Scottish Law Commission
promoting law reform

RESPONSE FORM

DISCUSSION PAPER ON PRESCRIPTION

We hope that by using this form it will be easier for you to respond to the questions set out in the Discussion Paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the summary at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the general comments form on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

Name:
Organisation: **BLM**
Address: 13 Bath Street, Glasgow, G2 1HY
Email address:

Summary of questions

1. Do you agree that the 1973 Act should provide that its provisions on prescription are not to apply to rights and obligations for which another statute establishes a prescriptive or limitation period?

(Paragraph 2.14)

Comments on Question 1

Yes.

2. Do you agree that the 1973 Act should provide generally for rights and obligations arising under statute to prescribe under the five-year prescription?

(Paragraph 2.46)

Comments on Question 2

Yes.

3. If the 1973 Act were to provide generally for rights and obligations arising under statute to prescribe under the five-year prescription, are there rights and obligations which ought to be excepted from this regime?

(Paragraph 2.46)

Comments on Question 3

Yes, though only as elsewhere provided by statute.

4. Do you agree that Schedule 1 paragraph 1(d) should refer not to obligations arising from liability to make reparation but to obligations arising from delict?

(Paragraph 2.59)

Comments on Question 4

Yes.

5. Do you agree that Schedule 1 paragraph 1 should include obligations arising from pre-contractual liability?

(Paragraph 2.77)

Comments on Question 5

Yes.

6. Do you agree that Schedule 1 paragraph 1 should include rights and obligations relating to the validity of a contract?

(Paragraph 2.77)

Comments on Question 6

Yes.

7. Are there other obligations to which Schedule 1 paragraph 1 ought to be extended?

(Paragraph 2.77)

Comments on Question 7

No.

8. Do you agree that it is appropriate to revisit the discoverability test of section 11(3)? If so, which option do you favour?

(Paragraph 4.24)

Comments on Question 8

No. The Supreme Court's consideration in *David T Morrison & Co Ltd v ICL Plastics Ltd [2014] UKSC 48* included careful scrutiny of underlying policy considerations. The Supreme Court's Judgment is conducive to legal certainty.

9. Do you agree that the 1973 Act should provide that loss or damage must be material before time starts to run under section 11(1)?

(Paragraph 5.17)

Comments on Question 9

No. The words "loss or damage" speak sufficiently for themselves. Qualifying those words would not be conducive to legal certainty and could give rise to unnecessary complexity, with

attendant cost.

10. Do you agree that the discoverability formula in section 11(3) should refer, for time to start running, to the need for the pursuer to be aware that he or she has sustained material loss or damage?

(Paragraph 5.17)

Comments on Question 10

No. Reference is made to Comments on Question 9.

11. Do you agree that the discoverability formula in section 11(3) should provide that the assessment of the materiality of the loss or damage is unaffected by any consideration of the pursuer's prospects of recovery from the defender?

(Paragraph 5.17)

Comments on Question 11

Reference is made to Comments on Questions 9 and 10. On any view, prospects of recovery should be irrelevant.

12. Do you agree that the present formulation of the test of "reasonable diligence" is satisfactory?

(Paragraph 5.23)

Comments on Question 12

Yes.

13. Do you agree that the starting date for the long-stop prescriptive period under section 7 should be the date of the defender's (last) act or omission?

(Paragraph 6.20)

Comments on Question 13

Yes.

14. Do you agree that the long-stop prescriptive period under section 7 should not be capable of interruption by a relevant claim or relevant acknowledgment?

(Paragraph 6.25)

Comments on Question 14

Yes.

15. Where a relevant claim is made during the long-stop period, do you agree that the prescriptive period should be extended until such time as the claim is disposed of?

(Paragraph 6.25)

Comments on Question 15

Yes.

16. Do you agree that construction contracts should not be subject to any special regime in relation to the running of the long-stop prescriptive period?

(Paragraph 6.31)

Comments on Question 16

Yes.

17. (a) Do you regard 20 years as the appropriate length for the prescriptive period under section 7?

(b) If not, would you favour reducing the length of that period?

