

This document relates to the Prescription (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 8 February 2018

Prescription (Scotland) Bill

Explanatory notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Prescription (Scotland) Bill, introduced in the Scottish Parliament on 8 February 2018.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 26–FM);
 - a Policy Memorandum (SP Bill 26–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 26–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

The Bill – commentary on sections

5. The Bill makes changes to the law of negative prescription to address certain issues which have caused or may cause difficulty in practice. These changes are designed to increase clarity, certainty and fairness as well as

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promote a more efficient use of resources. The Bill makes amendments to the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”).

The structure of the Bill

6. Sections 1 to 5 of the Bill make provision in relation to the five-year prescription provided for in section 6 of the 1973 Act, as read with schedule 1 of that Act. The effect of the five-year prescription is to extinguish certain types of obligations (and rights) after a period of five years has elapsed, provided that various conditions are met. Sections 6 to 8 of the Bill make provision in relation to the 20-year prescription in sections 7 and 8 of the 1973 Act. The 20-year prescription, in terms of section 7, currently extinguishes obligations 20 years after the date on which they became enforceable (other than those which are imprescriptible (obligations that cannot be extinguished by the law of prescription, such as a real right of ownership in land), in terms of schedule 3 of the 1973 Act, and those relating to reparation for personal injury/death and damage caused by defective products). The remaining sections cover miscellaneous and general matters.

Section 1 - Obligations to pay damages and delictual obligations

7. Currently, paragraph 1(d) of schedule 1 of the 1973 Act refers to obligations arising from liability to make reparation. The courts have interpreted “reparation” narrowly to mean only a claim for the payment of damages arising from a wrongful act. Consequently, obligations arising from delict other than the obligation to pay damages currently do not fall within the five-year prescription.

8. Section 1 amends paragraph 1 of schedule 1 of the 1973 Act. Subsection (2) inserts a new sub-paragraph (d). This makes clear that obligations to pay damages fall within the scope of the five-year prescription regardless of their source; examples are obligations arising by virtue of any enactment, the common law, delict, breach of contract or promise.

9. Subsection (2) also inserts a new sub-paragraph (da) into paragraph 1 of schedule 1 of the 1973 Act to the effect that the five-year prescription, in addition to applying to all obligations to pay damages, extends to any obligations arising from the law of delict which do not fall within any other sub-paragraph of paragraph 1.

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10. Subsection (3) makes textual changes to section 11 of the 1973 Act to reflect new sub-paragraph (d) of paragraph 1 of schedule 1 of the 1973 Act.

Section 2 - Obligations related to contract

11. This section amends paragraph 1 of schedule 1 of the 1973 Act to bring within the scope of the five-year prescription two further types of obligation.

12. Subsection (2) inserts a new sub-paragraph (fa) dealing with the first type of obligation: any obligation relating to the validity of a contract. Where a contract has been induced by error or innocent misrepresentation (caused by the debtor innocently or otherwise), the contract is voidable. In other words, the contract is valid until it is set aside by the party entitled to avoid it. For example, A is induced to purchase a painting from B by B's innocent misrepresentation that the painting is by artist C. When A discovers the painting is not in fact by C, A can seek to have the contract set aside on the ground of misrepresentation and recover from B the sum paid. It does not appear however that the right to reduce a contract on those grounds can in all cases be categorised as a right arising from contract and hence fall within the ambit of schedule 1, paragraph 1(g) of the 1973 Act. The effect of the provision is that such rights and obligations relating to the validity of a contract which do not fall within any other sub-paragraph of paragraph 1 are subject to the five-year prescription. The purpose of the qualification in the final part of the sub-paragraph is to deal with any potential overlap with obligations arising from delict, for example in cases of fraud or negligent misrepresentation. This sub-paragraph is not concerned with a situation where the error is so material as to preclude consent, meaning that there is no contract at all. Subsection (2) also inserts a new sub-paragraph (fb) dealing with the second type of obligation to be brought within the five-year prescription by this section: the obligation to reimburse expenditure incurred as a result of dealings in anticipation of the coming into existence of a contract which does not in fact come into being. The situation in which this would apply would generally be where one party has in good faith incurred expenditure in reliance on an assurance by the other that there is a binding contract between them, but the contract does not come into being; in other words, the liability is pre-contractual in nature. Perhaps the most famous example of this concerned the Melville Monument in Edinburgh. Development of an estate in Edinburgh owned by W was to include a monument paid for by subscribers led by M. The subscribers, with W's consent, carried out preparatory work on the estate

