Collated responses to

Discussion Paper on Prescription (DP No 160)

Consultation period ended: 23 May 2016

This document collates the responses to the above Discussion Paper. The closing date for the responses was 23 May 2016. Comments have been copied and pasted to follow the relevant question, and any general comments have been added into the section at the end of this document. The paragraph number which follows each question directs the reader to the relevant section of the Discussion Paper.

List of those who submitted responses:

- BLM Scotland ('BLM')
- Brodies LLP ('Brodies') (Response formulated on basis of informal discussions; intended only to reflect the views of those who took part in the discussions.)
- Burness Paull LLP Construction and Projects Team ('Burness Paull (Construction and Projects)')
- Burness Paull LLP Dispute Resolution Team ('Burness Paull (Dispute Resolution)')
- Clyde & Co (Scotland) LLP ('Clyde & Co')
- CMS Cameron McKenna LLP ('CMS')
- Craig Connal QC (Partner at Pinsent Masons LLP - response submitted in a personal capacity.)
- Faculty of Advocates
- HMRC
- Law Society of Scotland (Response prepared on behalf of the Society by members of the Obligations Law Sub-Committee.)
- Charles McGregor (Partner at Clyde & Co (Scotland) LLP - response submitted in a personal capacity.)

- Douglas McGregor (Solicitor - response submitted in a personal capacity.)
- Morton Fraser LLP ('Morton Fraser')
- Hugh Paterson
- Senators of the College of Justice

Architectural institute:

- Royal Incorporation of Architects in Scotland ('RIAS')

Insurance-related interests:

- Forum of Scottish Claims Managers ('FSCM')
- NFU Mutual Insurance Society Ltd ('NFU Mutual')
- Zurich Insurance plc ('Zurich')

Utility company:

- Scottish Water Business Stream Limited ('Scottish Water (Business Stream)')

Questions and responses

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	
BLM	Yes.
Brodies	It seems sensible that where a prescriptive period is established for particular rights and obligations by another statute then the 1973 Act should be explicitly dis-applied in relation to such rights and obligations. If statutory obligations generally are to be brought within the 5 year prescriptive period as proposed then it also seems sensible that where another statute provides for a limitation period for particular rights or obligations then the 1973 Act should be explicitly dis-applied. It is not entirely clear to us whether it is intended that any such rights and obligations would be subject to the 20 year prescription or whether, by dis-applying the 1973 Act it is intended to make such rights and obligations imprescriptible and subject only to the specific statutory limitation period. Whilst there are good reasons to exclude them from the 5 year prescription we are not sure that there is any reason to render all statutory rights and obligations which are subject to their own limitation period imprescriptible. There is a risk of further confusion regarding the distinct concepts of prescription and limitation. It may however be appropriate to exclude certain statutory provisions from the 20 year prescriptive period.
Burness Paull (Dispute Resolution)	Yes. Clarity in this respect would be welcomed.
Clyde & Co	Yes
Craig Connal QC	Yes
Faculty of Advocates	Yes. We consider that provision would be particularly important if the decision is taken to subject all statutory obligations to the five-year prescription (question 2, below).

HMRC	At the time of writing the Taxes Acts do not establish any prescriptive or limitation period. That said, HMRC agrees with the proposition. See our responses to Questions 2 & 3 below.
Law Society of Scotland	Yes, we consider that the 1973 Act ought to be the "default" position in the absence of alternative statutory provision.
Charles McGregor	Yes.
Morton Fraser	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.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes because: (i) where people are applying a statute it is to the statute that they go for time limits and procedures; (ii) some statutes cross the border and they take precedent under English Law and so should also take precedent under Scots Law; and (iii), as the Commission does, that they take precedence anyway and to make express provision would avoid ambiguity and doubt. It will mean that any cross border statutes will need to use provisions which are compatible with the 73 Act (such as the appropriate use of prescription and of limitation).
Insurance-related interests:	
FSCM	Yes. The time limits set out in more specific and appropriate statutes should take precedence over the 1973 Act.
NFU Mutual	Yes.
Zurich	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	
BLM	Yes.
Brodies	Yes.
Clyde & Co	Yes.
Craig Connal QC	I understand the logic of this proposition; although it strikes me that it raises a range of potential complications. In the context of an obligation to make payment, the logic may be most compelling. If it is extended to "all rights and obligations under statute" my impression - and it is only an impression - is that that could create a series of issues. Perhaps that is well illustrated by the discussion in the Paper about including a right to implement (but only in relation to a claim for damages). Rights and obligations under statute may be infinitely variable.
Faculty of Advocates	We note the reasons given for the proposed change. Further we agree that, in certain circumstances, the present structure of the law produces anomalous results, where obligations arising under statute are imprescriptible. We consider, however, that the question of whether general provision should be made for statutory obligations is essentially one of policy. In the event that a decision is taken to include statutory obligations within Sch 1 para 1, we agree with the observations made in para 2.45 of the report in relation to exclusions from the five-year prescription and statutory obligations subject to their own time limits.
HMRC	Generally, yes, but HMRC's view is that a longer period is appropriate to sums due to HMRC.
Law Society of Scotland	Yes.
Charles McGregor	Yes.
Morton Fraser	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.
Senators of the College of Justice	Yes. In our view the Discussion Paper makes out a persuasive case for this reform.
Architectural institute:	
RIAS	Yes, because of the reasons set out in the paper, in particular in the interests of clarity, for example, rights to interim payment under Housing Grants, Construction and Regeneration Act could be said to arise under statute, but the statute does not give the right directly, but requires that the contract make such provision, and if it does not, it is implied into the contract by statute. The right is therefore a contractual right, albeit the term is implied by statute. Thus it would be covered by Schedule 1.
Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes.
Zurich	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	
BLM	Yes, though only as elsewhere provided by statute.
Brodies	Of the examples given in the discussion paper it seems to us that both the obligation to pay child support maintenance under Child Support Act 1991 and the right of a consumer right to seek relief from a credit agreement on basis that the relationship between creditor and debtor is unfair are examples of the type of obligation that may have to be excluded from the 5 year prescriptive period. It is not entirely clear to us when it would be intended that the prescriptive period should commence in relation to such rights and obligations but in any event, a 5 year period may be considered too short a timescale given the aims of these statutory provisions. It is likely that other statutory provisions will also fall to be excluded but much will depend on the terms of the provisions contained in any draft Bill.
Burness Paull (Dispute Resolution)	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.
Clyde & Co	No.
Faculty of Advocates	We consider that this is a matter of legislative policy and have no further comments.
HMRC	As the Discussion Paper says, an obligation to pay income tax does not prescribe in five years. The reason is, of course, that income tax is not mentioned in Schedule 1 to the 1973 Act and so is subject to the longer 20 year prescription period. Interest on unpaid tax is also

