Scottish Law Commission
promoting law reform

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. The time limits set out in more specific and appropriate statutes should take precedence over the 1973 Act.

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

Yes. The policy grounds referenced in 1970 remain 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

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

We have no suggested extensions

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. Option 3

The position adopted pre-*Morrison* would appear to be the fairest and if the law were to be amended to follow that, then it would not present a radical shift given the approach that the Scottish Courts had been adopting prior to *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 views reflect many of the factors which were identified within the discussion paper - any change to the wording of section 11(1) would give rise to uncertainty. Each case depends upon its own particular facts. Introducing a further test to be determined (whether or not the damage is material) would lead to increased complexity. 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.

Assessing damage in relation to section 11 should be objective and 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 specific facts, it is does not seem sensible to add a further complexity.

We do accept that there is a need to distinguish minimal damage and 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. The aim must be to bring certainty and predictability for all concerned parties.

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

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

(Paragraph 5.23)

Comments on Question 12

Yes as any changes may complicate the considerations. In *Adams v Thorntons* the test was found to be pragmatic and understandable.

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 - the legislation should be amended to make clear that, after the long-stop period, no claim can be brought – preventing a claim potentially existing in perpetuity.

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

No – please see 14 above

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 - Prescription & Limitation periods are taken into account in the process of underwriting and pricing insurance which provide liability coverage and any increased uncertainties over extent or period of policy coverage will have a direct impact on this process.

Ultimately, defenders/policy holders require consistency and certainty when entering contracts and procuring insurance arrangements.

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

No we suggest a reduction to 15 years.

The current period of 20 years is long when compared with other jurisdictions and it is seen as something of an anomaly. The current 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 so a shorter period would be more equitable and allow certainty for defenders.

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

No. Please refer to answer 16

Defenders require certainty where possible. This will allow defenders to more easily to procure adequate and cost appropriate insurance arrangements. Any change to permit agreements to vary prescriptive periods could lead to coverage disputes which may result in increased litigation around the variation of terms and could lead to increase costs and delay in resolution of disputes.

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

No - please refer to answers 16 & 18 above

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

(Paragraph 8.10)

Comments on Question 20

Yes - any statutory provision that provides for clarity where it does not already exist is 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

Option (i) is preferred.

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

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

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

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

Comments on Question 27

We have no observations to make

General Comments

We would be happy to discuss any aspect of our response if that were deemed of assistance.

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.