraph (b).

The 60 year period may include time which occurs before the commencement of the Act (section 4(1)).

#### **4 Computation of continuous period**

- (1) In this Act, a “continuous period”—
  - (a) may include time which occurs before the commencement of this section, but
  - (b) is not constituted by any such period which ends before the beginning of the day after that commencement.
- (2) In the computation of a continuous period for the purposes of any provision of this Act—
  - (a) any time during which a person against whom the provision is pled was under legal disability is to be reckoned as if the person were free from that disability,
  - (b) if the commencement of the continuous period would, apart from this paragraph, fall at a time in any day other than the beginning of that day, the period is to be taken to have commenced at the beginning of the next following day, and
  - (c) if the last day of the continuous period would, apart from this paragraph, be a holiday the period is (disregarding anything in the provision) to be taken to include—
    - (i) any immediately succeeding day which is a holiday,
    - (ii) any further immediately succeeding days which are holidays, and
    - (iii) the next succeeding day which is not a holiday.
- (3) In subsection (2)(c), “holiday” means a day of any of the following descriptions—
  - (a) a Saturday,
  - (b) a Sunday,
  - (c) a day which is, in Scotland, a bank holiday under the Banking and Financial Dealings Act 1971.

NOTE

**Section 4** lays down a number of rules regarding the computation of periods of time.

**Subsection (1)** allows periods of time prior to the commencement of section 4 to be included as part of a continuous period under the Act. So, for example, if a person (“B”) had held an item of corporeal moveable property for 10 years prior to the commencement of section 4, B would (if the requirements of section 1 were otherwise satisfied) acquire ownership of the item 10 years after commencement. If B had held the item for a continuous period of 20 years or more, and continued to hold it on the date of commencement of section 4, B would (again assuming that the other requirements of section 1 were satisfied) acquire ownership at the start of the day following commencement. This is the same approach as was adopted in section 14(1)(a) of the 1973 Act; but we have not adopted the wording of that Act, which was criticised by the House of Lords in *Dunlop v McGowans* 1980 SC (HL) 73. Subsection (1) should be read together with section 9

(commencement), which provides for commencement of the Act to be delayed for a period of three years following Royal Assent (see paragraphs 3.48 – 3.49).

**Subsection (2)(a)** provides that the clock will continue to run towards the completion of a continuous period under the Act, notwithstanding the legal disability of the person against whom the continuous period might be relied upon (paragraphs 3.23 – 3.25 and Recommendation 9).

**Paragraph (c)** of subsection (2) prevents any continuous period from ending with a holiday. The purpose of this provision is to ensure that any person who may stand to lose a right by virtue of the completion of a continuous period is not prevented by a holiday from interrupting the period by an application to court.

## **5 Amendment of Prescription and Limitation (Scotland) Act 1973**

In Schedule 3 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (rights and obligations which are imprescriptible for the purposes of sections 7 and 8 of, and Schedule 1 to, that Act), for paragraph (g) there is substituted—

“(gg) any real right of ownership in corporeal moveable property;”.

NOTE

**Section 5** abolishes the existing rule of negative prescription in relation to rights of ownership in corporeal moveable property by amending Schedule 3 of the 1973 Act to add those rights to that Schedule's list of imprescriptible rights. (Paragraphs 3.35 – 3.41, Recommendation 20).

## **6 Common law as to acquisition of corporeal moveable property by positive prescription**

On the coming into force of this section, any common law rule which enables corporeal moveable property to be acquired by positive prescription ceases to have effect.

NOTE

It is possible, though doubtful, that at common law there exists a forty year positive prescription for corporeal moveables (paragraph 3.34). **Section 6** abolishes any such rule that might exist, implementing Recommendation 19.