	subject to a 20 year period (*Lord Advocate v. Butt* 1992 SC 140). So far as national insurance contributions are concerned HMRC's view is that, since these too are not mentioned at Schedule 1 to the 1973 Act they are subject to 20 year prescription. HMRC's view is that, generally, a statutory obligation to pay taxation should remain subject the long 20 year prescription. Our position is that, as the Discussion Paper suggests at 2.34, this is the appropriate result. We hope these exceptions remain.
Law Society of Scotland	This is a difficult question to answer from a legal stand point. We would certainly think there are political reasons why, for example, council tax or business rates would not prescribe but we see no logical reason or legal reason why that ought to be. As we understand it, council tax and business rates are generally caught by long negative prescription but in England and Wales they "prescribe" after 6 years in the usual way.
Charles McGregor	No.
Morton Fraser	No comments.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	No comments.
Insurance-related interests:	
FSCM	Yes. The policy grounds referenced in 1970 remain appropriate.
NFU Mutual	Yes.
Zurich	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	
BLM	Yes.
Brodies	We agree that it is odd that delict is not specifically mentioned in the 1973 Act. Having said that, an obligation to make reparation is one of the most common claims made through the Scottish courts. Subject to what we have to say below we wonder whether it would not make more sense to introduce obligations arising from delict as an <u>additional</u> category in Schedule 1 to sit alongside the current "obligation arising from liability…to make reparation. It might also be helpful to expand Schedule 1(1)(d) to cover all obligations to make reparation irrespective of the source of the obligation (so as to encompass obligations arising under both contract and delict). That would have the advantage of effectively giving obligations to make reparation their own regime courtesy of Sch 1 and s.11. We tend to agree that it would be better to use the term "damages" rather than "reparation" for the sake of clarity (p.18 fn 47) The examples used in the Discussion Paper (p18) to justify the change from "reparation" to "delict" throw up some difficult issues and, to our mind, tend to support the retention of "reparation" as a separate category. In relation to fraudulent or negligent misrepresentation for example it is understandable that the 5 year prescription should apply to claims for reparation. Pursuers are given specific protection by the discoverability provisions of s.11 and the terms of s.6 (although in s.6 the degree of protection is subject to argument about the meaning of "induced to refrain") and it can easily be accepted that the current 5 year period, with its slightly flexible start date, is long enough for any damages claim. We are not sure though that the same can necessarily be said of a right of reduction or specific implement. Should a pursuer who has suffered from fraud or negligent misrepresentation lose the right to reduce the resultant contract after only 5 years? When is that 5 year period to commence? What is the

	status of a contract which one party has been induced to enter into by fraud/negligent misrepresentation but has taken no steps to reduce within the 5 year prescriptive period? These questions can perhaps all be dealt with by careful drafting but do illustrate the potential for problems arising from the expansion of the application of the 5 year prescriptive period from mere reparation to the more general "obligations arising from delict". It may be that the proposals outlined in para 2.58 of the Discussion Paper regarding continuing wrongs and postponement of the start of the prescriptive period will deal with any difficulties.
Burness Paull (Dispute Resolution)	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.
Clyde & Co	Yes.
Craig Connal QC	I have no strong view on this issue, although again the point I make above about payment lending itself to simpler analysis probably applies. Reform ought to be aimed at making the law simpler, not opening up more complications. I regret that time has not allowed analysis of the extent to which complications might occur. In passing I mention the issue touched upon in paragraph 2.58 in relation to "obligation relating to land". I suspect I am among a relatively small band who have litigated on this topic - see the case in footnote 56 and also one or two others. I endorse the view at present that it is sufficiently rarely litigated on to justify statutory intervention.
Faculty of Advocates	We agree with the policy underlying this change: that obligations arising from delict (other than the obligation to make reparation) should be subject to the short negative prescription. We consider, however, that the drafting of Sch 1 should not be altered without good reason and that any alteration should be made with care. At present, an obligation to make 'reparation', whatever its source, will prescribe negatively. We acknowledge that such obligations have typically been delictual obligations and that attempts to widen the category have been unsuccessful (for example, *Hobday v Kirkpatrick's Trustees* 1985 SLT 197). Nevertheless, it appears to us, in principle, that the category of obligations to make reparation is capable of encompassing non-delictual obligations (as, for example, with obligations to make reparation arising from a breach of trust: *Ross v Davy* 1996 SCLR 369 at 384). There seems to be no reason why such non-delictual obligations should be excluded from the short negative prescription. Accordingly, we consider that it would be more appropriate for para 1(d) of Sch 1 to remain unchanged. Instead, a

	further provision might be inserted to encompass delictual obligations other than the obligation to make reparation (as is the case for contractual obligations under para 1(g)). We also note the views expressed at para 2.58 in relation to continuing wrongs. We note the proposal that the relevant provision of s 11 (s 11(2)) should be extended from obligations to make reparation to obligations arising from delict, and that similar provision should be made to extend s 11(3) (or its replacement). We understand the policy underlying such a proposal. To extend it in such a way, however, seems inconsistent: an obligation (other than one to make reparation) will remain unaffected by the discoverability and continuing wrong provisions if its source is contractual or in unjustified enrichment. The proposed alteration would be a major change to the framework of the 1973 Act, and we agree with the remarks made at paras 9.21-9.22 in this regard. Moreover, we consider that the proposed change would introduce particular complexity in cases where an obligation can be located in both contract and delict, leading to the unsatisfactory situation where very similar obligations would have entirely different prescriptive periods.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	Yes we consider this to be logical, as otherwise the choice of potential remedies available means that causes of action could persist long after a party had arranged their affairs on the basis the claim had prescribed.
Charles McGregor	Yes.
Morton Fraser	We agree that Schedule 1 paragraph 1(d) should refer to obligations arising from delict.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes because there is no good reason why the limitation should be restricted to one form of delict.

Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes.
Zurich	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	
BLM	Yes.
Brodies	We see no difficulty with obligations being included within the 5 year prescriptive period. Careful consideration will be needed as to the commencement date.
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co	Yes.
Faculty of Advocates	We agree, in principle, with the policy which underlies this proposal. A claim based on Melville Monument liability does not at present fall within Sch 1 and we agree that, for reasons of consistency with contractual liability, such claims should be subject to the five-year prescription. We note, however, that the existence and scope of Melville Monument liability has recently been doubted by the Inner House (*Khaliq v Londis (Holdings)* 2010 SC 432), and that its principles might now be found in the developed Scots law of contract and delict. Commentary on the decision has suggested that the Inner House in Khaliq was incorrect to suggest that the scope of Melville Monument liability should be restricted in such a way and that it would, in fact, be fruitful if the doctrine were extended in Scots law, consonant with a greater emphasis of principles of good faith in contract (Hogg and MacQueen, 'Melville Monument liability: some doubtful dicta' (2010) Edin LR 451). Given that the scope of the modern law is, as a result, unclear, and its future development uncertain, it may not be appropriate, at present, for legislation to be passed on it in the field of prescription. We suggest that it would be more appropriate for the law to be developed either by the courts or by primary legislation, following consideration of the issues raised in *Khaliq.*
HMRC	HMRC does not have a view on this.
Law Society of Scotland	Yes we see no reason in principle why this should not be the case. We suspect that this is not a common problem given the now regular use of "entire agreement clauses" or exclusion of pre-contract representations etc. in commercial matters at least. However, that

	would not be applicable where no contract was ultimately entered into so this proposal is sensible.
Morton Fraser	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.
Charles McGregor	Yes.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes.
Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes.
Zurich	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	
BLM	Yes.
Brodies	We agree that it would be helpful to clarify the position in relation to rights or obligations relating to the validity of a contract. The concerns expressed above in relation to fraud/negligent misrepresentation may not be as acute in cases where reduction is based on error or innocent misrepresentation.
Burness Paull (Dispute Resolution)	Yes – clarification would be welcomed.
Clyde & Co	Yes.
Faculty of Advocates	No. We are concerned about the practical implications of the change proposed. We consider that reform in this area would create considerable additional complexities and the possibility of unjust results. We are of the opinion that these disadvantages outweigh the advantage of greater certainty in a limited number of cases which a change would provide. We consider that the proposed change has the potential to produce undesirable results in certain circumstances, and that these undesirable results outweigh the benefits of a change. We consider that it is useful to distinguish two situations: (i) Situations in which a party seeks to set aside a contract concluded more than five years previously, where that party's obligations arising from the contract have not yet been completed. In many cases, outstanding obligations will be subject to the five-year prescription and therefore the availability (or non-availability) of reduction will not create difficulties. In other cases, however, this will not be so. In such a situation, a party bound to complete an obligation as a result of the contract would lose the right to challenge the contract. This might arise, for example, where the contract contains obligations relating to land, which will prescribe after twenty years. On the face of the reform suggested, it would appear that these obligations would subsist, whilst a potential defence to any action based on them would have prescribed. More complex issues might also arise where the outstanding obligations under the contract fell under one of the provisions of the Act which postpone the five-