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with a view to having the monument erected there. This disrupted W's other plans for the estate. Subsequently, the subscribers had the monument erected in a different place – in St Andrew's Square. W sued M. The court decided that W was entitled to recover from M any wasted expenditure incurred as a result of the monument not having been erected at the agreed location on his estate.

Section 3 - Statutory obligations

13. This section brings within the scope of the five-year prescription all statutory obligations to make a payment in so far as they neither fall within any other sub-paragraph of paragraph 1 of schedule 1 of the 1973 Act, nor are excluded. A statutory obligation to make a payment should be interpreted broadly so as to include any statutory obligation to pay something or to repay something.

14. Subsection (2)(a) provides for the repeal of provisions of paragraph 1 of schedule 1 of the 1973 Act which relate solely to statutory obligations to make a payment. This is a rationalisation of paragraph 1, given that these obligations will be covered by the general provision inserted by subsection (2)(b), discussed below. Those sub-paragraphs dealing with statutory obligations which do not involve payment, or may involve something in addition to payment, are unaffected and so remain in place.

15. Subsection (2)(b) inserts a new sub-paragraph (h) into paragraph 1 of schedule 1 of the 1973 Act. Subject to exceptions set out in subsection (3) (on which see below), new sub-paragraph (h) creates a default rule that all statutory obligations to make a payment prescribe under the five-year prescription. Statutory obligations to make a payment that fall within any other sub-paragraph of paragraph 1 will not fall within the scope of sub-paragraph (h). Moreover, as provided by section 9 of the Bill, obligations to make a payment deriving from statutes with their own provisions on prescription or limitation will continue to be subject to those provisions, to the exclusion of the five-year prescription. For example, the one-year limitation period, in terms of the Carriage of Goods by Sea Act 1971, for claims for loss of or damage to goods carried at sea.

16. Subsection (3) amends paragraph 2 of schedule 1 of the 1973 Act which sets out obligations to which the five-year prescription does **not** apply. Subsection (3)(a) makes consequential changes to sub-paragraph (e) of paragraph 2 to reflect the addition to paragraph 1 of statutory

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obligations to make a payment (sub-paragraph (h)); it also reflects the rationalisation of paragraph 1 as discussed above. For the avoidance of doubt, that part of the current sub-paragraph (e) which relates to any obligation of the Keeper of the Registers of Scotland to pay compensation by virtue of section 77 or 94 of the Land Registration etc. (Scotland) Act 2012 (“the 2012 Act”) has been moved into a separate new sub-paragraph (ea), in order to make it clear that such obligations of the Keeper in terms of the 2012 Act will continue to be governed by the 20-year prescription.

17. Subsection (3)(b) sets out further exceptions to the application of the five-year prescription to statutory obligations to make a payment. First, notwithstanding sub-paragraph (h) of paragraph 1 of schedule 1 of the 1973 Act (statutory obligations to make a payment), obligations to pay taxes and duties recoverable by the Crown (i.e. HM Revenue and Customs and Revenue Scotland which, as part of the Scottish Administration, is a Crown body), and any interest, penalty or other sum recoverable as if it were an amount of such taxes or duties, are not subject to the five-year prescription (new sub-paragraph (fa)). Secondly, an exception is made for obligations to pay sums recoverable under certain social security and tax credit legislation (new sub-paragraph (fb)). Thirdly, an exception is made for any obligation to pay child support maintenance under the Child Support Act 1991 (new sub-paragraph (fc)). Fourthly, an exception is made in relation to obligations to pay council tax or non-domestic rates and sums recoverable in connection with the enforcement of such obligations (new sub-paragraph (fd)).

