



**HEI Records Retention Schedule
Prescription & Limitation (Scotland) Act 1973**

Guidance Note

NB: Though this guidance note was originally written as an internal project document to inform JISC infoNet about the basic approach being taken to this project it was agreed that its contents were likely to have wider appeal and be of use as an accompaniment to the revised RRS for practitioners within the Scottish HE sector.

1. **BACKGROUND**

Pinsent-Masons were requested by JISC infoNet to review the Higher Education Records Retention Schedule ("**RRS**"), which is provided by JISC infoNet to Higher Education Institutions ("**HEIs**") in the United Kingdom as a resource to guide them on retention periods for records held by such HEIs.

The remit of our review was to consider the impact of the law of prescription and limitation in Scotland and, in particular, The Prescription and Limitation (Scotland) Act 1973 ("**the Act**") on the guidance provided by JISC, including the retention periods recommended in the RRS.

The RRS is intended to assist HEIs take the right decisions and adopt appropriate procedures with a view to retaining records for as long as is required to meet their legal requirements, insurance requirements and operational needs. If a HEI is involved in litigation or arbitration, either as a pursuer or defender, the retention of relevant documents may be critical to either proving the organisation's case or defending its position.

By considering the types or rights and obligations arising from the functions, activities and transactions common to all HEIs we can recommend minimum periods for retaining records in light of the time limits in which actions can be brought under Scots law.

The majority of the recommended retention periods contained in the current RRS are informed by the Limitation Act 1980. The Limitation Act 1980 does not apply in Scotland, where the Act is the nearest approximation. Thus, naturally, much of the advice contained in this note is directed at the differences between the Act and the Limitation Act 1980.

Where there is specific statutory authority for limitation or prescriptive periods, such as in the case of employment law or intellectual property rights, the position is often the same in England and Scotland – the legislation applying, as it often does, throughout the UK. Accordingly, there are a number of recommendations in the RRS – such as in the case of employee claims for serious injury (40 years) – where it is appropriate for the recommended retention periods to be the same for England and Scotland.

This note considers in general terms:-

- the differences between the relevant legal positions in England and Scotland;
- the impact of such differences on the contents of the RRS, and
- the proposed general approach to be taken in adapting the RRS.

2. **LIMITATION ACT 1980**

As a starting point, we reviewed the recommended retention periods contained in the RRS. A majority of these are based on the Limitation Act 1980. In particular (but not exclusively), the following clauses and related periods of limitation are cited as authority for recommended retention periods:-

Limitation Act 1980	
Section – Basis for Action (Summary)	Period of Limitation (years)
Section 2 – Actions founded on tort	6 years from date on which cause of action occurred
Section 5 – Actions founded on simple contract	6 years from date on which cause of action occurred
Section 8 – Actions on a speciality	12 years from date on which cause of action occurred
Section 11 – Actions in respect of personal injuries	3 years from date of act occurring or date of knowledge (if later) of person injured
Section 11 – Actions in respect of personal injuries resulting in death	3 years from date of death or date of the personal representatives knowledge
Section 14B – Overriding time limit for negligence actions not involving personal injuries	15 years from the date on which there occurred any negligent act of omission
Section 32 – Postponement of limitation period in case of fraud, concealment or mistake	Period shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake

The next step we took was to consider the equivalent position in Scots law. In order to do this reference must be made to the Act. Understanding and interpreting the Act, and the legal concepts of prescription and limitation, is critical to being able to recommend sensible retention periods for the Scottish HE sector.

3. PRESCRIPTION AND LIMITATION ACT (SCOTLAND) 1973

3.1 Prescription

The concept of negative prescription is a legal presumption that, following the lapse of prescribed period of time, a person entitled to challenge or to make a claim has determined not to do so and their rights are, accordingly, extinguished.

To put it another way, following the passing of the relevant prescriptive period, the person owing the obligation or having the liability (the debtor), is no longer bound by that obligation or accordingly liable, as the relevant obligation has been extinguished. The corollary is that the person holding the right to which that obligation relates (the creditor) can no longer enforce that right, as it has ceased to exist.