	year time period. S 11(3), for example, as presently drafted (and, as we understand the reform proposed, as will be in future) applies only to obligations to make reparation. If a pursuer was able to rely on this provision, a defender, who had entered the contract as a result of error or innocent misrepresentation, might be unable to rely on this defence. Similar issues would arise in relation to s 11(2). More broadly, it seems to us that any reform would have to take account of the potential mismatch between the start date for the prescriptive period in relation to enforcing a contractual obligation (which will often be the date performance is due or the date on which loss arises) and the start date for an action of reduction under the proposed reform (which might be the date of the misrepresentation). Such a mismatch would, in our view, have the effect of adding considerable and undesirable complexity to this area of the law. (ii) Situations in which a party seeks to set aside a contract concluded more than five years previously, where the obligations under the contract have all been completed. This is, in essence, the example given at para 2.75 under reference to *Peco Arts v Hazlitt*. In such situations, we agree that a five-year period would provide increased certainty. In view of the other difficulties which the introduction of such a period might cause, however, we consider that the present law provides sufficient protection. These features are referred to at para 2.76 and include the requirement for *restitutio in integrum* and the inherently equitable nature of reduction as a remedy. Equally, the practical effect of such a change might well be limited, as a party seeking reduction would often be able to rely on the terms of s 6(4). For the reasons given above, we consider that the potential benefit in situation (ii) is outweighed by the difficulties which situation (i) would create. Accordingly, we do not support the proposed change.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	We think this is finely balanced but we consider that it is desirable that such claims should also be subject to the five-year prescriptive period.
Morton Fraser	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 of contract.
Charles McGregor	Yes.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes.
Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes.
Zurich	Yes.

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

(Paragraph 2.77)

Comments on Question 7	
BLM	No.
Brodies	No comment.
Clyde & Co	No.
Faculty of Advocates	We are not aware of any such obligations.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	We do not think so.
Morton Fraser	No comments.
Charles McGregor	None of which I am aware.
Senators of the College of Justice	None that occur to us.
Architectural institute:	
RIAS	We have no other obligations to add.
Insurance-related interests:	
FSCM	We have no suggested extensions.
NFU Mutual	No.
Zurich	We have no suggested amendments.

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	
BLM	No. The Supreme Court's consideration in *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48 included careful scrutiny of underlying policy considerations. The Supreme Court's Judgment is conducive to legal certainty.
Brodies	We agree that the discoverability test needs to be reviewed. We would favour option 3.
Burness Paull (Construction and Projects)	Yes. In the context of construction disputes, once the act or omission is identified, discovering the identity of the wrongdoer usually (although not always) follows relatively quickly and for this reason both options 2 and 3 would be acceptable. A large number of parties can be involved in construction projects eg. developers, professional consultants, contractors, numerous subcontractors. The most difficult task is usually identifying "why has something gone wrong" rather than "who is the person who caused it". Having said that, sometimes it is only when an expert report is obtained that the precise cause of the failure is identified and only, at that point, is the identity of the wrongdoer capable of ascertainment.
Burness Paull (Dispute Resolution)	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.
Clyde & Co	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*.
CMS	Generally we are in agreement that it is right to revisit the discoverability test in light of Morrison. However, views on the desirability of the various options for reform are inevitably coloured by whether you consider the options from the standpoint of a pursuer or a defender. Those who act primarily for pursuers were in favour of option 3, although some doubt was expressed about whether it would entirely eliminate the need for protective writs. There was however general agreement that certainty is desirable, and therefore option 4 is not attractive. See also our comments in relation to question 19.
Craig Connal QC	I preface my discussion on this point by touching on the question - what is the purpose of the 5-year period? I ask that question in part influenced by a case in which I was recently involved. The Pursuers (to paraphrase) were aware that they had sustained a loss and then spent a great deal of time trying to sort out whether it was due to anyone's fault (in my case, as in quite a few others, there was no issue potentially arising over identity - it could only have been one party). The case the Pursuers propounded under the pre ICL Law was, <u>after</u> they had done all of that, they then had 5 years to commence proceedings. As an aside, that actually led to the first intimation the Defenders received of the claim being the service of a Summons more than 20 years after they had last been on site! Be that as it may, why should 5 years have been allowed to the party <u>after</u> they had come on that view to their conclusions? That would be the result of a test which focusses on the start of the prescriptive period not arising until a conclusion is reached that loss has been caused by an actionable wrong. The alternative way of approaching the matter is accordingly to suggest that the purpose of the 5 years is to allow the party to investigate the known loss, ascertain whether it is actionable and then <u>commence</u> proceedings. The alternative approach, of course, would be to suggest that either a longer prescriptive period should arise or a short period after that decision had been reached should be added, either producing the same effect. So, for example, if the period became 6 years, but the test remained as before, that might involve some element of concession. That leads me to favour option (1) failing which, reluctantly, option (2). Clearly the construction industry has a view on the consequences of option (3). I am somewhat cynical about this, because although it may be that writs are fired at numbers of parties, in many other situations it will not become clear who is responsible until well into an action in which a variety of parties are pursued actively on alternative or additional bases. Option (4) is productive of undue uncertainty.

Faculty of Advocates	We agree that it is appropriate to revisit the discoverability test contained in section 11(3). Our view is that there are merits to both Option 2 and Option 3, each of which represent an improvement on the state of the law following *David T Morrison & Co Ltd v ICL Plastics Ltd*. Option 2 has the advantage that it was widely understood to represent the law prior to the Supreme Court's decision in that appeal. Further, the five year prescriptive period should afford ample time to the pursuer who is aware of both his loss and the cause of his loss to identify the person who has caused the loss and raise an action. There is considerable logic to the reformulation proposed in option 3 which defines the date from which prescription runs by reference not only to the awareness of loss, but also the act which has caused the loss and the identity of the person who has caused it. The addition of a third fact which the pursuer must be aware of inevitably raises the prospect of the date from which prescription commences being delayed further, however. While our view is that either option 2 or option 3 will represent an improvement on the current state of the law, disputes on the commencement of the prescriptive period are likely to be of a different character than under the current interpretation of section 11(3). In particular we have reservations regarding how option 3 would interact with the test of reasonable diligence. We accept that the proposed revision of Section 11(3) represented by option 3 requires the pursuer to be aware of three facts in order for prescription to start running, and that in most cases it will be the appearance of loss which will alert the pursuer to the possibility that another has caused them loss. There will be other instances, however, where negligence or breach of contract becomes apparent, but loss is not necessarily discernible at that point. Our view is that the broad similarity of the option 3 to the provisions of section 17(2)(b) regarding the limitation of actions for personal injury raises questions regarding how the pursuer who becomes aware of one of the facts must act thereafter. A pursuer who becomes aware of one of the material facts set out in section 17(2)(b) must then take all reasonably practicable steps to inform himself of the other material facts: *Agnew v Scott Lithgow (No2)* 2003 SC 448. Although the test in section 11(3) is one of reasonable diligence rather than reasonable practicability, the expansion of the range of facts which the pursuer must be aware of in order to commence the running of the prescriptive period raises the obvious prospect of the courts having to resolve disputes as to whether the pursuer who is aware of one of the criteria in option 3 is under a duty to investigate the other facts on account of the similarity of this option to section 17(2)(b). The situations in which this might arise potentially are significant, and are not necessarily a rare occurrence. In one obvious example, it could become apparent that a professional advisor's conduct or advice is negligent, but, because of the nature of the transaction, loss is not apparent. We agree that the start of the prescriptive period

