

Prescription (Scotland) Act 2018

Consultation on commencement
regulations

Analysis of responses

Introduction

1. The doctrine of prescription serves a vital function in the civil justice system. Negative prescription sets time-limits for when obligations (and rights), such as obligations under a contract, are extinguished. The rules of negative prescription¹ as they currently stand are, for the most part, to be found in the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”).

2. The Prescription (Scotland) Act 2018 (“the 2018 Act”), when commenced, will make a number of changes to the rules of negative prescription, addressing certain issues which have caused or may cause difficulty in practice.

3. The changes made by the 2018 Act are designed to increase clarity, legal certainty and fairness as well as promote a more efficient use of resources, such as pursuers being less likely to have to raise court proceedings to preserve a right, and reduce costs for those involved in litigation and insurance. The Act makes these changes by amending the 1973 Act. Most notably, the 2018 Act makes changes in the following areas:

- the scope of the 5 year negative prescription;
- section 11(3) of the 1973 Act and the discoverability test;
- the long-stop prescriptive periods under sections 7 and 8 of the 1973 Act; and,
- contracting out and standstill agreements.²

4. The Scottish Government sought the views of interested parties on proposed commencement regulations.³ A consultation document was published on 13 July 2020 and was open for 12 weeks;⁴ there were 11 respondents to the consultation.⁵

¹ For ease, when using the term “prescription” in the remainder of the consultation we will be referring to “negative prescription”.

² This list is non-exhaustive.

³ The proposed regulations can be found at [Appendix A](#).

⁴ Available at <https://www.gov.scot/publications/prescription-scotland-act-2018-consultation-commencement-regulations/>.

⁵ The questions asked and responses thereto can be found at [Appendix B](#).

Analysis

5. The law of prescription is set out in the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”). In relevant circumstances, the 1973 Act provides for the extinction of certain types of obligations on the expiry of a period of 5 years, without interruption, from the date on which they became enforceable. In relevant circumstances, it also provides for the extinction of certain obligations after they have subsisted for a continuous period of 20 years from the date on which they became enforceable. Unlike the 5 year prescription, the date on which the 20 year prescription begins to run takes no account of whether the creditor knew the obligation in question existed.

6. The commencement provision in section 25 provides that the substantive Parts of the 1973 Act should come into operation three years after the Act is passed, giving an effective date of 25 July 1976. Also included is a second provision (in section 14) relating to the computation of prescriptive periods: the effect is that time which occurred before 25 July 1976 can be counted towards the prescriptive period, but the whole prescriptive period cannot pre-date 25 July 1976.

7. A number of provisions in the 2018 Act can, for the purposes of commencement, usefully be divided into two broad categories: those which might in practice *reduce* the amount of time before an obligation prescribes and those which might in practice *increase* the amount of time. Taken together, these seven types of provision give rise to a number of recurring issues that may require a transitional provision when the 2018 Act is commenced. More detail on the types of provision and recurring issues are provided in the consultation paper.

We asked: We have identified three potential issues that may benefit from transitional or saving provision when the 2018 Act is commenced. These are ‘overnight prescription’, ‘retrospective prescription’ and ‘revived obligations’. Are there any other issues that you consider may benefit from transitional or saving provisions?

Option	Total	Percent
Yes	4	36%
No	5	45%
Not Answered	2	18% ⁶

⁶ In the following tables, percentages are rounded to the nearest whole number and so the sum of the column may not equal 100%.

8. Three respondents brought up an issue that they referred to as “straddle” rights/obligations: those in respect of which the prescriptive period has started to run – but not finished – prior to the transition date. While one respondent concluded that, in its view, “no transitional or saving provision is needed to address this issue”, another respondent was concerned that the draft Regulations “[do] not expressly state what is to happen to any right of obligation in existence but not extinguished before the appointed day. The conclusion has to be that any such right or obligation is subject to the changes made by the 2018 Act...”. Using the example of an obligation involving latent damage to illustrate this matter, a creditor will have the benefit of the amended discoverability test. This could result in the prescriptive start date being recalculated or reset.

