

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.

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Organisation:

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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

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

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

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

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

(Paragraph 2.77)

Comments on Question 5

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

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

(Paragraph 2.77)

Comments on Question 7

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

Yes.

In the context of construction disputes, once the act or omission is identified, discovering the identity of the wrongdoer usually (although not always) follows relatively quickly and for this reason both options 2 and 3 would be acceptable. A large number of parties can be involved in construction projects eg. developers, professional consultants, contractors, numerous sub contractors. The most difficult task is usually identifying “why has something gone wrong” rather than “who is the person who caused it”. Having said that, sometimes it is only when an expert report is obtained that the precise cause of the failure is identified and only, at that point, is the identity of the wrongdoer capable of ascertainment.

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

Yes, although we would note that while this is superficially attractive, it can be difficult to advise what is material and what is not. In the context of construction disputes, it may be possible to advise what is material when it is a physical defect but much harder to do this when it is a non physical defect.

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

Yes.

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

Yes.

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.

The Burness Paull Construction and Projects team have discussed this and are of the view that a special regime is not required; but only if there is no doubt about the ability to shorten the long - stop prescriptive period (see Answer 17)

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

Comments on contracting out as they relate to the construction sector:

We would welcome contractual freedom to limit (and perhaps extend) the 5 year period, and to limit (but not extend) the 20 year period. This would facilitate a closer alignment with contracts governed by English law as well as facilitating a wider range of commercial arrangements.

- Clarification of the law on shortening the 20 year period is favoured. The 20 year period is, at present, routinely reduced to 10 or 12 years in construction contracts.
- Extending the 20 year period is not favoured, albeit there are occasionally projects where this would be welcomed eg. projects with a long design life. The practical difficulties litigating over a project completed more than 20 years ago could be substantial.
- Extending the 5 year period – our views on this depend on the test adopted for when the period starts. If option 3 were adopted then the creditor would need to know the facts of the loss, the act or omission which caused it, and the identity of the person who caused it before time started to run. 5 years would therefore be a long enough period. If however an early start date is adopted, eg. when the creditor knows of the fact of the loss, then 5 years may not be long enough. A fixed upper limit for the short negative period is attractive for substantial claims as it can limit the period for which a contingent liability needs to sit on a company's accounts.
- Contractual freedom to shorten the 5 year period is favoured – this is commercially attractive (particularly in high risk projects) in terms of pricing for the risk: a cheaper price for a shorter period of exposure.

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

Yes - our Construction and Projects team is strongly in favour of permitting agreements to shorten the statutory prescriptive periods. It reflects current practice. There should be no lower limit. See our comments in response to Q17

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

[See our comments in response to Q17](#)

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

(Paragraph 8.10)

Comments on Question 20

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

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

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

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

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

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

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

Comments on Question 27

General Comments

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.