	ultimately should be postponed until the pursuer becomes aware of loss. However, it may be considered anomalous for the pursuer to become aware of professional misconduct on the part of an advisor, for example, but not to exercise reasonable diligence in order to investigate whether there has been loss. This situation may be compounded if the test in section 11(3) is also reformulated in order to require the loss to be material. In that scenario the pursuer would be aware of an element of loss, the event causing it, and the person responsible, but the question will arise as to whether he has to continuously review his loss to determine whether it has become material. In the situation which is truly the emergence of latent damage, where the loss is the first thing the pursuer becomes aware of, our view is that the reformulation of the test in section 11(3) will present no prejudice to either pursuer or defender. It will also be for the courts to determine whether a similar test to that in Agnew will apply if option 3 is adopted. If the proposed revision of the test in section 11(3) represented by option 3 is adopted, it is not apparent at this point how disputes as to what is required of a pursuer can be avoided by legislative drafting.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	Yes. We consider that option 3 is the most logically consistent but also the most practical for those facing or advising in possible litigation. The decision in *David T Morrison & Co Ltd v ICL Plastics Ltd* has spawned a series of litigations such as *Heather Capital Ltd (in liquidation) v Burness Paull & Williamsons LLP*, *Heather Capital Ltd (in liquidation) v Levy & McRae*, *Gordon v Campbell Riddell Breeze Paterson LLP* (and other cases) many of which are pending appeal. It strikes us that the approach taken by the courts in the cases above can have a somewhat harsh (and in places unfair and illogical) result. It would seem unfair for a party to have a claim prescribe where there was no awareness on their part of one of the three key elements for a claim to succeed and the absence of any one of those (the defender, the awareness of loss and awareness of act or omission) would make drafting an action problematic.
Charles McGregor	No. Option 1 is identified as representing the present interpretation of Section 11 of the 1973 Act following upon the decision of the Supreme Court in *Morrison v ICL Plastics* [2014] UK SC 48. It is noted that this present interpretation of the relevant section of the Act appears to be consistent with the recommendation of the earlier SLC report. It is, however, noted that a test in these terms is not applied widely elsewhere. The present report suggests that this option is not only potentially unfair to pursuers but also to defenders who might find themselves involved in a Court action purely because of a

	concern on the part of injured pursuers (or their agents) not to exclude any party who might conceivably be responsible for having caused loss, injury or damage. I would suggest that such concerns are either misplaced or at least overstated. When the 1973 Act came into operation information was, in general disseminated at a significantly slower pace. Most business communications were communicated by letter or (at best) by use of a telex machine where installed. In the present day email has to a very significant extent replaced all other business communications and, moreover, a significant proportion of professional people are able to send and receive such communications outwith regular business hours. One consequence of this is that an injured party now has available to them the means to investigate not only the physical cause of any loss sustained by them but also likely legal liability much more quickly than at any other time in the past. The present report points to the existence of the Stockline Inquiry as an instance where the means of discovering the cause of a loss was significantly delayed but it is only in a very small minority of cases that the cause of any loss might ever be judicially considered in advance of Court proceedings being commenced. Unless the relevant rules were revised so as to provide that prescription could not begin to operate until after the cause of a loss had been judicially determined then it is axiomatic that at the point of determining whether or not it is appropriate to initiate judicial proceedings (and if so against whom) then there remains in the mind of the injured party some uncertainty about the likely outcome of the pursuit of any such claim. That is therefore a natural part of the litigation process and it is respectfully submitted that what the relevant legislation requires to provide is a reasonable period of time within which an injured party can make a proper assessment of where responsibility is likely to lie. It seems to the writer that a period of five years running from the date when the creditor knows of the fact of the loss is a sufficient period of time within which to do so. Separately, it is generally recognised that, in order to minimise the scope for any legal dispute, then any piece of legislation should be clear and unambiguous. It is respectfully submitted that this principle is all the more significant in the context of a piece of legislation which governs the ability of parties to seek to enforce their legal rights. Option 1 has the advantage of being by far the clearest and most easily applied of any of the options presently being considered and is therefore less likely than any other to generate litigation about the operation of the prescriptive period.

Morton Fraser	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.
Senators of the College of Justice	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).
Architectural institute:	
RIAS	Yes. **Option (2)** This has the advantage that time starts to run when the damage and its cause are known, and there is an incentive on the pursuer to find who is responsible, but the danger is that when in doubt the pursuer will sue everyone concerned just to be on the safe side. **Option (3)** This has the advantage that the client is less likely to raise an action just to halt prescription, and any action will be more clearly focused, but the danger is that they have no incentive to focus any action against those responsible. Option (3) would be attractive as long as it was combined with a robust requirement that the prescriptive period started when the creditor knew, **or ought with reasonable diligence to have known**, the facts required to start the time running**.**

Insurance-related interests:	
FSCM	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*.
NFU Mutual	Yes. We favour Option 3.
Zurich	Yes. Option 3 is favoured. It is clear from the *Morrison v ICL Plastics* [2014] UKSC 48 decision that the discoverability test is a contentious issue. 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	
BLM	No. The words "loss or damage" speak sufficiently for themselves. Qualifying those words would not be conducive to legal certainty and could give rise to unnecessary complexity, with attendant cost.
Brodies	Yes.
Burness Paull (Construction and Projects)	Yes, although we would note that while this is superficially attractive, it can be difficult to advise what is material and what is not. In the context of construction disputes, it may be possible to advise what is material when it is a physical defect but much harder to do this when it is a non physical defect.
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co.	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.
Craig Connal QC	My inclination is to leave this as it stands, because inevitably questions will be asked of what the definition of "material" is, and without a clear definition any addition by statute does not advance matters from the current position. If I go back to my example of the bolt, is damage "material" as soon as it has created more weakening of the bolt that would otherwise have existed absent the (assumed) fault? Or at the other extreme, does it have to wait until there is an actual crack visible from the outside arising from the internal problem. Or is it somewhere in between? Or does it depend on the function of the bolt, or even on the cost of replacing it?
Faculty of Advocates	Yes. The situation where any loss, however minor, can commence the running of the prescriptive period can produce harsh results for pursuers. We agree that the inclusion of a reference in section 11(1) to the need for the loss to be material would represent an improvement from the current position, although it may present a different set of problems for pursuers and defenders compared with those encountered at present. We note the test proposed at para 5.13 is an objective one of the damage being of such significance that a reasonable person would have thought it worth pursuing. In a simple case where there is only one head of loss or damage the assessment of what a reasonable person would see as sufficiently significant to warrant raising an action might be relatively straightforward. In the more complex case where there are various heads of damage, involving possibly significant consequential loss, the application of the proposed test is likely to be more difficult. We therefore have reservations that the proposed test is sufficiently precise to curtail or forestall arguments regarding what the view of the reasonable person would be. The proposed test inevitably raises the question of whether a reasonable person would consider the loss to be worth pursuing simply because it is beyond that which is trivial or de minimis, a concept which in turn is necessarily ill-defined: see *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229 per Lord Sumption at para 50. Our reservation is whether the proposed test in practice would require the material loss to be something which is not de minimis, or something which is significantly beyond that which is de minimis. Our view is that it would be more straightforward simply to define material loss as loss which is not trivial, de minimis, or 'insignificant'. Defining materiality in this manner would import a well-known concept which is sufficiently flexible in its application to allow the significance of the loss to be considered in the factual context of each case. Adopting a test for materiality of loss by reference to that which is not trivial or de minimis is not without precedent, with at