## **7 Abandonment**

- (1) Corporeal moveable property, on being abandoned by its owner, becomes ownerless.
- (2) Ownership of corporeal moveable property which has been abandoned by its owner and then found can only be acquired by the finder in accordance with—
  - (a) Part 6 of the Civic Government (Scotland) Act 1982 (c.45) (lost and abandoned property); or
  - (b) any enactment—
    - (i) making such provision as is referred to in section 67(2)(a), (c) or (d) of that Act (duty of finder), and
    - (ii) the provisions of which correspond to provisions of that Part.
- (3) The rule *quod nullius est fit domini regis* does not apply to property which becomes ownerless by virtue of subsection (1).

NOTE

At common law, abandoned property falls to the Crown by virtue of the rule *quod nullius est fit domini regis* (what belongs to no-one becomes property of the lord king). **Section 7** alters this rule. **Subsection (1)** provides that abandoned property becomes ownerless. **Subsection (3)** makes it clear that abandoned property does not, as a result of becoming ownerless, fall to the Crown. It follows that such property may be acquired by a person who takes possession of the abandoned property with the intent to acquire it (by means of the common law doctrine of *occupatio*) (paragraphs 5.4 – 5.6, Recommendation 36).

**Subsection (2)** places an important limit on the acquisition by *occupatio* of objects which have been found. At present, the finder of an item which may have been lost or abandoned is obliged, in terms of Part 6 of the Civic Government (Scotland) Act 1982, to deliver the property or report the fact that he or she has taken possession of it to the police or another specified person. If the item is then unclaimed, the finder may acquire ownership in terms of section 68(4) of that Act. **Subsection (2)** retains this procedure by providing that the finder of an item of corporeal moveable property may only acquire ownership of abandoned property (which is, in terms of subsection (1), ownerless) by complying with the requirements of Part 6 of the Civic Government (Scotland) Act 1982 or any other enactment making corresponding provision.

## **8 The expression “possession”**

In this Act, “possession” includes civil possession (that is to say, possession through an intermediary or representative); and analogous expressions are to be construed accordingly.

## **9 Commencement**

- (1) This Act, except this section and section 10, comes into force on the expiration of the period of 3 years immediately following the day of Royal Assent.
- (2) This section and section 10 come into force on the day after Royal Assent.

### NOTE

The coming into force of the substantive provisions of the Act is delayed for a period of 3 years following Royal Assent in order to allow time for owners of property which might be affected by the rules in sections 1 or 2 to take appropriate action to assert their ownership. This section should be considered along with section 4 (computation of continuous period). The approach is the same as that taken to the commencement of the Prescription and Limitation (Scotland) Act 1973 (see paragraphs 3.48 – 3.49).

## **10 Short title**

The short title of this Act is the Prescription and Title to Moveable Property (Scotland) Act 2012.

## **ANNEX B: Business and Regulatory Impact Assessment, prepared by the Scottish Law Commission**

### **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 would 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 (Scotland) 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:**

*Chairman, Scottish Law Commission*

**Date:**

*Scottish Government Contact point: Simon Stockwell*

## Annex C: Equality Impact Assessment (EQIA), prepared by the Scottish Government

<b>Title of policy/ practice/ strategy/ legislation etc.</b>	Prescription and Title to Moveable Property (Scotland) Bill	
<b>Minister</b>	Paul Wheelhouse	
<b>Lead official</b>	Simon Stockwell	
<b>Officials involved in the EQIA</b>	Name	Team
	Patrick Fraser Simon Stockwell	Family and Property
<b>Directorate: Division: Team</b>	Learning and Justice: Civil Law: Family and Property Law	
<b>Is this new policy or revision to an existing policy?</b>	New policy	

### Screening

#### *Policy Aim*

##### 1. To introduce:

- A positive prescriptive period of 20 years for corporeal moveable property;
- the ability for cultural institutions, such as museums, to claim ownership of lent or deposited items for which the former owner had not made a claim of ownership in the previous 50 years;
- the ability of the Crown to claim any corporeal moveable item which has not been under possession of any person for a period of 60 years.

#### *Who will it affect?*

The policy will affect those who are involved in the running of museums and other cultural institutions. It will also affect those who wish to reclaim their possessions if they have been stolen from them or they have been lost. It will also affect the Crown.

