RESPONSE

by the Senators of the College of Justice

to the Scottish Law Commission Discussion Paper on Prescription

(Discussion Paper No 160)

CHAPTER 2: The scope of the five-year negative prescription

Question 1 (paragraph 2.14): *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?*

Yes. While the rule of statutory construction that an enactment of a special nature normally takes precedence over an enactment of a general nature may already provide the answer in this situation, we agree that the recommended provision would be conducive to clarity.

Question 2 (paragraph 2.46): *Do you agree that the 1973 Act should provide generally for rights and obligations arising under statute to prescribe under the five-year prescription?*

Yes. In our view the Discussion Paper makes out a persuasive case for this reform.

Question 3 (paragraph 2.46): *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?*

Yes. As suggested in the Discussion Paper, we think it appropriate that obligations to pay taxes and duties, and obligations related to forfeiture, should be excluded from the five-year prescription.

Question 4 (paragraph 2.59): *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?*

In principle, yes. Our only caveat is that we are not clear whether the Discussion Paper is suggesting that the five-year prescription should apply to the obligation of trustees to restore property to the trust estate (*Hobday v Kirkpatrick's Trs* 1985 SLT 197). Our impression is that that is not being proposed, but the matter requires clarification. If it is being suggested that the five-year prescription should apply to

such an obligation, we would have expected the case for and against such a substantial change to have been fully discussed in the Paper. That has not been done.

Question 5 (paragraph 2.77): *Do you agree that Schedule 1 paragraph 1 should include obligations arising from pre-contractual liability?*

Yes. We agree that there would appear to be no policy reasons why pre-contract liability ought not to prescribe under the five year prescription.

Question 6 (paragraph 2.77): *Do you agree that Schedule 1 paragraph 1 should include rights and obligations relating to the validity of a contract?*

Yes. We agree that it is undesirable in principle that transactions should be amenable to reduction without limit of time. The current law is unsatisfactory, as is demonstrated in paragraphs 2.72 to 2.76 of the Discussion Paper. We agree that reform is appropriate. We have no strong view as to which of the two options mentioned in paragraph 2.76 is preferable.

Question 7 (paragraph 2.77): *Are there other obligations to which Schedule 1 paragraph 1 ought to be extended?*

None that occur to us.

CHAPTER 4: Options for reform of the discoverability test

The options considered in the Discussion Paper are that the start of the prescriptive period should be postponed:

(1) until the creditor knows of the fact of the loss; or
(2) until the creditor knows the facts of (a) the loss and (b) of the act or omission which caused it; or
(3) until the creditor knows the facts of (a) the loss and (b) of the act or omission which caused it and (c) the identity of the person who caused it; or
(4) until such time as seems to the court to be just and reasonable having regard to all the circumstances of the case.

Question 8 (paragraph 4.24): *Do you agree that it is appropriate to revisit the discoverability test of section 11(3)? If so, which option do you favour?*

In *David T Morrison & Co Ltd v ICL Plastics Ltd* 2014 SC (UKSC) 222 ("*Morrison*") Lord Neuberger PSC succinctly summarised the competing policy considerations which are at play in this area:

> "54 …The imposition of prescription and limitation periods inevitably involve balancing competing public and individual interests. In particular, it

involves balancing the public interest in valid claims being litigated and legal wrongs being righted with the public interest in claims not lingering over the heads of potential defenders and claims not being difficult to dispose of justly due to their antiquity. Similarly, it is an area which throws up another, familiar, tension: on the one hand, it is desirable to have general and clear rules about limitation, even if they occasionally appear to produce a harsh result; on the other hand, it is sometimes appropriate to have specific exceptions to avoid too many unfairnesses…"

His lordship went on to note that the pursuers in that case argued that there was unfairness to a potential pursuer if time runs against him from the date he knows of the injury, even though he may not know of the identity of the person who caused the injury or what the cause of the injury was. He observed, however:

> "55. … In my view, the legislature could perfectly reasonably have assumed that in almost every case, five years from the date of discovery of loss, injury or damage would represent plenty of time for the injured party to discover all he needs to know to bring proceedings. The fact that there may be a very rare case where five years may not be enough is simply an example of the inevitable consequence of the compromise which limitation law involves. After all, even under the interpretation favoured by Lord Hodge there could be potential unfairnesses in individual and unusual cases, sometimes to pursuers and sometimes to defenders."

