

## Briefing for the Public Petitions Committee

**Petition Number:** [PE1672](#)

**Main Petitioner:** Hugh Paterson

**Subject:** Scottish Law Commission Report on Prescription

Calls on the Parliament to urge the Scottish Government to consider remedial action in terms of the law relating to prescription and limitation.

### Background

#### *Overview*

This petition relates to **prescription**, principally **negative prescription**.

Negative prescription extinguishes legal rights after the passage of time and, at first glance, it can seem quite an abstract, technical legal concept. However, negative prescription can have important practical consequences.

The background material to this petition expresses concern over how the current law of negative prescription applies to claims for damages. Specifically, some claims for damages where the purchase of a property has gone wrong and the purchaser has not received good legal title to all or part of it.

The relevant legislation on prescription is the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act').

Aspects of the law of negative prescription under the 1973 Act were reviewed by the [Scottish Law Commission](#) (SLC) recently, the body that makes recommendations for law reform to Scottish Ministers. A discussion paper<sup>1</sup> was published in 2016 and a report<sup>2</sup> recommending various reforms was published in July 2017. The recent [Programme for Government](#) makes a commitment to a Bill on prescription (at p 32), which will implement the recommendations of the SLC report.

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<sup>1</sup> Available at:

[https://www.scotlawcom.gov.uk/files/3514/5614/9429/Discussion\\_Paper\\_on\\_Prescription\\_DP\\_No\\_160.pdf](https://www.scotlawcom.gov.uk/files/3514/5614/9429/Discussion_Paper_on_Prescription_DP_No_160.pdf)

<sup>2</sup> Available at:

[https://www.scotlawcom.gov.uk/files/3414/9978/5138/Report\\_on\\_Prescription\\_Report\\_No\\_247.pdf](https://www.scotlawcom.gov.uk/files/3414/9978/5138/Report_on_Prescription_Report_No_247.pdf)

The petitioner responded to the SLC's discussion paper. In the SLC report the SLC considered the issue that the petitioner is concerned with but decided against changing the law.<sup>3</sup>

More detail is provided below, including on negative prescription and, specifically, how it applies in the context of conveyancing transactions. It also explains why the SLC does not want to change the law and what the Scottish Government thinks about this issue.

### *Negative prescription – law and policy*

In the context of claims for damages negative prescription sets a **time limit** in which a person wronged (the pursuer) must raise his or her legal claim in the civil courts against the person or organisation which caused the loss (the defender). If the time limit is missed, the legal obligation is extinguished and the right to pursue the claim is lost.

In policy terms, people first encountering the law of prescription sometimes find it difficult to understand why this area of law exists at all. At first glance, if a person has suffered a loss, it seems that they should always have the right to bring a well-founded court action. However, prescription (or an equivalent to it) exists in nearly all developed legal systems in the world. This is for various policy reasons, including the **public interest in not having claims litigated on the basis of stale or missing evidence**.

### *Five year and twenty year prescription – important differences*

The 1973 Act gives two main timescales for negative prescription – **five years** (section 6; schedule 1, para 1) and **twenty years** (section 7). Both five year and twenty year negative prescription apply to an obligation to pay damages in respect of a financial loss.

The five year time period associated with negative prescription can start from the point at which the loss occurred. However, the five year prescription also takes some account of **the pursuer's state of knowledge in relation to the circumstances of the claim** in determining when the clock starts to tick (section 11(3)). This means **the pursuer must be aware the loss has occurred** for the five year period to begin.

On the other hand, the twenty year prescription **has no regard to the pursuer's state of knowledge**. It always **starts from the date the loss occurred**.

The effect of this is that sometimes a legal obligation to pay damages can be extinguished by twenty year negative prescription i) without the five year prescriptive period starting to run; and ii) perhaps more fundamentally, **without the pursuer having ever been aware that a legal obligation to pay damages existed at all**.

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<sup>3</sup> See paras 4.3–4.4.

### *A legal claim arising from a conveyancing defect*

Turning now to house sales, to successfully transfer ownership of property, the new owner's legal title to that property (with its boundaries correctly described) must be registered in one of the property registers maintained by the [Registers of Scotland](#).

Various things can go wrong with this process. Sometimes the prospective purchaser (unwittingly) ends up not owning the property at all or, more commonly, ends up owning land or buildings with legal boundaries which are different from those he or she believed he or she owned.