In Scots law *prescription* is different from the concept of *limitation*, in that, if negative prescription applies the right / obligation is extinguished altogether – it ceases to exist. Whereas limitation is effectively a legal bar or impediment to the creditor being able to exercise his rights against the debtor who owes the obligation. Under the principle of limitation the obligation / right still exists, it is just that it is no longer enforceable.

There are essentially two negative prescriptive periods established in terms of the Act:

3.1.1 Short Negative Prescription

In general terms, an obligation (whether arising under contract or in respect of delict or breach of statutory duty) which has subsisted for a period of **five years** from the 'appropriate date' without any claim being made and without the subsistence of the obligation being acknowledged, is extinguished.

Obligations extinguished by short negative prescription are restricted to thirteen categories (that is, it does not apply to all legal obligations), including, for example

- obligations to pay a sum of money due for a particular period arising for example, by way of interest or a periodical payment under a lease;
- an obligation based on redress of unjustified enrichment, including an obligation of restitution, repetition or recompense;
- an obligation arising from liability to make reparation, such as where a party has suffered loss due to the negligence of another party; and
- any other obligation arising from, or by reason of any breach of, a contract or a promise. Although, categories of contractual obligation such as those arising through partnerships are explicitly excluded.

The five year period starts running on the 'appropriate date', which in the case of an obligation to make reparation for loss, injury or damage caused by any act, neglect or default shall (generally) be the date when the obligation became enforceable. In general, this itself is tied to the date on which the person suffering the loss became aware or ought to (using reasonable diligence) have become aware of such loss and thus the liability or breach crystallises (or ought to have crystallised) into something that can be recovered or enforced.

For example, in the case of a delictual liability the appropriate date will be the date that the loss is suffered, or, if later, the date the creditor became aware of that loss or should have done so using reasonable diligence. The 5

year period will run from **this** date, not necessarily the date on which the act causing the loss took place.

As we will see, this is different from English law, in that the equivalent 6 year period under the Limitation Act 1980 for, say, contractual obligations starts running from the date of the breach of the obligation, whilst in Scotland the 5 year period commences on the date on which the loss follows on from the breach. This is a subtle but important distinction.

So, in theory the 6 year period in England could expire before the 5 year period in Scotland.

For example, if a supplier of services breaches a contractual obligation to supply services in accordance with a particular specification but his customer does not become aware of the loss suffered as a result of this breach until a year after the breach (and could not using reasonable diligence have become aware of that loss before that date), then the prescriptive period in Scotland will, in respect of the loss, run for 6 years from the actual breach of the contractual obligation, notwithstanding the stated 5 year period for short negative prescription.

If the obligation relates to a series of events the appropriate date will be the date the last event occurred, or in relation to an obligation in a contract the date specified therein.

In computing the short negative prescriptive period, any time during which the creditor is a) induced to refrain from raising an action by fraud or error, or b) is under a legal disability (for example, of non-age or of unsound mind) is to be disregarded.

3.1.2 Long Negative Prescription

Obligations of 'any kind' (but excluding a limited list of rights and obligations (such as a real right of ownership in land) which are expressed to be imprescriptible) can be extinguished by long negative prescription including those affected by short negative prescription and those connected to certain rights in property, but excluding those relating to personal injury, product liability or consumer contracts for which specific legal rules on prescription and limitation apply.

If, after the date when any such obligation becomes enforceable, **twenty years** has subsisted without any claim being made and without the subsistence of the obligation being acknowledged, then the obligation is extinguished.

Unlike short negative prescription, in the case of obligations to make reparation, there is no "discoverability" element to long negative prescription. Therefore, it matters not that the person relying on the right was not aware of the loss that he suffered, whether or not he ought to have been so aware. The 20 year period will start running from the date the loss actually occurred, a question of fact.

In addition, 20 year prescription, unlike 5 year prescription, does not allow for time to be disregarded due legal disability or error or fraud.

As with short negative prescription, where the obligation relates to a series of events the relevant 'enforceable date' will be the date the last event in the series occurred.