We agree that the imposition of a prescriptive period involves balancing competing public and individual interests. Where the balance ought to be struck between the relevant competing interests appears to us to be very much a matter of policy. That being so, it is probably inappropriate that we should express any firm policy preference - that ought to be for others. It is undeniable that the current legislative provision, as authoritatively interpreted by the majority of the court in *Morrison*, has the benefits of clarity and certainty. However, the balance struck by it between the competing interests is less favourable to pursuers and more favourable to potential defenders than had previously been thought. We are not conscious of there having been any general feeling before the Supreme Court's decision that section 11(3) was unfair to potential defenders. On the other hand, our impression is that since the decision there has been considerable unease that section 11(3) may unduly favour the interests of potential defenders to the disadvantage of pursuers. As the law stands, we doubt whether it will only be a very rare case where five years may not be enough for a pursuer to discover all he needs to know. We agree with the observation of Lord Malcolm in *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* [2016] CSIH 16 (at paragraph 24) that hard cases may be more common than was anticipated by the Justices who made up the majority in *Morrison*. For these reasons we incline to the view that it is appropriate to revisit the discoverability test.

For the same reasons we doubt whether Option (1) would command widespread support or be regarded as representing a fair compromise between the relevant public and individual interests which exist.

We think that option (4) is unattractive, substantially for the reasons set out in paragraph 4.22 of the Discussion Paper. We agree that it would not be conducive to the achievement of clarity, certainty and finality in this area of the law.

Both Option (2) and Option (3) would remove the perceived harshness to pursuers of time starting to run as soon as there was mere awareness of loss. In broad terms, Option (2) would involve striking the balance between the various competing interests at much the same point as it had generally been understood to have been struck before the decision of the Supreme Court in *Morrison.* Option (3) would shift the balance more in favour of pursuers than Option (2). As we have said, how far the balance should be shifted in favour of pursuers appears to us to be largely an issue of policy, rather than one of legal principle.

However, we are surprised at the rather short shrift which the Discussion Paper gives to Option (2) (in paragraphs 4.19 - 4.20). We are not persuaded that the only rational choice is between Option (1) and Option (3). Options (1), (2) and (3) are different points on a continuum. In *both* Options (1) and (2) the pursuer has knowledge of only some of the essential matters which he requires to raise proceedings against the defender. With each of those Options it is a perfectly coherent position to say that a pursuer has the five-year period in which to discover the remaining facts and bring proceedings. Equally, it is not obvious that justice requires that the five-year period should not start to run until a pursuer is aware of *all* of the facts referred to in Option (3).

For aught yet seen, after consultation the general view *might* be that Option (2) results in a fairer balancing of the respective interests of potential pursuers and defenders than the other options. If that does prove to be the case, it would be a perfectly sensible reason for adopting the option. The reference in paragraph 4.19 to the excerpt from paragraph 33 of Lord Reed's judgment in *Morrison* does not appear to us to be particularly apposite to the issue presently under consideration. Lord Reed was construing section 11(3). That was the context in which his observations were made. By contrast, the issues here are whether the law should be reformed; and if so, how?

Finally, we agree (see Discussion Paper, paragraph 4.4) that deciding which option is most appropriate as a matter of policy must depend on examining the checks and balances in the system as a whole; and that, in particular, regard should be had to the combined effect of the discoverability test and the rules governing the long-stop prescription. We make two points in relation to this. First, because consideration of the checks and balances in the system as a whole is so important, we are cautious about drawing any conclusions from the short survey of comparative material in chapter 4. For such material to be of any real assistance one would need to know much more about the system as a whole in each jurisdiction, and how the discoverability provisions fit in with other provisions. Second, we note that the Commission's provisional view is that if the long-stop prescriptive period of 20 years is to be reduced, it should not be reduced substantially (paragraph 6.33). If, however,

the long-stop period were to be reduced significantly, that would be likely to strengthen the case for Option (3).

CHAPTER 5: Other considerations relating to section 11

Question 9 (paragraph 5.17): *Do you agree that the 1973 Act should provide that loss and damage must be material before time starts to run under section 11(1)?*

Yes. While we think the better view is that this is the position under the existing law, we agree that clarification would be useful.

Question 10 (paragraph 5.17): *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?*

Yes. Reference is made to the previous answer.