At this point, **providing the property has been registered**, a different type of prescription – positive prescription – can operate in some circumstances to 'cure' the defect in the legal title.

However, sometimes a solicitor acting for a purchaser **fails to apply to register the legal title of the would-be purchaser at all**. In these circumstances, positive prescription cannot operate. Depending on the circumstances, the affected person may then have a claim for damages, including against his or her solicitor.

However, if the property is not sold until many years later the problem with the legal title may not come to light for a long time. The associated claim for damages in the civil courts may then be affected by the twenty year negative prescription, as described above. In other words, **their claim for damages could be extinguished without them having ever been aware of it**.

### *The approach of the SLC*

When recommending no change to the current law, the SLC said:

“On buying a house a purchaser cannot reasonably be expected to review or scrutinise the work done by the conveyancing solicitor, so there is every justification for him or her to be entirely ignorant of the title defect.

This is a difficult situation, in which prescription operates harshly. We have sympathy with the affected purchaser. The question is whether this case (or similar cases) leads to the conclusion that the long-stop prescription should be reconfigured so as to take account of the state of knowledge of the person affected. We have considered this matter closely.

The long-stop prescription serves an important purpose, that of bringing about certainty and finality. It does so by fixing a clear limit on the period within which a claim can be brought. That clarity and certainty cannot be achieved if the length of the period takes account of factors specific to an individual pursuer, in particular his or her state of knowledge. If that were done, no defender would ever be able to be sure that a potential liability had gone; and it would not be possible

safely to dispose of records that might potentially be relevant to a claim from many years earlier. While we recognise that there will be cases in which individuals suffer loss as a result of this rule, we have to take account also of the wider public interest which the doctrine of prescription serves. We therefore do not recommend that the law be changed so as to address this issue.” (report, paras 4.3–4.4)

## Scottish Government Action

SPICe asked the Scottish Government to comment on the subject matter of this petition. The Government commented as follows:

“The Scottish Government plans to accept the Scottish Law Commission’s (SLC) recommendation on this issue in their report on Prescription. We agree with the SLC that negative prescription is an essential part of balancing individual interests on one hand and serving the wider public interest on the other. We share their view that the 20 year long-stop serves the important purpose of creating legal certainty, finality and fairness.

Aiming to strike a fair balance overall means there will sometimes be cases where prescription operates harshly. But the prospect of such cases needs to be balanced against the wider public interest of certainty and finality. Our view is that there has to be a clear and certain cut-off somewhere. Undoing this certainty would prevent individuals and organisations arranging their affairs effectively and it might raise concerns about stale and missing evidence and difficulties of administering justice in very old cases.”<sup>4</sup>

The Scottish Government also highlighted that, instead of a court claim for damages, a **complaint could be made about a solicitor** to the [Scottish Legal Complaints Commission](#) (the SLCC) in some circumstances. If a complaint relating to inadequate professional services is upheld the Commission can award **damages not exceeding £20,000**.

The Commission operates **strict time limits** for handling complaints. For complaints about inadequate professional services occurring pre-1<sup>st</sup> April 2017, the time limit is **one year** from the point the service was last provided. For services on or after that date, the equivalent time period is **three years**. In both instances, periods where the complainer was **excusably unaware** of the inadequate professional services are excluded. The SLCC would need to be consulted as to how this would be interpreted in an individual case (or class of cases).

The Scottish Government also highlighted its **reform of the property registers in Scotland**. At present there are two property registers – the original Register of Sasines and the ‘new’ Land Register for Scotland (which

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<sup>4</sup> Email to SPICe from the Scottish Government dated 3 October 2017.

has been in operation since the 1980s). A significant proportion of Scotland's land and buildings remain on the Register of Sasines.

On its reforms, the Scottish Government commented:

“More generally, on land registration the General Register of Sasines is progressively being replaced by the Land Register of Scotland. The Land Register shows more accurately the extent of titles. Under the Land Registration etc (Scotland) Act 2012 and subsequent subordinate legislation, all dispositions now induce registration in the Land Register. **The Scottish Ministers have asked the Keeper to complete the Land Register by 2024.**”<sup>5</sup>

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**4 October 2017**

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<sup>5</sup> Email to SPICe from the Scottish Government dated 3 October 2017.