Consultation Response

Prescription (Scotland) Act 2018 commencement regulations: consultation

October 2020

Introduction

The Law Society of Scotland is the professional body for around 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Obligations Law committee welcomes the opportunity to consider and respond to the Scottish Government consultation, *Prescription (Scotland) Act 2018 commencement regulations.*

General comments

We believe that commencing provisions from the 2018 Act is an important priority and are of the view that this should be done as soon as is reasonably practicable. The current situation around prescription is unsatisfactory, with Scots law at a disadvantage by comparison, for instance, to the laws of England and Wales. This disincentivises the selection of Scots law as governing law in commercial contracts, places Scots private law at a disadvantage and makes Scotland a less attractive place to do business. The provisions of the 2018 Act can help to address these challenges and we are keen to see these measures introduced at the earliest opportunity.

Response to Questions

# 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?

We have no comments on this question.

# 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?

We strongly recommend 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.

We believe that the changes to section 11(3) on short negative prescription periods and the introduction of standstill agreements are urgently needed: they merit a shorter implementation period and we do not believe that a three-year period is required for people to “adequately arrange their affairs”, as the consultation paper suggests.

Indeed, for measures such as standstill agreements, these could be introduced without a transitional period and without significant impact on parties to proceedings. Members report that the current confusion over the “discoverability 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 - see eg the recent case of *WPH Developments Ltd* v *Young and Gault (In Liquidation)*, Glasgow Sheriff Court, 8May 2020, and currently on appeal to the Inner House. This places both clients and advisors in an impossible situation. Although the reforms of the 2018 Act will not assist litigants whose cases will be resolved under current arrangements, ensuring a more effective, predictable and consistent approach by commencing the 2018 Act provisions with a shorter transition period is important.

We are also of the view that the 1973 Act should be amended to provide that the period of Coronavirus lockdown this year, and any future substantial future lockdown which precluded normal court service, should be discounted when calculating prescriptive periods (in the same way as currently applies in relation to induced error). We think this is needed due to the current approach of the Scottish courts, particularly the lack of clarity as to what amounts to urgent business. It is vital that this is done in a very careful and clear manner in order to avoid creating any further uncertainty as to the operation of the law of prescription.

# 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?

We have no comments on this question.

# 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?

The drafting of the transitional provisions is straightforward. There is a question around how user friendly that makes them to apply in more complex situations, such as where the short negative prescriptive period commences prior to the implementation date for the new provisions and concludes after the implementation date, with the date of commencement of the prescriptive period differing depending on whether it is calculated in accordance with the old or new version of section 11(3). In such a situation, the transition provisions seem to us to have a "retrospective" effect, or to be more precise, they impact on existing rights/obligations. Based on the current drafting, a pursuer in this scenario seems to benefit from the 2018 Act provisions when calculating the commencement of the prescriptive period in terms of section 11(3). Similarly, the new "not interruptible" rule seems to apply to 20 year periods that would have previously been considered as interrupted.

The intention appears to be that the corollary of regulation 3 applies, ie that amendments to the 1973 Act made by the 2018 Act do have an effect in relation to any right or obligation that was not extinguished before the day appointed in regulation 2.

Ideally, the regulations would clearly address how the new provisions apply to rights/obligations accrued prior to implementation of the Act to avoid confusion. However, it is not apparent what more could practicably be done in terms of drafting and we would conclude that the transitional provisions are ultimately workable.

# 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?

As set out above, we are concerned that the proposed implementation timescales for certain provisions will in fact be detrimental to relevant parties and unnecessarily extend the current uncertain situation. This may further damage the reputation of Scots law, incentivising parties to contract under other laws and making Scotland less attractive as a place to do business.

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

We have no comments on this question.

**For further information, please contact:**

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