Question 11 (paragraph 5.17): *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?*

Yes. We agree that it would be desirable to clarify that the assessment of materiality is an assessment confined purely to the extent of the loss which has been sustained and has nothing to do with the prospects of recovery from the defender. We agree that the test in section 11(3) should be reformulated to make that clear.

Question 12 (paragraph 5.23): *Do you agree that the present formulation of the test of reasonable diligence is satisfactory?*

Yes. We agree that the existing wording, as interpreted by the courts, is clear. Reformulation is unnecessary and might give rise to uncertainty. In particular, there is a risk that reformulation in an attempt to deal with specific issues would give rise to confusion and complexity.

CHAPTER 6: The long-stop prescriptive period under section 7 of the 1973 Act

Question 13 (paragraph 6.20): *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?*

This question addresses how best to structure a long-stop provision for the long negative prescription. As the law presently stands, prescription starts to run from the concurrence of the date when loss or damage (*damnum*) flows from the wrongful act or omission (*iniuria*) of the defender. A brief review of the comparative materials shows that the preponderance of legal systems provide for time to run from the date

of the wrongful act or omission. The provisional view of the Commission is to adopt this approach. This has the virtue of providing a clear rule. Such a rule would also elide problems that can arise where there may be difficulties in determining when damage flows (e.g. in construction cases or cases of latent damage) or where issues of discoverability have the potential to postpone the start of the running of prescription. These matters may be inimical to the policy rationale underpinning a long-stop negative prescription, that of securing legal certainty for the defender.

We agree with the proposed change for the reasons discussed.

Question 14 (paragraph 6.25): *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?*

The Discussion Paper notes that one of the unusual features of the Scottish long negative prescription is that it is amenable to interruption by a relevant claim or acknowledgement and that, as a consequence of such an interruption, a whole new period (of 20 years) is restarted. The example posed is of a claim made in year 19, with the effect that the long negative prescription would not operate until 39 years after the date on which the loss or damage occurred.

In order to achieve the result that the long negative prescription under section 7 genuinely does operate as a long-stop, it is suggested (i) that the long negative prescription ought not to be susceptible to interruption either by a claim or by a relevant acknowledgement, but (ii) that it should be capable of being extended where a claim has been made during the prescriptive period, until that claim is finally disposed of.

We agree with this provisional recommendation. The result would be to bring this approach into line with other areas of the law, e.g. the Consumer Protection Act 1987. More fundamentally, this approach would enable a long negative prescription to operate in a clearer way as a genuine long-stop of a clearly determinate length.

Question 15 (paragraph 6.25): *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?*

Yes. The proposed change would have the effect that the long negative prescriptive period would in all cases be of a determinative length. This would achieve the objective of legal certainty which is at the heart of prescription. We believe that the allowance for the extension of the long negative prescription in cases where a claim is made during the prescriptive period, as suggested, would represent a fair balance between the relevant competing public and private interests which exist.

Question 16 (paragraph 6.31): *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?*

Yes. Some of the difficulties identified as prompting some of the proposed reforms (e.g. latent defects) arise in the construction field. The proposed changes (by way of simplification) (i) to the start of the long negative prescription (to run from the date of the defender's act or omission) and (ii) to preclude the interruption of the long negative prescription, should address the difficulties that might have justified a special rule for construction contracts.

Question 17 (paragraph 6.34): *(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?*

The Commission reasons that if (as it provisionally recommends) the long-stop provision is to run from the date of the wrongful act or omission rather than from the date of the loss, prescription will start to run earlier in some cases than under the present law. That being so, its provisional view is that *if* the prescriptive period is to be reduced, it should not be reduced substantially. While we have no strong view as to the appropriate period, we think there is a case for it remaining 20 years. In reaching that conclusion, we are mindful that the effect of the proposed reforms would be a clearly defined start to the running of prescription that is no longer susceptible to interruption. Twenty years is a relatively generous period in comparison to other systems, but parties are familiar with it. The combination of its retention and of the reforms which the Commission proposes would produce an overall result which appears to us to be fair and balanced.