It is expressly provided in the Act that obligations which prescribe under short negative prescription can also prescribe under long negative prescription. Given that the start of the five year period can be postponed and its running suspended in the case of fraud, error or legal disability, it is possible for the 20 year prescription period to extinguish an obligation before the 5 year period does.

Thus a person can rely on long negative prescription in a way which is not possible with short negative prescription due to the variables which can affect the date on which the 5 year short negative prescriptive period begins to run or be interrupted.

There is also greater certainty in terms of obligations to make reparation, in the sense that there is no need for the person who has the right to enforce the obligation to be aware (actually or constructively) of the loss he has suffered for the prescriptive period to commence.

3.2 Limitation

The principle of limitation is that following the lapse of a specified period of time an action claiming damages for personal injury, wrongful death or defamation may no longer be brought. The Act provides that limitation applies in specific circumstances, often to the exclusion of the law on prescription.

3.2.1 Actions in respect of personal injuries not resulting in death

An action for damages in respect of personal injuries, whatever the legal ground (delict, breach of contract, breach of statutory duty or other but not in those arising from product liability or consumer contracts) must be commenced within **three years** of the date on which the injuries were sustained / the causing act or omission ceased (e.g. in the case of asbestosis contracted during employment) or, where later, the date the injured party became, or should have become aware of the injuries and their cause.

3.2.2 Actions where death has resulted from personal injury

The right of action where a person has been killed or sustained injury and subsequently died as a result, rests with the deceased's entitled relatives. Any action raised by an entitled relative must be brought within **three years** of the deceased's death or, where later, from the time they learned or should have learned that the injuries which caused the death were attributable to the wrongdoer.

However, if the deceased allowed the triennium mentioned above at 3.2.1 to lapse without commencing an action for damages in respect of their personal injuries, the entitled relative cannot raise an action following the death.

3.2.3 Defamation and related actions

An action for defamation must commence within **three years** following the date when the defaming publication or communication first came to the notice of the defender.

3.2.4 The limitation periods specified above are subject to the following two provisos:-

- (a) *Disregarded Time* – In computing a limitation period, any time during which the person who sustained the injuries, or where

relevant, an entitled relative was of unsound mind or under the age of 16 is to be disregarded.

- (b) *Judicial Discretion* – The Courts have the power to override the limitations where *equitable to do so* and may allow an action to be brought notwithstanding the passing a relevant 3 year period. Essentially the pursuer escapes the operation of time bar.

There is difficulty in analysing case law to determine which key factors will induce a court to exercise their discretion however there are three principles which emerge.

1. The burden of satisfying the court that equitable grounds exist rests with the pursuer (or the defender where attempting to have a counterclaim admitted out of time)

2. All factors relevant to the interests of the parties will be considered, and

3. The discretion of the court must be exercised on the basis of the material before it but is otherwise unfettered.

4. **THE IMPACT OF THE DIFFERENCES BETWEEN ENGLISH AND SCOTS LAW AND SUGGESTED APPROACHES**

The legislation cited in the RRS in respect of individual activities should not be regarded as the only legislation which will be relevant to that particular activity. We assume that each recommended retention period represents guidance on the longest minimum period for which records should be retained in respect of the relevant potential obligations.

The purpose of this note is not to recommend retention periods for each category of activity included in the RRS; these are stated in the updated RRS for Scottish HE institutions. However, we have flagged up broad categories of obligation and our proposed approach to each below. Clearly, the vagaries connected to the operation of short negative prescription mean that a claim might validly be brought after what was (assumed to be) the end of the 5 year period, such as where loss has arisen some time after the act or omission that led to that loss.

This should be borne in mind by Scottish HEIs when determining their own policy in such matters. **It may be that in certain categories, although a five year retention period is recommended in the RRS, it is determined that a retention period based on the long negative prescription period of 20 years should be adopted.**

4.1 Actions founded upon Tort

Delict, in Scotland, encompasses the concept of tortious liability arising under English law and loss arising from negligent acts or omissions. While the existing RRS makes a distinction in such actions, under Scots Law both would fall under, either the 5 year short negative prescription period, or the twenty year long negative prescriptive period.

A significant question for practitioners in the HE sector in Scotland to consider, in conjunction with their colleagues within their institution's administration, will be whether to adopt the short or long period as a basis for their institution's policies in such matters.