	least one significant case on prescription already referring to materiality of loss by reference to the loss in question being 'more than insignificant': *ANM Group Ltd v Gilcomston North Ltd* 2008 SLT 835. We are further of the view that, whether the test set out in the proposals, or the test which we suggest, is adopted, there would be considerable benefit in excluding from the test any consideration of the resources of the pursuer or defender. The reason for this is that, in our view, consideration of the relative resources of the parties is not only a matter which is unrelated to the nature of the loss, but is also an issue which raises considerations which are subjective rather than objective.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	Yes. Materiality by its nature will vary by the context but it seems a sensible threshold.
Charles McGregor	I recognise that there is significant scope for entirely valid differing views in respect of this and the related questions. On the one hand (as mentioned above) the need to maintain clarity in provisions regarding the enforceability of legal rights militates against the introduction of any additional layer of complexity. On the other hand it could reasonably be seen as being unfair for the injured party to lose the right to recover compensation in respect of significant loss where this had been presaged at some earlier stage by very minor or inconsequential problems. With some hesitation I agree that it would be appropriate for the legislation to make clear that in order for time to start to run in terms of Section 11(1) of the Act then the damage in question should be recognised as being "material".
Morton Fraser	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.
Senators of the College of Justice	Yes. While we think the better view is that this is the position under the existing law, we agree that clarification would be useful.
Architectural institute:	
RIAS	Yes because, although this may delay the start of the prescriptive period, it would avoid premature actions to protect the creditors' rights. It is normal for buildings to have initial shrinkage and cracks

	and, to a lay person, these may be confused with long term settlement cracks due to defective structure. However if such defects persist and increase then it would be reasonable for the building owner to seek expert advice.
Insurance-related interests:	
FSCM	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.
NFU Mutual	No. Potential arguments about what is or is not "material" would give rise to uncertainty and delay.
Zurich	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	
BLM	No. Reference is made to comments on question 9.
Brodies	Yes.
Burness Paull (Construction and Projects)	Yes.
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co	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.
Craig Connal QC	See again the answer to question 9 above.
Charles McGregor	Consistent with the existing provisions of Section 11(3) then it would appropriate to incorporate a reference to the discoverability of materiality of any such damage. Importantly it should, however, be made clear that the test should not simply be subjective but, preferably, objective and therefore incorporate a reference to the "ought reasonably to have known" formulation.
Faculty of Advocates	Yes. If section 11(1) is to reflect the need for loss or damage to be material, the test in section 11(3) should adopt a formulation consistent with that in section 11(1). It is our view that a reformulation which refers to the materiality of loss would be of benefit to both pursuers and defenders. For pursuers, the need for loss to be material would remove the potentially harsh effect of the law at present. For defenders, the objective nature of the proposed test for materiality of loss ought to remove the prospect of a pursuer turning a blind eye to material loss in order to delay the commencement of the prescriptive period.

HMRC	HMRC does not have a view on this.
Law Society of Scotland	Yes.
Morton Fraser	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).
Senators of the College of Justice	Yes. Reference is made to the previous answer.
Architectural institute:	
RIAS	Yes, as long as the test is an objective one based on such awareness as a person acting reasonably might have.
Insurance-related interests:	
FSCM	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.
NFU Mutual	No.
Zurich	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	
BLM	Reference is made to comments on questions 9 and 10. On any view, prospects of recovery should be irrelevant.
Brodies	Yes.
Burness Paull (Construction and Projects)	Yes.
Burness Paull (Dispute Resolution)	Yes
Clyde & Co	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.
Craig Connal QC	If this change is to be made, I agree.
Faculty of Advocates	No. In our view it would be unnecessary to do so if the test for materiality of loss expressly excluded reference to the resources of the parties. In any event, irrespective of whether option 2 or option 3 were to be adopted, the terms of any legislative provision reflecting either option would be sufficiently clear as to the facts which must be focussed on to exclude consideration of the prospects of recovery as a factor in determining whether prescription has started to run.
HMRC	HMRC does not have a view on this.

Law Society of Scotland	Yes. We do not consider that the strength or otherwise of the financial covenant of a possible defender is relevant. There is always a risk that a defender will be unable to meet an award but we do not see why that should impact on this area of law.
Charles McGregor	Yes.
Morton Fraser	We agree that the pursuer's prospects of recovery from the defender should not be a relevant factor to be taken into account in assessing the materiality of loss or damage for the purposes of the discoverability formula in section 11(3).
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes, because the materiality of the damage is unconnected with any prospects of recovery, which prospects are too subjective.
Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes.
Zurich	Yes.

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

(Paragraph 5.23)

Comments on Question 12	
BLM	Yes.
Brodies	Yes.
Burness Paull (Construction and Projects)	Yes.
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co	Yes.
Craig Connal QC	This matter also arises in the case in question because there was an argument between parties as to whether things said by an expert at one point should have led a competent party to have reached a particular conclusion. The matter remains debateable but on reflection I agree that the present formulation takes the matter as far as is feasible.
Faculty of Advocates	We agree that the present test of reasonable diligence is satisfactory. As noted above in our response to question 8, it has to be acknowledged, however, that the test will be applied to a new set of criteria if section 11(3) is reformulated. The test remains satisfactory, but its application to a new set of criteria will raise additional questions as to what the pursuer has to do in practical terms in order to comply with section 11(3). The addition of the criterion that loss must be material will also raise issues of how the pursuer must exercise reasonable diligence in order to ascertain whether his loss is trivial or has become material.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	No. The decision in *Gordon v Campbell Riddell*, it seems to us, produces a harsh and unfair result though in line with the decision of the Supreme Court in *ICL Plastics*. The example given by the Commission in paragraphs 5.3 et seq. of the Discussion Paper also emphasises that this is an area which could do with review. Lender claims are a frequent feature of litigation but there is no clarity as to

	whether "reasonable diligence" is a subjective or objective test or what obligations are incumbent on a lender and when. Combined with the decision in *Heather Capital v Burness Paull* it seems to us that this already grey area of the law has become more clouded and needs clarifying.
Charles McGregor	Yes. Any alteration to the present formulation is likely simply to generate additional litigation with all of the attendant expense.
Morton Fraser	We do not consider the test of "reasonable diligence" should be altered to, for example, make express provision regarding the obtaining of expert reports.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes, because there is some case law giving guidance on what 'reasonable diligence' means and because the expression is flexible enough to cover the many and various circumstances and to give the courts sufficient discretion. A more directive provision could hamper the courts.
Insurance-related interests:	
FSCM	Yes as any changes may complicate the considerations. In *Adams v Thorntons* the test was found to be pragmatic and understandable.
NFU Mutual	Yes.
Zurich	Yes. Indeed, any changes may complicate the considerations. In *Adams v Thorntons* the test was found to be pragmatic and understandable.
Utility company:	
Scottish Water (Business Stream)	Business Stream provides retail water and waste water services but is not responsible for the water network and its infrastructure. The responsibility for the maintenance and operation of the water network lies with Scottish Water. Business Stream does face a limited number of claims in which the application of section 11(3) of the 1973 Act arises as an issue. That may happen, for example, where the wrong meter size is used in the calculation of charges and the customer argues that it could not with reasonable diligence have been aware of the use of that wrong meter size, and has suffered

	loss as a result. Business Stream notes with interest the comments at 5.21 of the Discussion Paper as to whether the exercise of reasonable diligence might in some circumstances require a pursuer to obtain expert advice. We generally agree that making express provision in the 1973 Act about the need to obtain expert advice would be complex. However, whether an expert has been instructed by a pursuer should be a relevant factor in assessing: (i) whether the pursuer has done what an ordinary prudent person would do having regard to the circumstances; and as a consequence (ii) what knowledge ought to be imputed to a pursuer. Business Stream agrees with the SLC that the statutory test is broad enough to allow the courts to place weight on the fact that a pursuer did not seek expert advice.

