

## 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](mailto: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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## 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. Clarity in this respect would be welcomed.

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

Yes.

Exceptions should include the existing list of exclusions stated in Schedule 1 paragraph 2 and Schedule 3 to the 1973 Act. There should also be no effect on statutory rights and obligations which are subject to their own specific time limits (to co-ordinate with (1) above).

In addition, we agree per the Law Commission's recommendation that further certainty could be obtained by making express exceptions to the five year rule for statutory obligations where appropriate.

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. It is unsatisfactory that at present some delictual obligations fall outwith five year prescription – as noted in relation to wrongs for which there is more than one remedy available eg damages and/or reduction of contract where there has been misrepresentation (whether fraudulent or innocent). Clarity would be welcomed.

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 – clarification would be welcomed.

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.

We favour option 3.

In our view a pursuer should be obliged to take reasonable steps to investigate when he comes on alert that he has suffered a loss.

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.

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.

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**

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**

Yes, agreements lengthening statutory prescriptive periods should be permitted.

Yes, there should be an upper limit. This can be dealt with by allowing an agreement to extend the statutory prescriptive period but not beyond the twenty year long-stop date ie the long-stop date for prescription should, in all cases, be strictly applied.

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

(Paragraph 8.10)

**Comments on Question 20**

Yes – as noted in the discussion paper the current legal position in existing case law leaves room for uncertainty. Clarity would be welcomed.

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**

We consider that it should be (i) or (iii).

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**

Yes. It makes sense that there should be certainty on this point encapsulated in the legislation.

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**

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**

Yes, such a proviso should be included.

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 Law Commission's recommendations for clarity in this area of the law are welcomed.

**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.