As can be seen from the summary on prescription and limitation set out above, interpretation of the Act is a complex matter. The decision as to which period to adopt will involve balancing the risks of relying on the shorter period against the cost involved in retaining records for the longer period of 20 years.

The key difference to consider is the fact that the operation of the long negative prescription period cannot be extended, unless it has been interrupted by a claim being made or an acknowledgement of the obligation by either party. However, the short negative prescriptive period can be extended in the event of fraud or legal disability. In addition, the need for either actual or constructive knowledge of the relevant loss in terms of short negative prescription creates potentially greater uncertainty than is the case with long negative prescription.

A strong argument could be made for Scottish HEIs retaining records associated with obligations arising other than through contract for a period of 20 years from the relevant date. The relevant date would have to be identified with regard to each activity, as is the case at present in terms of the RRS. However, this must be balanced against practical considerations, and in updating the RRS, we have assumed that in many cases Scottish HEIs may wish to retain documents and records based on the short negative prescriptive period on the basis of a risk / benefit analysis.

4.2 Actions founded upon Contract

A good number of the recommended retention periods contained in the RRS stem from HEI obligations arising from their contractual relationships.

The English position, based on the Limitation Act 1980, requires that all actions associated with HEIs contractual obligations should be raised within a period of 6 years from the date on which the relevant breach occurs. The Scottish legislation however provides that such actions should commence within a period of 5 years from the date the obligation became enforceable. In respect of reparation the 5 year period is tied to the loss arising from the breach.

This principle is the same as in terms of the immediately preceding section. Namely, that the 5 year period starts running on the date when the obligation became enforceable. As noted above, in the case of claims for reparation this date is date on which the person suffering the loss became aware or ought to (using reasonable diligence) have become aware of such loss and thus the liability or breach crystallises (or ought to have crystallised) into something that can be recovered or enforced.

This creates a degree of uncertainty which is less obvious under English law. In terms of English law the 6 year recommended retention period can be tied to termination or expiry of the contract, in that, in general terms (subject to certain limited exceptions, such as under section 32), no breach (triggering the 6 year period) can occur after the rights and obligations of the parties fall away upon termination – although certain obligations (such as confidentiality obligations) may be expressed to survive termination. However, in terms of the position under Scots law loss arising from a breach of contract may not come to bear for some time after the contract has expired or terminated and the 5 year period will commence on that later date.

The question for Scottish HE practitioners is then one of whether a view is taken on this issue, and whether, accordingly, the recommended retention period in relation to activities encompassing contractual obligations should be 5 years from the date on which the HEI's particular contractual relationship ends. Alternatively, a longer retention period could be selected to take account of the vagaries of when the five year prescriptive period commences in relation to contractual obligations under Scots law.

By way of example, the Teaching and Learning retention period relating to records documenting feedback on academic progress and general academic guidance and support given to individual taught students could provide that all records relating to such activities should be held for a period of 5 years from the date on which the particular student completes their programme and his or her contract with the HEI comes to an end. Alternatively, a longer (and admittedly somewhat arbitrary) period of, say, 10 years might be selected to take account of the possibility of the loss flowing from the breach arising at a later date.

To take an extreme example to make the point, if a university failed to satisfy its obligations to a student through sub-standard teaching or assessment and as a result that student subsequently suffers loss as a result, say, by not being able to take a post-graduate course that he would otherwise have qualified for, then whilst the university's breach will have occurred during the period of the student's studies, the loss suffered as a result of the breach may not come to light until a later date. In this example we will assume that the student travels abroad for 2 years and then applies for his post-graduate degree on his return to Scotland. In such an event, the short period of negative prescription will run from the date she becomes (or ought to have become) aware of her loss caused by the university's failure. That could (depending on the application of the discoverability test) be as late as the third year and the short period of prescription would run from that date and for 5 years, thus extending beyond the 5 year period commencing on the end of her studies and expiry of her contract with the university.

So, as with the English RRS the period selected should be viewed as a minimum. HEIs should also be made aware that in certain circumstances, where a fraud/error has occurred or the individual involved has suffered a legal disability, an action against them may still arise after the 5 year period.