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	
BLM	Yes.
Brodies	We would agree that this would have the advantage of a more certain commencement date for the 20 year prescriptive period in the very limited number of cases affected. We do wonder however just how often the issue causes real practical difficulties? The hard cases rehearsed on p.43 of the Discussion Paper seem unaffected by the oddity that the long stop period commences at the same time as the 5 year period.
Burness Paull (Construction and Projects)	Yes.
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co	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.
Craig Connal QC	I recall litigation over the Kingston Bridge in Glasgow in which the alleged fault had taken place a great many years ago. I can likewise recall the enormous difficulties that this brought in trying to recover relevant information. It may be argued that with the adoption of electronic communications it will prove easier in future to obtain historic material, but a talk I recently heard on Technology and the Law as to the volumes of electronic material now being produced and retained somewhere, and the real difficulties in searching that material, suggest that that benefit may be illusory. Again, one of the examples I touched on briefly before may help to illustrate the potential difficulties. We were recently approached over

	an assertion that a will, drafted some 47 years ago, had been negligently drafted, but it was said the loss did not arise until such time as the testator died and the problem was then discovered. To anyone advising on the receipt of such a claim it will be apparent that the prospects of finding materials so long ago are negligible. Accordingly, on balance I agree with the proposed change.
Faculty of Advocates	Yes. When it is the long negative prescriptive period which is under consideration, the more important matters in the balance between the interests of pursuers and defenders are certainty and the need to allow potential defenders to proceed upon the footing that a possible source of liability can henceforth be ignored. The central problem, as it seems to us is that the occurrence of loss may be long delayed and that if it happens at all, it may happen at a date quite unknown to the defender. Erroneous advice to a trust may only be productive of loss a generation later. If, therefore, the *terminus a quo* for the running of prescription is taken to be the date on which loss in fact eventuated, certainty for the defender is lost. We are therefore of the view that time should count from a date which can more readily be identified by the defender and his insurers. We accordingly agree with the general thrust of this proposal, though we wonder if sins of omission can be treated in the same way. When, to take an example, would a failure to comply with a continuing duty to review the building's design or to warn of a dangerous design flaw prescribe?
Law Society of Scotland	Yes. The only occasion upon which we see this proving difficult is in the case of ongoing breaches, but on balance fairness favours the period starting at the last act or omission.
HMRC	HMRC does not have a view on this.
Charles McGregor	Standing the importance attached to the provision of certainty to parties in their legal relationships then there is an obvious need for a long-stop date and a clear means of identifying it. It is respectfully submitted that these aims are achieved by providing that the relevant period runs from the date of the defending party's last **act**. It is submitted that to expand this in order to refer not simply to acts but also "omissions" would introduce an unwarranted and necessary degree of doubt in the calculation of the relevant day. Depending upon the nature of the obligation then the calculation of the last omission may be almost impossibly difficult. For example in the case of a solicitor instructed to prepare a will on behalf of a client then the date of the relevant last act should be obviously identifiable. In circumstances where it is maintained that advice offered by the lawyer to the testator was incorrect then it is easy to imagine a situation in which it might be alleged that an obligation to provide appropriate advice extended beyond the date of preparation of the will and even its execution. There would then be significant difficulty in identifying for the purposes of the legislation

	the date of the last omission to provide appropriate advice and hence the identification of the relevant long-stop date.
Morton Fraser	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.
Hugh Paterson	A brief history of our experience:- In 1990 my wife and I purchased a property plus approximately four acres of land [words redacted]. The conveyancing solicitor was [words redacted]. However when the Registers of Scotland were approached to convey the title to the new purchaser in 2013, when the property was sold, we were advised that other parties had title to some of the land. Not surprisingly the purchaser dropped the price by £25000. [Words redacted] were advised on 27 May 2013, and they made a token offer of £5000 which we rejected. We spent a great deal of time and money on this matter, and eventually in December 2013, some six months later, [words redacted] advised our claim was being rejected by reason of "Prescription and Limitation [S] Act 73 section 7[2]". Over the past years we have been involved in five purchases and sales of property and with the sale of [words redacted] it was the first time we have been made aware of the 20 year prescription period. If we were not aware of this with our experience of property transactions, then it is safe to assume that the Scottish public is no better informed. It therefore appears that if a client is holding a defective title and this does not come to light until 20 years after conveyancing, then the client, and not their solicitor or insurer, is liable to suffer a 100% loss, a potentially disastrous situation. Perhaps we were fortunate to lose only £25000; it could have been much much worse. This is highlighted in para 6.3 of your discussion paper where a party did not have good title to their house. Solicitors are trusted and paid to carry out conveyancing, but we have been badly let down by Scots law and shabbily treated by [words redacted]. We know this does not address question 13 directly, but in view of the abovementioned comments and to protect the public, we recommend as follows:- At the very least clients should be advised by their solicitor of this very important prescription period and recommended a course of protection eg additional insurance or a rechecking of title before the 20 years expires. A fresh prescription period would then commence. Costs would be for the client and it would be their decision whether

	or not to cover their unprotected exposure to the risk that their title deeds may be worthless.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes for the reasons set out in the discussion paper especially, in relation to building defects where physical damage is required to start prescription running (*Renfrew Golf Club*) leading to the possibility that, where there is a wrongful act, such as the under designing of a column, the prescriptive time limit only starts to run when there is physical damage (if the defect is discovered and remedied before damage occurs (as per *DoE v Thomas Bates*) does time ever start to run and is there a remedy in Delict (if the contractual remedy is barred)? This situation produces a cut off date which is neither clear (in that its starting point is unclear) nor final (as there is scope for arguing about the starting point). It also makes it difficult to obtain insurance cover for a liability of indeterminate length.
Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes.
Zurich	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	
BLM	Yes.
Brodies	This seems likely to affect an extremely limited number of cases. Our view is that the suggestion does have some merit insofar as it gives certainty to a defender. However, we would observe that the proposal does seem to sit better in the context of limitation rather than prescription. In personal injury actions, for example, the limitation period continues to run notwithstanding that an action has been raised. That is more easily accepted because limitation is simply a procedural bar to raising proceedings. It seems odd that an obligation could be extinguished by prescription even while a pursuer was seeking enforcement of that same obligation. (The proposal to automatically extend the prescriptive period to the conclusion of proceedings would merely deal with the practical difficulty caused by the 20 year period expiring during the course of the action). One possible alternative might be for the long-stop prescription to merely be interrupted by a relevant claim (as opposed to starting a fresh 20 year period) and might re-commence running once the court action has concluded.
Burness Paull (Construction and Projects)	Yes.
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co	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.
Craig Connal QC	I can see the logic which says that if a claim has persisted for a very long time and is then interrupted by action, it should only continue in existence until a point has been reached where the action has been disposed of. Acknowledgement seems to me to be more problematic.

	Once acknowledged the claim is in the sense accepted. I confess I have not come up with a solution which resolves that conundrum.
Faculty of Advocates	Yes. This follows from our view that the most important consideration when looking at the long negative prescriptive period is to achieve a certain end to the prospect of litigation about some alleged ground of liability at a reasonable date. To permit either a relevant claim or a relevant acknowledgement to re-start the prescription clock is to lose that certainty and to extend potential liability for an undesirably long period of time. In theory, to allow the prescription clock to be re-started by a relevant claim is to make potential liability indefinite at the whim of the pursuer and so defeat the object of prescription altogether. To permit that clock to be re-started by relevant acknowledgement is to invite litigation about the existence or otherwise of an acknowledgement in the requisite terms as a precursor to litigation about the actual failure complained of in the substantive part of the action. We doubt whether this is of advantage.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	We agree that a relevant claim or acknowledgement should not re-start the prescriptive clock. However, if this rule is to be abolished, it would be desirable for the new rule to be clear in its operation. We consider this in more detail in answer to Question 15.
Charles McGregor	Yes.
Morton Fraser	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.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes, because of the reasons set out in the discussion paper. The rational for the longstop is to give certainty to the cut off to liability and to avoid stale claims.
Insurance-related interests:	
FSCM	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.
NFU Mutual	Yes.
Zurich	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.