#### *What might prevent the desired outcomes being achieved?*

There is no evidence to suggest there are issues which will prevent the desired outcomes being achieved.

## **Stage 1: Framing**

### ***Results of framing exercise***

A meeting was held with other members of the Family and Property Law team where the impacts of the bill on the protected groups, particularly Religion, was discussed.

### ***Extent/Level of EQIA required***

Following the framing exercises, we believed that the level of EQIA needed was low as the degree of impact on the protected characteristics was limited.

**Stage 2: Data and evidence gathering, involvement and consultation**

<b>Characteristic</b>	<b>Evidence gathered and Strength/quality of evidence</b>	<b>Source</b>	<b>Data gaps identified and action taken</b>
<b>AGE</b>	No evidence	N/A	N/A
<b>DISABILITY</b>	No evidence	N/A	N/A
<b>SEX</b>	No evidence	N/A	N/A
<b>PREGNANCY AND MATERNITY</b>	No evidence	N/A	N/A
<b>GENDER REASSIGNMENT</b>	No evidence	N/A	N/A
<b>SEXUAL ORIENTATION</b>	No evidence	N/A	N/A
<b>RACE</b>	No evidence	N/A	N/A
<b>RELIGION OR BELIEF</b>	There is information available online about looted artworks.		

**Stage 3: Assessing the impacts and identifying opportunities to promote equality**

**Do you think that the policy impacts on people because of their age?**

<b>Age</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination, harassment and victimisation			√	No effect.
Advancing equality of opportunity			√	No effect.
Promoting good relations among and between different age groups			√	No effect.

**Do you think that the policy impacts disabled people?**

<b>Disability</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination, harassment and victimisation			√	No effect.
Advancing equality of opportunity			√	No effect.
Promoting good relations among and between disabled and non-disabled people			√	No effect.

**Do you think that the policy impacts on men and women in different ways?**

<b>Sex</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	No effect.
Advancing equality of opportunity			√	No effect.
Promoting good relations between men and women			√	No effect.

**Do you think that the policy impacts on women because of pregnancy and maternity?**

<b>Pregnancy and Maternity</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	No effect.
Advancing equality of opportunity			√	No effect.
Promoting good relations			√	No effect.

**Do you think your policy impacts on transsexual people?**

<b>Gender reassignment</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	No effect.
Advancing equality of opportunity			√	No effect.
Promoting good relations			√	No effect.

**Do you think that the policy impacts on people because of their sexual orientation?**

<b>Sexual orientation</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	No effect.

Advancing equality of opportunity			√	No effect.
Promoting good relations			√	No effect.

**Do you think the policy impacts on people on the grounds of their race?**

<b>Race</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	No effect.
Advancing equality of opportunity			√	No effect.
Promoting good race relations			√	No effect

**Do you think the policy impacts on people because of their religion or belief?**

<b>Religion or belief</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	No effect.
Advancing equality of opportunity			√	No effect.
Promoting good relations		√		This legislation may allow for the claiming of items which are of importance to certain groups. The proposed Bill could also affect the successors of those whose property was seized.

## Stage 4: Decision making and monitoring

### *Identifying and establishing any required mitigating action*

Have positive or negative impacts been identified for any of the equality groups?	There could be an impact on religion or belief. However, there are safeguards in the Bill such as the time periods proposed and the requirements to act in good faith and without negligence.
Is the policy directly or indirectly discriminatory under the Equality Act 2010?	No.
If the policy is indirectly discriminatory, how is it justified under the relevant legislation?	Not applicable.
If not justified, what mitigating action will be undertaken?	Not applicable.

### *Describing how Equality Impact analysis has shaped the policy making process*

The consultation discusses whether or not more protection should be given in some circumstances. There are also questions on whether or not cultural items need more protection.

### *Monitoring and Review*

A review will be undertaken 5 years after the Bill has been in force to receive views from interested parties on how the policy is functioning. This will be a small-scale review, reflecting the extent of the equality considerations.

