Scottish Law Commission
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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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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

No.

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 decision by the UK Supreme Court in *Morrison v ICL Plastics* [2014] UKSC 48 provided a clarification of the interpretation of the discoverability test of section 11(3). This not only provided clarity but reinforces that the position under the 1973 Act is one which balances the rights of both the pursuer and the defender. The start of the prescriptive period is postponed until the pursuer knows of the fact that he has sustained loss, injury or damage. This provides adequate protection to the pursuer until that knowledge is obtained. Once this has occurred, the clock begins to run for prescription balancing the rights of the defender against those of the pursuer.

If there is merit in revisiting the wording at all, it should be to put that clarity in statutory language. Option 1 is favoured as it outlines the position of the UK Supreme Court in *Morrison*.

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.

Our reasoning is based upon many of the same factors which were identified within the discussion paper. Any change to the wording of section 11(1) would only give rise to uncertainty. Every case depends upon its own precise facts. Adding another test to be determined (whether or not the damage is material) is unnecessarily complex. It is not possible (as the discussion paper accepts) to define 'material' adequately in order that it does not create confusion or bring about prejudice.

The assessment of damage in relation to section 11 should be objective. The inclusion of a materiality test raises the likelihood that it will be determined on a subjective basis – whether consciously or not. In cases where it is already acknowledged that the application of the 1973 Act depends very much upon the facts, it is illogical to add a further complexity.

It is accepted that there is a need to distinguish minimal damage. The paper acknowledges that this is how the courts in practice interpret the legislation so we see no need to change this. Adding a further statutory test risks the application of the statutory provision becoming dependent upon what the pursuer, subjectively, may consider to be material. Mention is also made of a 'reasonable man' test. As with the points discussed above, this would provide nothing other than further confusion for pursuers and defenders in determining when time began to run. Instead, the aim to be to bring certainty and predictability.

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.

The comments that apply to question 9 above are also applicable here. The materiality of the loss should not be included in the discoverability formula. It is even more pertinent here where there is already a multi-stage statutory test to be evaluated.

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.

Although (as stated above) we do not agree that s.11 should be amended to incorporate a materiality test, if it were to be changed then we agree that it must be clear 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. This relates to the points made above in answer 9 about the necessity to ensure that the test under section 11 remains an objective one. Any reference to the considerations of success made by the pursuer makes the test subjective, removes certainty and predictability and will cause prejudice to the defender.

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

Changing the starting point for the long-stop negative prescription period of twenty years to run from the date of the defender's last act or omission is logical. The purpose of the long-stop provision is to provide a degree of finality for both parties. This finality is not provided to the defenders when the period only begins to run from the date on which the loss, injury or damage flowed from the act, neglect or fault.

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. The legislation should be amended to make clear that, after the 20 year long-stop period, no claim can be brought – preventing a claim potentially existing in perpetuity if repeated claims interrupted the prescriptive period.

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

Time should cease to run for that claim in respect of that obligation but should otherwise run so as to affect any other claim made while the first claim is ongoing and so as to affect any other obligation.

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) No.

(b) The current period of twenty years is very lengthy. In comparison with other jurisdictions it is seen to be something of an anomaly. The length of the prescription period does not provide an adequate balance and is weighted too heavily in favour of the pursuer. It is also too far from the five-year period applicable to other obligations. A shorter period would be more equitable and allow certainty for defenders and their insurers. A reduction to 10 years, in effect, provides pursuers with twice the time before a claim prescribes compared to section 11.

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

Providing clarity about the position of contractual agreements regarding prescription is welcome. The discussion paper's position that the 1973 Act should be clarified to allow the shortening of the prescriptive period will allow sensible commercial decisions to be taken between consenting parties. It is not clear why there should be a lower limit. If there is a general consensus in favour of contractual autonomy it seems odd that that autonomy would

be subject to a lower limit.

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

In light of the answer to question 18, there is no reason why, if contractual agreements to shorten the statutory prescriptive periods are favoured, there would be a logical basis for opposing the increase of them. Parties currently find that they require to litigate to prevent a claim prescribing. It would assist all parties to permit agreements to lengthen the prescriptive period.

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

(Paragraph 8.10)

Comments on Question 20

Any statutory provision that provides for clarity where it does not already exist is to 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 favour (i), the burden of proof should rest on the pursuer. As a generality the burden of proof should rest on the party seeking to assert a right.

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 may remain a matter of dispute as to whether a creditor has indeed been induced by the debtor not to raise proceedings. However the focus ought to be on that question of fact rather than on the intention of the debtor.

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

Yes. This provides further clarity to the discoverability formula and will prevent a pursuer attempting to rely upon their ignorance of the law to delay the start of the prescription period. To do otherwise would be to encourage a party not to make further investigation once they were aware of their loss.

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 change favoured by the discussion paper to section 11(3) of the 1973 Act will place a higher financial burden upon defenders as it will have the effect of delaying the start of the prescriptive period. Whereas the decision in *Morrison* meant that defenders could move on five years following loss occurring, this proposed change will undo that. There will be increased uncertainty for defenders and their insurers who must keep reserves available long after five years has passed. That will inevitably mean increased insurance premiums.

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.