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	
BLM	Yes.
Brodies	If a relevant claim is not to interrupt the 20 year prescriptive period then it is essential that there is provision to prevent a pursuer's cause of action disappearing during the course of proceedings. We would tend to favour a system like that described in Germany where an additional period is added from the end of the action. That would allow pursuers time to assess their options while giving defenders comfort.
Burness Paull (Construction and Projects)	Yes.
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co	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.
Craig Connal QC	See answer to question 14 above.
Faculty of Advocates	Yes. This strikes us as being both fair and sensible. A defender should not be able to defeat a claim against him by the deployment of Fabian tactics in litigation.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	We agree in principle with this suggestion, but it will be important to clarify what is meant by 'disposal'. For example, if a case remains sisted through no fault of the pursuer (such as for legal aid) for a considerable period, would the clock continue to run? Would 'disposal' mean final order of the court, or expiry of any appeal period against that final order? If it is intended to keep the claim live only for the duration of the proceedings, would provision be made for inadvertent disposal such as by failure of representation resulting in decree in absence? While we think it would be desirable to prevent

	a renewal of the prescriptive period, it would be undesirable for that certainty to be replaced by lack of clarity over when the period did come to an end.
Charles McGregor	Yes, but only in respect of the obligation which is the subject of the relevant claim. Any other obligations arising by virtue of a contract or any other legal relationship should continue to be governed by the long-stop prescriptive period unaffected by the existence of any proceedings.
Morton Fraser	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.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes, but only relative to the relevant claim and any associated proceedings (such as third party actions). Any other unconnected claims should be subject to the fixed longstop. Otherwise an action commenced near the end of the longstop could be used to extend liability generally.
Insurance-related interests:	
FSCM	No – please see answer to question 14 above.
NFU Mutual	No.
Zurich	No. We refer to answer 14.

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	
BLM	Yes.
Brodies	We agree that construction contracts should not be subject to their own prescription regime. Provided the underlying law is sound and well understood then the construction industry will have little difficulty in ensuring that their contractual arrangements make acceptable provision for the sharing of risk. It is already clear that the construction industry arranges its affairs with an eye on English law including contractual limitation periods. That seems unlikely to change. A plethora of different prescription regimes is unlikely to prove helpful.
Burness Paull (Construction and Projects)	Yes. The Burness Paull Construction and Projects team have discussed this and are of the view that a special regime is not required; but only if there is no doubt about the ability to shorten the long - stop prescriptive period (see Answer 17).
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co	Yes
CMS	We agree. The current position has the benefit of simplicity.
Craig Connal QC	Yes. The more specialities are created the less logically consistent the law is.
Faculty of Advocates	We do not support the creation of a special rule about long negative prescription in building contracts. We note that examples of long negative prescription becoming the subject of dispute in such cases are rare, especially when compared to the wealth of cases in which the deferment or suspension of the short negative prescriptive period is contended over. We are inclined to doubt whether the creation of a new rule would be of benefit in sufficiently great a number of cases to justify the fragmenting of the law which the creation of the special

	rule would entail. This would be so even if the special rule would be otherwise merited and practical. We are not inclined to think that that is so. We would agree with commentators in the past who have argued that the special rule's existence would generate new areas of dispute over whether the contract in hand attracted the new rule or not. We do not believe that the Commission's suggestion of overcoming that objection by the adoption of the definition of "construction contract" in the Housing Grants, Construction and Regeneration etc., Act 1996 would succeed in achieving the desired aim of obviating dispute, not least because of the size of the jurisprudence which has been built up in the twenty or so years of that Act's existence as a result of disputes about the ambit of the statutory definition.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	We think there is advantage in the same periods applying across the board to give certainty.
Charles McGregor	Yes. There is, however, at present a degree of uncertainty in respect of claims which arise out of construction contracts and which relates to the decision in *Strathclyde RC v Border Engineering Contractors Ltd* 1998 SLT 175. That case suggests that where defective work is executed in terms of a building contract then the commencement of the prescriptive period is postponed at least until the issue of a final certificate. Unfortunately in many building contracts no final certificate is ever issued and therefore as matters presently stand there is at least an argument for suggesting uncertainty in such cases about the date from which the prescriptive period in respect of defective work begins to operate. This may merit some further consideration by the Commission.
Morton Fraser	We agree that construction contracts should not be subject to any special regime in relation to the running of the long-stop prescriptive period.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	In relation to the comments in paragraph 6.27 on practical completion, sectional completion is the equivalent of practical completion (albeit for a section only) and in both cases they or their equivalents, have significant legal effects, especially in relation to

	commercial agreements such as agreements for lease or development agreements or finance agreements, as well as the legal effects they have under the building contract. They have the merit that under most building contracts the Works are complete at this stage (before this the Works can be varied to remedy any design defects. After this only defects arising from a failure to conform to contract can be remedied under the contract). A precedent has now been set with Part II of the Housing Grants Construction and Regeneration Act 1996 (as currently amended) which has already set up a special regime for construction contracts. However, the main problems in relation to prescription of rights and liabilities relative to latent defects associated with construction contracts are that: (i) commencement of both the long and the short (separate from the discovery principle) prescriptive periods is postponed until an indeterminate date unrelated to any wrong committed by the wrongdoer, but subject to the vagaries of the physical world (weather, gravity and other unexpected natural phenomenon) and that the time taken to discover such defects, relative to the short prescriptive period, is also indeterminate. Neither of these points allow for clarity or certainty with regard to liability and the ability to obtain insurance cover for such liability. However if these points can be addressed under the general prescription regime then it would be preferable to have construction included as part of the general prescription regime rather than being in a ghetto of its own.
Insurance-related interests:	
FSCM	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.
NFU Mutual	Yes.
Zurich	Yes. Prescription & Limitation periods are taken into account in the process of underwriting and pricing liability policies. Increased uncertainties over 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	
BLM	(a) Yes (b) N/A
Brodies	(a) We are not persuaded that there is any good reason for altering the current 20 year period under s.7. Some jurisdictions have a shorter period and others have longer. Changing the 20 year period seems unlikely to bring any real benefit. (b) We are not in favour of a reduction but if the figure were to be reduced we think that it should not be reduced below 15 years.
Burness Paull (Construction and Projects)	Comments on contracting out as they relate to the construction sector: We would welcome contractual freedom to limit (and perhaps extend) the 5 year period, and to limit (but not extend) the 20 year period. This would facilitate a closer alignment with contracts governed by English law as well as facilitating a wider range of commercial arrangements. - Clarification of the law on shortening the 20 year period is favoured. The 20 year period is, at present, routinely reduced to 10 or 12 years in construction contracts. - Extending the 20 year period is not favoured, albeit there are occasionally projects where this would be welcomed eg. projects with a long design life. The practical difficulties litigating over a project completed more than 20 years ago could be substantial. - Extending the 5 year period – our views on this depend on the test adopted for when the period starts. If option 3 were adopted then the creditor would need to know the facts of the loss, the act or omission which caused it, and the identity of the person who caused it before time started to run. 5 years would therefore be a long enough period. If however an early start date is adopted, eg. when the creditor knows of the fact of the loss, then 5 years may not be long enough. A fixed upper limit for the short negative period is attractive for substantial claims as it can limit the period for which a contingent liability needs to sit on a company's accounts.

	Contractual freedom to shorten the 5 year period is favoured – this is commercially attractive (particularly in high risk projects) in terms of pricing for the risk: a cheaper price for a shorter period of exposure.
Burness Paull (Dispute Resolution)	(a) Yes (b) N/A
Clyde & Co	(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.
Craig Connal QC	(a) Yes (b) N/A
Faculty of Advocates	We take the view that the issues raised in these two questions are policy matters on which the Faculty ought not to express an opinion.
Law Society of Scotland	20 years appears neither significantly longer nor significantly shorter than comparative systems. For this reason, and in the absence of a compelling reason to change it, we would support its retention.
HMRC	HMRC does not have a view on this.
Charles McGregor	(a) No. (b) As noted in the report the present period of 20 years is long in comparison with other jurisdictions. The report mentions the potential difficulties posed through deterioration in the quality of evidence available after an extended period however there is another consideration. The bulk of claims for damages are, at present, the subject of indemnification by insurance companies. In respect of insurance in respect of any professional liabilities then the cover which may respond is that in place not at the date of the wrongful act (or omission) but that in place at the date when any claim is intimated.