9. The law of prescription involves looking back in time from a fixed point and ascertaining whether a right/obligation has been extinguished. As far as straddle rights and obligations are concerned, the new regime must be capable of taking into account events which occurred prior to the date of commencement but, importantly, calculating those events according to the provisions of the 2018 Act. If the 2018 Act were to apply only to those rights/obligations which arose after the date of commencement then not only would the full benefits not be felt for a long time, but a dual-regime of prescription would apply for an equally long period, one based not on the instant date of calculation but on the date when the right/obligation came into existence.

10. This may mean that some rights/obligations would prescribe earlier than under the new regime, depriving some creditors. This, however, can be mitigated by having a sufficiently lengthy commencement period in which individuals can assess their affairs and take any necessary steps to protect those rights/obligations.

11. If the Scottish Government opts for a general 3-year implementation period then we would consider this sufficient time for an individual to assess their circumstances and consider whether any existing rights/obligations will “straddle” the date of commencement of the new regime, the effect of the new regime on those existing rights/obligations, and to act accordingly.

Proposed transitional and saving provision

12. Commencement of the 2018 Act must give sufficient notice to creditors and debtors before they are affected by the changes made to the law. This is necessary to allow people to adequately arrange their affairs and protect their position in anticipation of the potential for an earlier (or later) date of prescription under the rules as amended by the 2018 Act.

We asked: The 1973 Act allowed those affected by the incoming regime a period of 3 years to arrange their affairs. Do you agree that 3 years is a sufficient length of time to ensure that creditors/debtors have the necessary time to arrange their affairs accordingly? If not, what period of notice would you suggest and what are your reasons for this suggestion?

Option	Total	Percent
Yes	4	36%
No	3	27%
Not Answered	4	36%

13. The general view of respondents was that 3 years was a sufficient time period. Of the 8 responses to this question, 6 were content with the 3 years proposed.

14. A number of respondents questioned whether a single lead-in period should be applied to all provisions of the 2018 Act. One respondent put forward “that many of the provisions of the Act should be brought into force immediately, or on a shorter timescale than three years. We are concerned that the current prescription arrangements under Scots law, which the 2018 Act sought to remedy, are very unclear and place Scots law at a significant disadvantage. If the proposed implementation period of three years is followed, this would mean that at the point of implementation five or more years could have elapsed since enactment.”

15. Of the 11 respondents to the consultation overall, 6 questioned the necessity to have a single 3 year period. Two provisions in particular were mentioned as requiring less time: standstill agreements (Section 13 of the 2018 Act) and the reformed discoverability test (Section 5 of the 2018 Act). One respondent suggested that where the changes implemented by the 2018 Act increase the amount of time before an obligation prescribes there should be a shorter lead-in period.

Standstill agreements

16. Respondents mentioned that such agreements can only be entered into with the consent of parties. One respondent mentioned that the existence of an agreement does not retrospectively alter whether a claim has prescribed or which regime it would fall under. Another respondent stressed that there is no need to give parties time to arrange affairs prior to the introduction of the option of entering into a standstill agreement.

Discoverability test

17. One respondent said that the test is causing unnecessary uncertainty and resulting in precautionary litigation, where disputes might otherwise be settled without recourse to the courts. Even where there is recourse to the courts, the law is still

unclear with conflicting decisions abounding. The same respondent recognised that commencement of the 2018 Act will not assist litigants whose cases will be resolved under current regime, but nevertheless maintain that a more effective, predictable and consistent approach as in the 2018 Act is important and should be brought forward in a shorter time frame than 3 years. Another respondent was of a similar view: litigating parties need certainty as soon as possible.

