

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.

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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

We 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. As a practical matter that could, however, lead to difficulties unless the 1973 Act exhaustively lists the other statutes which provide separately for prescription or limitation periods.

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

We agree that the 1973 Act should provide for rights and obligations arising under statute to generally prescribe under five year prescription. However it is our view that introducing such a change to the prescription of statutory rights and obligations would have a significant effect on the debt collection functions of public authorities and may require changes to be implemented to the operation of these functions in practice to ensure that that all outstanding debts could be reviewed prior to this change coming into force. It would therefore be necessary for transitional provisions to be put in place whereby a reasonable notice period would be allowed to enable such a review to be carried out before any such change were to come into force.

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 comments.

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

We agree that schedule 1 paragraph 1(d) should refer to obligations arising from delict.

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

(Paragraph 2.77)

Comments on Question 5

We agree that it would be sensible for obligations arising from pre-contractual liability to be included within schedule 1 paragraph 1 so that they have the same prescriptive period as obligations arising from any breach of contract.

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

We agree that the prescriptive period for rights and obligations relating to the validity of a contract should be included within schedule 1 paragraph 1 so that they have the same prescriptive period as obligations arising from any breach contract.

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

(Paragraph 2.77)

Comments on Question 7

No comments.

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

We agree that the discoverability test of section 11(3) could be revisited.

We consider that option three whereby, before a claim which involved reparation in respect of latent damage will prescribe, there should be knowledge on the part of the pursuer (or the pursuer should reasonably have been aware) of the facts (a) of the loss, (b) or the act or omission which caused it and (c) of the identity of the defender who caused the loss could be advantageous.

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

If the 1973 Act were to expressly state that any loss or damage suffered must be material before time would start to run in accordance with section 11(1), then we would agree with the comments in paragraph 5.8 of the consultation that the definition of "material" in the legislation would need to be very carefully considered.

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

As with our response to question 9, we consider that very careful thought should be given to the definition of what was classified as "material" if this concept were to be expressly introduced into section 11(3).

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

We agree that the pursuer's prospects of recover from the defender should not be a relevant factor to be taken into account the discoverability formula under section 11(3).

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

(Paragraph 5.23)

Comments on Question 12

We do not consider that the test of "reasonable diligence" should be altered to, for example, make express provision regarding the obtaining of expert reports.

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

We 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.

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

Views were mixed in relation to this question.

Allowing the long-stop prescriptive period under section 7 to be capable of interruption by a relevant claim or relevant acknowledgement appears to defeat the point of having such a provision under Scots law. It is our view that providing for a long-stop period which was not capable of interruption would provide greater certainty.

However, no longer allowing interruption of the prescriptive period under section 7 could have an impact in some cases involving the enforcement of decrees. At present the 20 year prescriptive period for decrees can be interrupted by a creditor carrying out diligence on the decree. We are aware of situations where clients may wish to take less direct forms of diligence, such as securing and renewing an inhibition over a property, to preserve their right to recover the sums due under the decree in the future where they are aware that a debtor is not in a position to easily release funds to settle the outstanding debt (for example, where the debtor is an elderly person with no significant assets apart from the property in which they reside and taking steps to liquidate this asset would put them in significant difficulty). If the effect of the 20 year prescriptive period was amended so that it was no longer capable of interruption then, in a small number of cases, the result could be that the creditors may have to look to alternative forms of diligence rather than simply continuing to renew an inhibition in order to provide them with protection to recover funds when the debtor's property was

eventually sold.

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

We agree that, where a relevant claim is made before the long-stop period has expired, the prescriptive period should be extended until such time as that claim is disposed of. Not allowing for this could mean that delays in the course of the determination of the claim which were not the fault of the pursuer could result in the pursuer losing their right to continue with the claim prior to its conclusion. We consider that the period should be extended to such point as the claim is finally disposed of so that any appeal directly related to the relevant claim can also be completed.

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

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

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

It is obviously arguable that the longstop prescriptive period should be lengthened or shortened and different jurisdictions provide for different periods in this regard. However, we do not consider that there are any compelling reasons to change the 20 year period. It has been in existence for some time in Scotland and it would cause unnecessary confusion to change it without good reason.

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

We are not in favour of permitting agreements to shorten statutory prescriptive periods. Having the periods fixed by statute avoids situations where parties could be disadvantaged by having the period within which they may raise a claim to enforce their rights in relation to obligations cut short. Allowing statutory prescriptive periods to be shortened could create both uncertainty and also risk unfairness in situations where there is an unequal bargaining power between the parties. In addition to the concerns highlighted in paragraph 7.16 of the consultation, regarding the importance of protecting consumers from standard form or other contracts purporting to cut off their rights at an early date, we think that unfairness could arise in other situations such as contracts of employment or even in commercial contracts where small businesses are dealing with larger and more sophisticated businesses.

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

For the reasons regarding concerns about the possibility of lack of certainty and unfairness outlined in our response to question 18 above we would also not be in favour of permitting agreements to lengthen statutory prescriptive periods.

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

(Paragraph 8.10)

Comments on Question 20

Statutory provision on the incidence of the burden of proof in matters of prescription could be beneficial given the uncertainty currently arising from different approaches taken in case law.

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 in ordinary cases (ie, where a pursuer is not seeking to apply the discoverability provision under section 11(3) or the provisions related to fraud or error on the part of the defender which caused a delay in the pursuer raising the action in line with section 6(4)) it would be appropriate for the burden of proof to rest with the party pleading prescription. It seems unfair that a defender should be allowed to assert a defence that an action has prescribed and then sit back and leave the pursuer to prove that this is not the case.

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

We agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment.

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

We agree that the exception under section 6(4) should apply in circumstances where the pursuer has been induced into not raising proceedings at an earlier stage either because of fraud or because of error as properly understood under Scot's law. It should be necessary to show that the reason that the pursuer did not raise proceedings against the defender at an earlier stage was as a result of the defender's behaviour and not for any other reason, for example, because the pursuer failed to investigate matter when they reasonably should have done so. We would also agree that the state of the defender's own knowledge (ie, whether they were behaving in a fraudulent or innocent way) should be irrelevant.

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

It is our view that extending the definition of "relevant claim" to include submission of a claim in an administration would be the simplest way to deal with this as although it may be possible to raise a claim with consent of the administrator and leave of the court this would take more time and expense.

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

We agree with the proposed change to replace the words "act, neglect or default" with "act or omission".

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

We agree with that knowledge on the part of the pursuer as to whether any act or omission is actionable as a matter of law should be irrelevant for the purposes of applying the discoverability formula under section 11(3).

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

Comments on Question 27

No comments

General Comments

No 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.