(Paragraph 6.34)

Comments on Question 17

(a) Yes.
(b) N/A.

18. Do you favour permitting agreements to shorten the statutory prescriptive periods? Should there be a lower limit on the period which can be fixed by such agreements?

(Paragraph 7.23)

Comments on Question 18

No. Permitting such agreements might add unnecessary complexity and scope for further dispute, both with attendant cost.

19. Do you favour permitting agreements to lengthen the statutory prescriptive periods? Should there be an upper limit on the period which can be fixed by such agreements?

(Paragraph 7.23)

Comments on Question 19

No. Stair observed that "Prescription is the extinction and abolishing of all rights". Prescription extinguishes obligations by operation of law. As such, it does not lend itself to "contracting-out". Even if it was in the potential gift of parties to contract-out, permitting that might add unnecessary complexity and scope for further dispute.

20. Do you favour statutory provision on the incidence of the burden of proof?

(Paragraph 8.10)

Comments on Question 20

Yes. Whilst the law may, at present, be clear that the burden rests on the pursuer, statutory provision to remove any doubt would be conducive to legal certainty.

21. If you do favour statutory provision on the incidence of the burden of proof, do you favour provision to the effect:

    (i) that it should rest on the pursuer; or

    (ii) that it should rest on the defender; or

    (iii) that for the 5-year prescription it should rest on the pursuer, and for the 20-year prescription on the defender?

(Paragraph 8.10)

Comments on Question 21

(i) that it should rest on the pursuer.

Lord Menzies put the point well in *Pelagic Freezing Limited v Lovie Construction Limited [2010] CSOH 145:* "…the argument that the onus rests on the pursuer is even stronger when considering prescription, because it is *pars judicis* to notice that an obligation has prescribed,

and a pursuer coming to court must show an extant obligation. There cannot be a burden on the defenders to aver or prove that the obligation has been extinguished by prescription. This was recognised by the Lord Justice Clerk in *Dunlop v McGowans* (at page 34) where he observes that 'The extinction of an obligation means that there is no legal right in existence, a matter of which the court can take notice *ex proprio motu*, and there is no right of action from the start.'". (para. 63).

22. Do you agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment?

(Paragraph 9.23)

Comments on Question 22

Yes.

23. Do you agree that section 6(4) should be reformulated to the effect that the prescriptive period should not run against a creditor who has been caused by the debtor, innocently or otherwise, not to raise proceedings?

(Paragraph 10.10)

Comments on Question 23

No. Reformulating would dilute the legal certainty which prescription brings.

24. (a) Do you agree that "relevant claim" should extend to the submission of a claim in an administration?

(b) Do you agree that "relevant claim" should extend to the submission of a claim in a receivership?

(Paragraph 10.16)

Comments on Question 24

(a) Yes.
(b) Yes.

25. Do you agree that the words "act, neglect or default", currently used in the formula for identifying the date when an obligation to make reparation becomes enforceable, should be replaced by the words "act or omission"?

(Paragraph 10.20)

Comments on Question 25

Yes.

26. Do you agree that the discoverability formula should incorporate a proviso to the effect that knowledge that any act or omission is or is not as a matter of law actionable, is irrelevant?

(Paragraph 10.24)

Comments on Question 26

Reference is made to the Comments on Questions 9, 10 and 11 (no need to revisit the discoverability formula). On any view, knowledge of actionability should be irrelevant.

27. Do you have any observations on the costs or benefits of any of the issues discussed in this paper?

Comments on Question 27

The *Morrison* case has brought the benefit of legal certainty. Revisiting the discoverability formula and qualifying that would risk creating uncertainty where none need exist. Reformulation also risks adding unnecessary complexity and scope for further dispute. With uncertainty, complexity and scope for further dispute inevitably comes cost.

General Comments

Para. 1.7 of the Discussion Paper refers to claims of historical sexual abuse only being affected by the law on limitation of actions. As seen in *DK v The Marist Brothers CSOH, 15 April 2016,* the law of prescription is also of relevance to that kind of claim and should be considered before limitation.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.