18. One other responded that section of the 1973 Act is concerned with obligations to make reparation: “The only step that we envisage parties to such claims may have to take during any transition period to “arrange their affairs” prior to the proposed change to the law taking effect would be the raising of protective proceedings to avoid potential claims being extinguished.” Accordingly, a 3 year period would not be appropriate.

19. The Scottish Government are persuaded by these arguments and therefore we will seek to commence provisions regarding standstill agreements and the discoverability test at an earlier date.

Savings provision and legal certainty

20. Commencement of the 2018 Act must not create legal uncertainty. It should be beyond doubt that obligations which have been extinguished by the 1973 Act (as it stands before amendment by the 2018 Act) are not revived by the coming into force of the 2018 Act.

We asked: Do you consider the savings provision proposed is sufficient to ensure that obligations which have prescribed under the 1973 Act as it stands prior to amendment by the 2018 Act will not be revived? Do you consider any further provision is required?

Option	Total	Percent
Yes	6	55%
No	1	9%
Not Answered	4	36%

21. Changes to the law of prescription made by the 2018 Act should not result in rights and obligations being extinguished with effect from a point in time before the coming into force of the 2018 Act. To put this beyond doubt we propose to make provision to ensure that a prescriptive period calculated in accordance with the amendments made by the 2018 Act cannot expire before the moment the 2018 Act comes into force.

We asked: Do you consider the transitional provision proposed to prevent the amendments made by the 2018 Act from providing for a date of prescription which pre-

dates the coming into force of the 2018 Act are sufficient? Do you consider any further provision is required?

Option	Total	Percent
Yes	4	36%
No	1	9%
Not Answered	6	55%

The draft regulations

22. In line with the analysis outlined in the consultation paper, an illustrative draft of the Commencement Regulations was prepared for the purposes of the consultation. The purpose was to afford anyone with an interest the opportunity to consider and comment on the proposed provision made.

We asked: Do you agree that the manner in which the Scottish Government proposes to commence the 2018 Act address the potential issues highlighted in this consultation?

Option	Total	Percent
Yes	4	36%
No	1	9%
Not Answered	6	55%

23. Two respondents thought there should be an express provision that the old regime will continue to apply in litigation commenced prior to the coming into force of the 2018 Act and which is still ongoing at the point of such implementation.

24. For the reasons set out in the consultation paper, the Scottish Government are not convinced of the need for an express provision that litigation commenced would proceed under the regime in force at that time.

We asked: Are there any effects of the commencement provision proposed that are not anticipated and addressed in this consultation?

Option	Total	Percent
Yes	3	27%
No	5	45%
Not Answered	3	27%

25. A respondent questioned how draft clauses 3 and 4 interact with one another. It was particularly concerned that the old regime and the new regime could be used to calculate the prescriptive period for the same obligation. To use the example provided by the respondent, “AB has a right currently subject to the twenty year prescription. The right arose in 2004. The prescriptive period (under the old law) will expire in 2024. The 2018 Act changes the right to be subject to the five year prescription (and so it would have expired in 2009 if the new law were applied). Regulation 4 will extend the prescriptive period to 2023. It is unclear, however, whether regulation 3 applies (as according to the old law the right has yet to prescribe but according to the new law it has already prescribed). If regulation 3 does apply, AB would have until 2024 to bring a claim (because regulation 3 would prevent the change from the 20 to the 5 year period from happening). There are therefore two potential end dates to the prescriptive period which might apply to AB’s right.”

26. The law of prescription operates by examining the history of events related to an obligation, and applying the rules of prescription to that sequence of events. The law of prescription therefore necessarily involves looking backwards in time at the history of events leading up to the date on which the question is asked “has the obligation prescribed”, when the prescriptive period is calculated. The Scottish Government is not persuaded that the interaction between the savings and transitional provision requires amendment in light of the issue highlighted above. The 3 year lead-in time for the majority of substantive provisions allows individuals to consider the impact of the new prescriptive regime and, where appropriate, take steps to enforce their legal rights and obligations.