Section 4 - Effect of fraud or error on computation of prescriptive period

18. Case law has drawn attention to the fact that the language of section 6(4)(a) of the 1973 Act is not as clear as it might be.

19. Subsection (2) addresses one of the problems identified in the case law, namely that the wording seems to imply that the creditor should have formed the intention to make a claim and then been induced by the debtor not to do so. “Failure to make a claim” carries no such implications. Subsection (2) therefore clarifies that, for the purposes of section 6(4), what matters is that the words or conduct of the debtor caused the failure by the creditor to make a claim for implement or part-implement of the obligation.

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20. Subsection (3), which inserts new subsection (4A) into section 6 of the 1973 Act, clarifies that it is irrelevant for the purposes of section 6(4)(a) whether or not the debtor *intended to* cause the failure on the part of the creditor. In other words, the debtor's own state of knowledge as to the situation is irrelevant. This relief is available when as a matter of fact (rather than intention) the cause of the creditor's failure to make the claim was the fraud, words or conduct of the debtor or his or her agent.

Section 5 - Start point of prescriptive period for obligations to pay damages

21. Subsections (2) and (3) provide for the replacement of the words "act, neglect or default" with the words "act or omission" in section 11(1) and (2) of the 1973 Act respectively. This serves two purposes: it minimises fragmentation by establishing consistency with the language in section 17 of the 1973 Act; also, by focussing the test more clearly on matters of fact, it reflects that knowledge of the debtor's liability in law is of no relevance in relation to the discoverability formula. This latter point is put beyond doubt by new subsection (3B).

22. Subsections (4) and (5) replace the existing discoverability formula for determining the knowledge which a pursuer must have before the prescriptive period begins to run where damages are sought for loss or damage which was initially latent. This is currently set out in section 11(3) of the 1973 Act. This addresses concerns that the decision of the Supreme Court in *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48 has brought forward the start of the five-year prescriptive period under section 11(3), in a manner that has been perceived to be detrimental to a fair balancing of the interests of creditor and debtor. In terms of the new formula, the five-year prescription does not begin to run until the date when the creditor became aware, or could reasonably have been expected to become aware, of the facts set out in new subsection (3A) of section 11 of the 1973 Act:

- (a) that loss, injury or damage has occurred;
- (b) that the loss, injury or damage was caused by a person's act or omission; and
- (c) the identity of that person.

23. Under new subsection (3A), in a case where there is more than one debtor in an obligation but the creditor gains knowledge about the identity

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of one co-debtor earlier than that of another co-debtor, the starting point for the running of the prescriptive period for each of the debtors will be different.

24. New subsection (3B), for the avoidance of doubt, expressly states the current position which is that knowledge that any act or omission is or is not actionable as a matter of law is irrelevant for the purposes of the discoverability formula.

Section 6 - Obligations: 20-year prescriptive period and extension

25. This section amends section 7 of the 1973 Act with a view to ensuring that the 20-year prescriptive period does function as a long stop. Subsection (2)(a) substitutes a new subsection (1) into section 7. The 20-year prescriptive period will no longer be amenable to interruption by a relevant claim or by relevant acknowledgement which has the effect of a full 20-year period starting again. The amendment is achieved through omitting any reference to such a claim or acknowledgement.

26. To complement this amendment, subsection (2)(b) provides for the insertion of new subsections (3) to (5) into section 7 of the 1973 Act. Although the 20-year prescription will no longer be amenable to interruption by a relevant claim or by acknowledgement, it may be extended in certain circumstances. Where a relevant claim, as defined for the purposes of section 7 of the 1973 Act by section 9 of that Act, has been made during the prescriptive period of 20 years but, before the end of that period, has not been finally disposed of and the proceedings in which the claim is made have not otherwise ended, the extension will run until the claim has been finally disposed of or until the proceedings otherwise come to an end.