CHAPTER 7: Contracting out and standstill agreements

The existing statutory provision is contained in section 13 of the Prescription and Limitation (Scotland) Act 1973. The Discussion Paper notes that there is general support for relaxation of the law in relation to both contractual extensions to prescriptive periods and the ability of parties to enter into standstill agreements. The Discussion Paper is unable to identify any policy objection to reform on these lines, subject to raising the possibility of there being long-stop time limits in relation to contractual extensions of prescriptive periods, these again being common in jurisdictions where such provisions exist.

The reasoning in this chapter is clear and it is difficult to see any objection to the line advanced by the Commission. In these circumstances, we respond to questions 18 and 19 as follows:

Question 18 (paragraph 7.23): *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?*

We agree that there is no objection in principle to agreements to shorten the statutory prescriptive periods. We favour permitting them. We see no need for the law to fix a lower limit on the period which can be agreed. We agree that the protection of consumers can be addressed by means of legislation on unfair contract terms (see paragraph 7.16 of the Discussion Paper).

***Question 19 (paragraph 7.23)*:** *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?*

We agree that there is no good reason in principle why agreements to lengthen the short prescriptive periods should be prohibited. We agree that such agreements could reduce unnecessary litigation. However, we are not persuaded that there is any pressing need to permit extension of prescriptive periods beyond the long-stop. We think that the long-stop should continue to operate, and that it should not be capable of extension by agreement.

CHAPTER 8: The burden of proof

Question 20 (paragraph 8.10): *Do you favour statutory provision on the incidence of the burden of proof?*

Yes. It is a surprising omission from the 1973 Act. Given the disparate views expressed in the first instance cases referred to, for the sake of clarity this should be the subject of express statutory provision.

Question 21 (paragraph 8.10): *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?*

We have no strong preference for any of the several options identified. It is noted that, generally, prescription favours the defender and that this is particularly the case in respect of the 20-year prescription. We can see the force in requiring the defender to bear the onus of proving that the claimant's claim has prescribed. We can also see the force in the suggestion that the burden of proof should, consistent with other matters generally, rest with the pursuer. This may justify adoption of option (iii).

CHAPTER 9: Unjustified enrichment and discoverability

This chapter addresses the issue of potentially postponing the start of a prescriptive period on the ground of discoverability in the context of unjustified enrichment. Unjustified enrichment is dealt with in a general sense. Three general categories of

unjustified enrichment are identified: payment of a sum that was not due, payment of a sum in anticipation of a future purpose which did not eventuate and enrichment by the pursuer's expenditure or services. The issue of discoverability as a test for commencement of a prescriptive period is considered in the context of each of these three general categories. The Commission's provisional conclusion is that the introduction of a discoverability test would be difficult without embarking upon a wholesale reform of the law of prescription and limitation (paragraph 9.22). The Commission does not consider that that would be justified. On the contrary, it inclines to the view that to change the law so substantially might be seriously detrimental to legal certainty.

We agree with the Commission's reasoning. Like them, we see no pressing need for reform.

Question 22 (paragraph 9.23): *Do you agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment?*

Yes. We agree with the reasoning in this chapter. We are aware of no pressing need for reform of the law in this area.

CHAPTER 10: Miscellaneous issues

Question 23 (paragraph 10.10): *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?*

Yes. The Discussion Paper identifies a number of difficulties that have arisen over the years in respect of the drafting of section 6(4), and the uncertainties inadvertently created. The purpose of the reformulation is to achieve greater clarity, not to alter the effect of the provision. We agree with this proposed change.

Question 24 (paragraph 10.16): *(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?*

Yes. A claim in other forms of insolvency procedures has long been recognised as capable of constituting a claim for the purposes of prescription. There is no reason in principle to preclude this effect in either administration or receivership.

Question 25 (paragraph 10.20)*:* *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"?*

Yes. We agree that this reform would have the advantages referred to in paragraphs 10.18 and 10.19. We note that this was a change also recommended in the 1989 Report. The purpose is to establish consistency of language with that adopted in

respect of limitation rules. It is also suggested that the language of 'act or omission' may go some way towards excluding knowledge of the defender's liability from any formula on discoverability. We agree with the proposed change of wording.

Question 26 (paragraph 10.24): *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?*

Yes. We agree that such express provision is desirable. The recommendation accords with that proposed in the 1989 Report. We note that the proposal is with a view to putting this matter beyond doubt and is consistent with the recent Supreme Court case of *Morrison* [2014] UKSC 48.

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

No.

25 April 2016