## **ANNEX D: Glossary of terms**

The 1973 Act: The Prescription and Limitation (Scotland) Act 1973

The draft Bill: The draft Prescription and Title to Moveable Property (Scotland) Bill, attached at Annex A to this consultation.

The Commission: The Scottish Law Commission

Corporeal: something tangible and physical

*Extra commercium*: a thing which is not susceptible to private ownership.

Moveable property: property other than land and buildings

Negative prescription: a legal rule which extinguishes a right such as ownership after a period of time if that right is not asserted

Positive prescription: a legal rule which enables someone to acquire ownership of property by possessing it for a period of time if certain conditions are satisfied

Queen's and Lord Treasurer's Remembrancer (QLTR): Representative of the Crown dealing with ownerless property<sup>38</sup>

Treasure trove: Portable antiquities which can be claimed on behalf of the Crown by the QLTR

*Occupatio*: Taking possession of ownerless corporeal moveable property with the intention of becoming owner

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<sup>38</sup> The website for QLTR is at <http://www.qltr.gov.uk/>

## **ANNEX E: The Scottish Government consultation process**

Consultation is an essential and important aspect of the Scottish Government's working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors and no two exercises are likely to be the same.

Typically, Scottish Government consultations involve a consultation paper inviting answers to specific questions or more general views about the material presented. Consultation papers are distributed to organisations and individuals with an interest in the issue, electronically or in hard copy and are placed on the Scottish Government's consultations webpage to allow for participation from a wider audience.

Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of written responses received to a consultation exercise may be published.

All Scottish Government consultation papers and related publications (such as the analysis of responses) can be accessed at <http://www.scotland.gov.uk/consultations>

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process.

Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review,
- inform the development of a particular policy,
- help decisions to be made between alternative policy proposals, or
- be used to finalise legislation before it is implemented.

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

## Annex F: Responding to this consultation paper

***Please send your response with the completed Respondent Information Form at Annex H to:***

[PropertyLaw@scotland.gsi.gov.uk](mailto:PropertyLaw@scotland.gsi.gov.uk) or

Catherine Devlin  
Civil Law and Legal System Division  
Scottish Government  
St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG

If you have any queries contact Catherine Devlin on 0131 244 4213.

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

The Scottish Government now has an email alert system for consultations (**SEconsult**: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest.

### **Handling your response**

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** at Annex H. This will ensure that we treat your response appropriately.

The Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

## **What happens next?**

Following the closing date, all responses will be analysed and considered. The analysis of responses will be published.

## **Comments and complaints**

If you have any comments about how this consultation exercise has been conducted, please send them to Catherine Devlin:

[Catherine.devlin@scotland.gsi.gov.uk](mailto:Catherine.devlin@scotland.gsi.gov.uk) on 0131 244 4213.

## **ANNEX G: List of consultees**

### **Corporate bodies**

Art Loss Register  
Airport Operators Association (AOA)  
Association of British Insurers  
Association of Local Government Archaeological Officers (Scotland)  
Church of Scotland  
Commission for Looted Art in Europe  
Confederation of Passenger Transport (CPT)  
Convention of Scottish Local Authorities, and all local authorities in Scotland.  
Crown Estate  
Department of Culture, Media and Sport  
Equality and Human Rights Commission  
Faculty of Advocates  
Historic Houses Association for Scotland  
Historic Scotland  
Industrial Museums Scotland  
Judges of the Court of Session  
Keeper of the Registers of Scotland  
Lands Tribunal for Scotland  
Law Society of Scotland  
Members of the European Parliament representing Scotland  
Museums' Association  
Museums Galleries Scotland  
Muslim Council of Scotland  
National Archives of Scotland  
National Galleries of Scotland  
National Library of Scotland  
National Museum Directors' Council (NMDC)  
National Museums Scotland  
National Trust for Scotland  
Network Rail  
PDSA  
Police Scotland  
Queen's and Lord Treasurer's Remembrancer (QLTR)  
Royal Commission for Ancient and Historic Monuments in Scotland (RCAHMS)  
Scotland Office  
Scotrail  
Scotland's Regional Transport Partnerships  
Scottish Churches Parliamentary Office (SCPO)  
Scottish Council for Jewish Communities (SCOJEC)  
Scottish Land and Estates  
Scottish Law Agents Society  
Scottish Law Commission  
Scottish Museums Federation  
Scottish Natural Heritage

Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)  
SSPCA  
Treasure Trove Unit  
University Museums in Scotland  
VOCAL Scotland

## **Individuals**

Amanda Clydesdale  
Amanda Kubie  
Andy Wightman  
Dr Andrew Simpson  
Dr Daniel Carr, University of Dundee  
Dr Lars van Vliet, University of Maastricht  
Dr Lorna Gillies  
Dr Simon Gilmour, Society of Antiquaries of Scotland  
Dr Veronica Ruiz Abou-Nigm  
Iain More  
John MacLeod, University of Glasgow  
Professor Angus McAllister  
Professor David Carey-Miller  
Professor George Gretton  
Professor Janet Ulph  
Professor Kenneth Reid  
Professor Robert Rennie  
Professor Roderick Paisley  
Sir Andrew Burns, UK Envoy for Post-Holocaust Issues

# ANNEX H: CONSULTATION ON PRESCRIPTION AND TITLE TO MOVEABLE PROPERTY (SCOTLAND) BILL



The Scottish Government  
Riaghaltas na h-Alba

## RESPONDENT INFORMATION FORM

Please Note this form must be returned with your response to ensure that we handle your response appropriately

### 1. Name/Organisation

Organisation Name

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname

Forename

### 2. Postal Address

Postcode	Phone	Email
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### 3. Permissions - I am responding as:

Individual / Group/Organisation

Please tick as

(a) Do you agree to your response being made available to the public?

Yes  No

(c) The name and address of your organisation will be made available to the public.

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis  
Please tick ONE of the following boxes

Are you content for your response to be made available?

Please tick as appropriate  
 Yes  No

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?  
Please tick as appropriate  Yes  No

## Questions

Q1 Should a period of positive prescription for corporeal moveables be introduced? Please give reasons.

Yes  No

Comments

Q2 Is a 20 year period suitable for positive prescription for corporeal moveables? Please give reasons.

Yes  No

Comments

Q3 Are any further provisions on prescription needed in this proposed Bill to reflect that objects might have been looted during the Nazi period or during other periods in history when injustice occurred as a consequence of the rule of law not being applied properly? If so what provisions are needed?

Yes  No

Comments

Q4 Should time outwith Scotland be counted toward the total time period needed for positive prescription for corporeal moveable property? Please explain your answer.

Yes  No

Comments

Q5 Should the proposed 3 year transition period be used? Please give reasons for your answer.

Yes  No

Comments

Q6a Should holders of lent or deposited property acquire ownership after 50 years?

Yes  No

Comments

Q6b Should there be a special rule here for cultural items and, if so, how should “cultural items” be defined?

Yes  No

Comments

Q7 Do you believe that the protections – time period, expectation of diligence in tracing owners etc. are sufficient? If not, what would you like to see introduced?

Yes  No

Comments

Q8 Should the proposals in the draft Bill on how a finder may acquire abandoned property be enacted? Please give reasons for your answer.

Yes  No

Comments

Q9 Do you have any comments on the Impact Assessments?

Yes  No

Comments

Q10 Do you have any other comments?

Comments

Responses should be sent to arrive by **17:00 on 23 September 2015** to:

[PropertyLaw@scotland.gsi.gov.uk](mailto:PropertyLaw@scotland.gsi.gov.uk) or

Catherine Devlin  
Civil Law and Legal System Division  
Scottish Government  
St Andrew’s House  
Regent Road  
Edinburgh  
EH1 3DG

Please note that no late responses will be accepted.

**Scottish Government**  
**July 2015**



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