27. Reference to final disposal and the end of proceedings means that the claimant has the benefit of the extension only if the claim has not been finally disposed of and the proceedings in which it is made have not otherwise come to an end. In other words, if the proceedings have ended by the time the prescriptive period expires, it does not matter that there has not been a final disposal of the relevant claim; it is enough that the proceedings have ended. This provision ensures that what is intended to be a narrow exception from the long-stop prescription is kept within tight bounds. The words in brackets in new subsection (4)(b) of section 7 of the 1973 Act make clear that, where a claim has been finally disposed of, the

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claimant cannot rely on the fact that proceedings are continuing for other purposes (for example in relation to the enforcement of a separate obligation under the same contract) in order to seek an extension of time.

28. New subsection (5) of section 7 of the 1973 Act is necessary as not all means by which a relevant claim, as defined for the purposes of section 7 of the 1973 Act by section 9 of that Act, may be made (for example a claim in a sequestration or liquidation) can be defined as “proceedings”. The circumstances in which a relevant claim will be taken to be disposed of finally are set out in section 12 of the Bill.

29. Subsection (3) of section 6 of the Bill provides for consequential amendments to section 10 of the 1973 Act. These reflect the fact that the 20-year prescriptive period will also no longer be amenable to interruption by relevant acknowledgement.

Section 7 - Property rights: 20-year prescriptive period and extension

30. In the same way as section 6 of the Bill amends section 7 of the 1973 Act with a view to ensuring that the 20-year prescriptive period functions as a long stop, section 7 so amends section 8 of the 1973 Act.

31. Section 8 of the 1973 Act deals with the extinction of certain rights relating to property by a 20-year prescriptive period. Subsection (2) of section 7 of the Bill provides that such a period of prescription will no longer be amenable to interruption by a relevant claim. (As section 8 contains no reference to relevant acknowledgement, it is necessary only to amend the section by repealing the reference to interruption by a relevant claim.)

32. Subsection (3) replicates the provision made by section 6 of the Bill for the extension of the prescriptive period in certain circumstances. Where a relevant claim, as defined for the purposes of section 8 of the 1973 Act by section 9 of that Act, has been made during the prescriptive period of 20 years but, before the end of that period, has not been finally disposed of and the proceedings in which the claim is made have not otherwise ended, the extension will run until the claim has been finally disposed of or until the proceedings otherwise come to an end. The circumstances in which a relevant claim will be taken to be disposed of finally are set out in section 12 of the Bill.

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Section 8 - Start point of prescriptive period for obligations to pay damages

33. By virtue of section 11(4) of the 1973 Act, the 20-year prescriptive period for obligations to pay damages currently runs from the date when loss, injury or damage occurred. Where time runs from the date of loss or damage, it is quite possible for a very long period to pass without the prescriptive period even beginning to run. That is capable of undermining one of the principal rationales of prescription, namely that after a certain defined period a debtor should be able to arrange his or her affairs on the assumption that any risk of litigation has passed.

34. Accordingly, this section substitutes a new subsection (4) into section 11 of the 1973 Act. Its effect is to introduce a separate start date for the running of the 20-year prescriptive period, but only in relation to claims involving recovery of damages. For such claims, time will run from the date of the act or omission giving rise to the claim or, where there was more than one act or omission or the act or omission is continuing, from the date of the last act or omission or the date when it ceased.

35. Not all obligations subject to prescription under section 7 are obligations to pay damages, and for them an analysis in terms of act or omission and loss, injury or damage is inappropriate. For these obligations, the starting date for the 20-year prescription remains the date on which the obligation giving rise to the claim became enforceable.

Section 9 - Saving for other statutory provisions about prescription or limitation

36. This section clarifies the interaction between the five-year and 20-year prescriptive periods provided for in sections 6 and 7 of the 1973 Act and other prescriptive or limitation provisions set out in other enactments.

37. Subsection (2) provides for the insertion of a new section 7A in the 1973 Act. This makes clear that neither the five-year nor 20-year prescriptive periods (under sections 6 and 7 respectively of the 1973 Act) will apply where an enactment other than the 1973 Act expressly provides either for a specific limitation or prescriptive period or that an obligation is imprescriptible or not subject to any period of limitation. (It is appropriate for the section to apply to provisions in other statutes which stipulate that an obligation should be imprescriptible or that proceedings in respect of it

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should not be subject to any period of limitation, even though it may be unlikely that this will be an issue of significance in practice.)