In such circumstances that action can be brought at any time up until 20 years following the date on which the loss arose. As time passes, following the end of the 5 year period the risk of an action being brought on the basis of a contractual obligation diminishes. Nonetheless, whilst on the basis of a risk / benefit analysis the 5 year period may be recommended in the RRS, HEIs should be aware of the risk associated with disposing of records at the passing of the earliest prescriptive period.

Partnerships – Records documenting the formation and management of legal partnerships are specifically excluded from obligations subject to short negative prescription. Obligations between partners are governed by the long negative prescription period and records relating to such dealings should be retained for a period of twenty years following the termination of the partnership. This exclusion is specific to "legal" partnerships and, in most cases, will not apply to the collaborative arrangements to which universities so often subscribe to, such as research collaborations governed by contract.

This exclusion does apply to agency contracts, such as (potentially) where a university has appointed a marketing agent to promote its activities and attract students in another jurisdiction.

4.3 Actions on a speciality

Retention periods based on the provisions of the Limitation Act 1980 relating to actions on a speciality are, in general, covered by the Scots law provisions relating to the extinction of rights relating to property. In general, obligations relating to land are excluded from the short negative prescription period and thus subject to the long 20 year prescriptive period.

It should be noted that any real right relating to ownership or use of land – namely a right of ownership or use conferred by a disposition or lease recorded in the Land Register of Scotland is excluded altogether from the application of prescription. Thus dispositions, title deeds and recorded long leases should be retained indefinitely whilst title is still held and for twenty years from the date of disposal of the property.

Other documentation relating to the acquisition, transfer, lease and disposal of properties referred to in the Corporate Resources section of the RRS should be retained for a period of at least 20 years.

4.4 Actions in respect of personal injury and actions in respect of personal injuries resulting in death

The limitation periods for actions associated with personal injuries and any deaths arising from there from are basically the same in Scots and English law, providing three year period for actions to be raised by injured persons or their entitled relatives. There are differences in terms of the exceptions to the rule and the right of the Scottish courts to set aside the limitation on equitable grounds. However, we suggest that a similar approach to that taken currently in the RRS be adopted.

4.5 Exceptions to the Above

There are a number of activities where the approach taken in the RRS appears to be governed more by practical considerations rather than the actual statutory position. For example, the requirement in the RRS to retain documentation relating to pension contributions for seventy five years from the date of termination of employment.

In most of these cases we believe the reasoning applied in the current RRS is equally applicable in Scotland and thus there has been no need for amendment.

5. **MANAGING RISK AND OTHER CONSIDERATIONS**

Finally, in interpreting this guidance note and the RRS it should always be borne in mind that decisions regarding retention and disposal of information are ultimately a matter of risk management and that, whilst provided in good faith, the information provided in this document and the RRS are followed at the institution's own risk and that further professional legal advice should be sought where appropriate.

It should also be always borne in mind by practitioners that other factors can influence the approach taken and the length of retention periods. For example, an institution's obligations under other legislation, such as freedom of information laws and the Data Protection Act 1998 may dictate that certain documents and records are retained for shorter periods. Clearly, any retention policy should take account of statutory duties, such as the duty under the Data Protection Act 1998 not to retain personal data longer than is necessary. Most HEIs will have well-developed policies on retention of records in a FOI and DP context and these should be taken account of in addition to any recommendations contained in the RRS.

In summary then, the law of prescription and limitation in Scotland should be applied on a case by case basis and will depend on the facts in each case. Even if records are retained for the longer period of 20 years from the relevant date it is possible that loss will arise after that date and that the relevant claim may not have prescribed at the point in time at which the records are disposed of.

Given this uncertainty, each institution should make its own analysis of the practical and legal risks in each category of the RRS. For example, an institution may take the view that as risk should in theory decrease as time passes without a claim having been made, they will retain records for a period beyond the 5 year period of short negative prescription, but not for a full 20 year period.

Institutional policy should have regard to the position under the Act, but equally will be shaped by practical and actual risk assessment considerations.

Pinsent Masons

October 2007