38. The reference to making provision in relation to prescription or limitation serves to focus on express provision in the enactment and directs attention to its effect rather than the way in which it is worded. Subsection (3) modifies the definition of “enactment” in section 15(1) of the 1973 Act. “Enactment” includes an enactment contained in, or in an instrument under, an Act of the Scottish Parliament. This is necessary to oust the restriction in the definition of “enactment” in the Interpretation Act 1978, which otherwise applies to the 1973 Act.

Section 10 - Definition of “relevant claim”

39. Section 9 of the 1973 Act defines “relevant claim” for the purposes of the Act. A relevant claim is a claim made by or on behalf of the creditor for implement or part-implement of the obligation, which claim must be made in one of certain specific ways. Although liquidation is mentioned in section 9(1)(d), it seems an anomaly that neither administration (process for a company in debt that cannot pay the money it owes) nor receivership (a receiver is appointed by a party holding a floating charge over some or all of the company's assets) is.

40. Accordingly, section 10(2) expands the definition of “relevant claim” to include the submission of a claim in an administration or receivership, and the acts that trigger administration or receivership.

41. Subsection (3) of section 10 inserts the expanded definition of “relevant claim” into section 22A(3) of the 1973 Act which sets out a separate definition in relation to the 10-year prescription which applies to obligations to make reparation for damage caused wholly or partly by a defect in a product.

Section 11 - Prescriptive periods under sections 6 and 8A: interruption by relevant claim

42. For periods of prescription which are amenable to interruption, in terms of section 6 or section 8A of the 1973 Act, section 11 clarifies the effect of the making of a relevant claim on the running of prescription. The current law on this matter is uncertain. On one view, the interruption of prescription takes place at an instant (the date when the relevant claim is made) from which prescription immediately begins to run again; on another

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view, the interruption of prescription endures until the claim has been finally dealt with.

43. To clarify the effect of the making of a relevant claim on the running of prescription, subsection (2) provides for the insertion of new subsection (2A) into section 9 of the 1973 Act. The effect of the new provision is that the making of a relevant claim for implement or part-implement of an obligation will interrupt the running of the five-year prescription, and the two-year prescription (which applies, in terms of section 8A of the 1973 Act, to extinguish obligations to make contribution between wrongdoers) until the claim is disposed of finally. Only at that point will a fresh prescriptive period begin to run. In other words, the claim is to be treated as being made continuously until it is finally disposed of. “Relevant claim” for these purposes is not restricted to claims advanced in litigation but includes those made, for example, in a liquidation.

44. This section applies only to prescription under sections 6 and 8A of the 1973 Act. (Provision is made in sections 6 and 7 of the Bill that the long-stop prescription under sections 7 and 8 of the 1973 Act should not be amenable to interruption by a relevant claim. The limited extensions of time provided for cases in which a relevant claim has been raised before expiry of the long-stop prescriptive period are applicable only to the long-stop prescription under section 7 or section 8 of the 1973 Act.)

45. The various circumstances in which a relevant claim will be taken to be finally disposed of are set out in section 12 of the Bill.

46. Subsection (3) updates the title of section 9 of the 1973 Act.

Section 12 - Definition of “final disposal” of relevant claim

47. Section 12, by inserting a new section 9A into the 1973 Act, provides a definition of “final disposal” of a relevant claim which applies for the purposes of sections 7, 8 and 9 of the 1973 Act – see new section 9A(1).

48. New section 9A(2) makes clear that, in the case of an appeal decision, the question whether or not there is an onward right of appeal from that appeal decision must be examined in determining whether section 9A(1)(a) applies. For example, disposal of an appeal in the Inner House of the Court of Session is not necessarily a “final disposal”: whether

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it is depends on whether there is a right of appeal from that decision to the UK Supreme Court.

Section 13 - Restrictions on contracting out

49. Section 13 substitutes a new section 13 into the 1973 Act. It makes clear that agreements to extend the five-year prescriptive period (section 6), and the two-year prescriptive period which applies to extinguish obligations to make contribution between wrongdoers (section 8A), are competent provided that certain conditions are met. Conversely, it provides that agreements to disapply those periods, or the 20-year prescriptive periods provided for by sections 7 and 8 of the 1973 Act, or to otherwise alter the operation of any of such periods, are not competent.

50. Subsection (1) provides that agreements to lengthen the five-year prescriptive period, and the two-year prescriptive period which applies to extinguish obligations to make contribution between wrongdoers, are competent providing certain conditions are satisfied. These conditions are laid down in subsection (2): the appropriate prescriptive period must have started to run (but not expired); the extension should be for no more than one year; and there may only be one extension of an agreement in relation to the same obligation. The provision refers to “the same obligation” rather than the particular creditor or debtor in the obligation. This means that it is not possible to get round the restriction which prevents more than one extension of the prescriptive period by assigning the obligation to a new creditor or debtor. That is because, even if there is an assignation, it remains “the same obligation”.

51. Subsection (3)(a) makes clear that where an agreement is reached for an extension of a prescriptive period, the prescriptive period will expire on the date set out in or determined in accordance with the agreement. It also makes clear that the extension binds only the parties to the agreement: if there are multiple creditors or multiple debtors, the agreement affects them only if they are party to it.

52. Subsection (3)(b) clarifies that the extension of the prescriptive period affects only the length of the prescriptive period. It does not affect the operation of the remainder of the 1973 Act in relation to either the obligation or the prescriptive period. Accordingly, the ordinary rules of the 1973 Act about the commencement, interruption and suspension of prescription continue to apply.

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53. Subsection (4) deals with the disapplication of, or alteration in some other way of the operation of, the five-year prescriptive period, the two-year prescriptive period which applies to extinguish obligations to make contribution between wrongdoers and the 20-year prescriptive periods provided for by sections 7 and 8 of the 1973 Act (other than by means of agreement to lengthen certain prescriptive periods as discussed above). Agreements to do so, for example by shortening such periods, are not competent. The subsection refers to the effect which the provision in the agreement would (apart from this section) have on the operation of section 6, 7, 8 or 8A of the 1973 Act. The intention is that it should extend not just to cases where parties have in terms purported to disapply one of those sections, but also where that is in fact the effect of their agreement.

54. This will not impact on the current practice in fields such as conveyancing where the parties enter into contractual limitation provisions. Such provisions do not extinguish obligations and, accordingly, are not provisions relating to prescription.

Section 14 - Burden of proof

55. For clarity, section 14 inserts a new section 13A, dealing with the onus of proof, into the 1973 Act.

56. Subsection (1) of new section 13A provides that the section applies to any proceedings for implementation of an obligation to which the five-year, 20-year or two-year prescriptive periods (as provided for by sections 6, 7 and 8A respectively of the 1973 Act), or to any proceedings to establish a right to which section 8 (extinction of other rights relating to property by prescriptive periods of 20 years) applies.

57. Subsection (2) provides that where there is any question as to whether or not an obligation or right has been extinguished by prescription, it is for the creditor to prove that the obligation or right has not been extinguished. The subsection is intended to apply “if a question arises as to whether the obligation or right has been extinguished by prescription”. Accordingly, the party seeking to rely on the right or obligation need not address that issue in the pleadings, unless the other party pleads that the obligation has prescribed. The subsection refers to the burden resting on the “creditor” rather than the pursuer, since issues of onus may arise in relation to a counterclaim, in which it would be the defender who bore the burden of proof.

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58. The subsection refers to the “creditor” in its application to property rights under section 8, as the 1973 Act already uses “creditor” in relation to the holder of a property right (section 9(2) is an example).

59. Subsection (3) extends the provision on burden of proof to proceedings for implementation of an obligation to make reparation for damage caused wholly or partly by defective products (section 22A of the 1973 Act).

Section 15 – Ancillary provision

60. This section allows the Scottish Ministers to make ancillary provision by regulations. Generally, such regulations are subject to negative procedure but any regulations which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure.

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