	Where the claim is directed against a continuing economic entity (or one which has inherited the liabilities of an earlier economic entity) then this should present no particular issue however a particular problem is presented in those cases where the professional person (for example an architect or a vet) operates as a sole practitioner. At the date of their retirement then their existing business generally closes and any continuing insurance requires to be funded from retirement income on a run-off basis. A feature of the present legislation is that any such cover should be maintained for a period of 20 years following upon the date of retiral. Failure to do so would result in either the retired person or their estate becoming personally liable in respect of any claim presented. Many such sole practitioners find the economic burden of continuing to fund the premiums for professional liability cover from retirement income to be extremely difficult and any reduction in the long-stop prescriptive period would therefore be welcomed by them.
Morton Fraser	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.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	This is a question for RIAS Insurers but we agree with the comments below: The bulk of claims for damages are, at present, the subject of indemnification by insurance companies. In respect of insurance in respect of any professional liabilities then the cover which may respond is that in place not at the date of the wrongful act (or omission) but that in place at the date when any claim is intimated.

	Where the claim is directed against a continuing economic entity (or one which has inherited the liabilities of an earlier economic entity) then this should present no particular issue however a particular problem is presented in those cases where the professional person (for example an architect or a vet) operates as a sole practitioner. At the date of their retirement then their existing business generally closes and any continuing insurance requires to be funded from retirement income on a run-off basis. A feature of the present legislation is that any such cover should be maintained for a period of 20 years following upon the date of retiral. Failure to do so would result in either the retired person or their estate becoming personally liable in respect of any claim presented. Many such sole practitioners find the economic burden of continuing to fund the premiums for professional liability cover from retirement income to be extremely difficult and any reduction in the long-stop prescriptive period would therefore be welcomed by them.
Insurance-related interests:	
FSCM	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.
NFU Mutual	(a) No (b) Yes – to 15 years.
Zurich	(a) No (b) Yes – A reduction to 15 years. The current period of 20 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.

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	
BLM	No. Permitting such agreements might add unnecessary complexity and scope for further dispute, both with attendant cost.
Brodies	We proceed on the assumption that such agreements will almost always be entered into before any dispute has arisen. We tend to consider that clarity and uniformity are best served by refusing to allow parties to shorten the prescriptive period. We can see that for some industries an ability to shorten the long negative period may be advantageous but in effect contractual limitation periods are achieving the need for shorter liability periods. An ability to shorten the 5 year prescriptive period is perhaps most problematic. The Discussion Paper mentions the need to protect consumers but we would have similar concerns regarding small businesses who may be forced to accept very short prescriptive periods when working with larger organisations. The 5 year period is already relatively short and we do not see any particular benefit in allowing a shorter period to be agreed. Were parties to be allowed to agree a shorter period we would suggest a minimum period of 3 years would be appropriate.
Burness Paull (Construction and Projects)	Yes - our Construction and Projects team is strongly in favour of permitting agreements to shorten the statutory prescriptive periods. It reflects current practice. There should be no lower limit. See our comments in response to Q17.
Clyde & Co	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.
CMS	Yes. We are of the view that the parties are best placed to decide what is required.

Craig Connal QC	I suggest it is unnecessary to legislate in this area. The wording of the Act is probably rarely considered in that context. Parties will regularly, particularly in commercial contracts, conclude arrangements by which claims not made by particular times, with or without other conditions, cannot be brought. That is not normally regarded as "prescription" in the legal sense, but has precisely the same effect. There is no particular reason to interfere with that arrangement which seems to work well.
Faculty of Advocates	We would not favour permitting contractual agreements to shorten the prescriptive period. If it is appropriate as a matter of Parliamentarily determined policy that in order to achieve a fair balance between the interests of pursuers and defenders a given period of time (say, five years from the date of loss, subject to certain extensions in case of latent defect) should be allowed to pursuers to bring actions on pain of the extinction of their rights if they do not, it would appear to us to be inconsistent with, and subversive of, that policy to allow parties (or, in reality, the commercially stronger party) to contract out of that period and substitute a different one which they conceive to be more in their – or its – interests. Such boilerplate clauses in standard or semi-standard contracts are frequently overlooked by parties and their advisers prior to litigation, and we would have limited confidence in the usefulness of the unfair contract terms legislation adequately to counter the problem. Not all obligations lengthened or shortened by contract would fall within the purview of that legislation. At the very least, because that tract of legislation employs a test of reasonableness in the circumstances, its use is apt to lead to litigation entailing proof with the concomitant delay and expense which that entails. It would seem preferable to have a straight-forward rule which protects the statutorily determined balance by simply outlawing agreements which would in some degree contract out of, or seek to circumvent, the substantive provisions on prescription. One might, indeed, consider extending the ban to contractual limitation clauses, as they often have in practice much the same effect as clauses altering the prescriptive period. We would make a limited exception from our general view, however, in the case of the “standstill” agreement reached after a dispute has arisen and with a view to delaying the point at which an action has to be served on the defender. Subject to the important proviso that such agreements should by statute be limited to a reasonably short maximum duration (we should have thought that something of the order of six months or a year would be appropriate), we would not see them as being objectionable as alterations of the short negative prescriptive period. They would have little more effect than does the present undertaking of limited duration not to take a prescription point, and if, for reasons of convenience, a party is willing to subject himself to a time-barred action provided that it is raised before a specified date, that is his choice.

	We think that some clear limits to the availability of "standstill" agreements should be laid down. We would not favour the agreement being able to be entered prior to the dispute to which it relates coming into existence or covering more than the competently raised subject-matter of one summons. In the interests of maintaining the certainty about the long negative prescription which we think to be important, we do not support the introduction of "standstill" agreements which would have the effect of extending the long negative prescriptive period.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	We do not see any reason in principle why this should not be possible between consenting parties. However, we would not want to see it being routinely inserted into contracts with uneven bargaining power (but which fell short of unfair contracts) and we consider there may be a risk of the period becoming routinely reduced, which would reduce some of the advantage of the present blanket policy in providing certainty.
Charles McGregor	Yes. In respect of claims arising out contractual obligations then there seems no good reason why the law should not respect an earlier decision on the part of the parties to adopt a separate prescriptive period whether shorter or longer than that prescribed by statute. That being the case there is no good reason for legislation to prescribe either a lower or upper limit in respect of the period which could be fixed by the parties themselves.
Morton Fraser	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 of 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.
Senators of the College of Justice	Introductory comments: 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: In response specifically to question 18: 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).
Architectural institute:	
RIAS	Yes. This is already done in commercial construction contracts and professional appointments and could be related to PII cover. There should be a lower limit extending beyond completion of the contract or the services but again the insurers may be best placed to advise. In respect of claims arising out contractual obligations then there seems no good reason why the law should not respect an earlier decision on the part of the parties to adopt a separate prescriptive period whether shorter or longer than that prescribed by statute. That being the case there is no good reason for legislation to prescribe either a lower or upper limit in respect of the period which could be fixed by the parties themselves.
Insurance-related interests:	
FSCM	No. Please refer to answer 16 Defenders require certainty where possible. This will allow defenders 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.
NFU Mutual	No. Parties are bound by statute and should not be permitted to vary the terms of the statutory provision.

Zurich	No. Please refer to answer 16 Defenders prefer certainty where possible. This will allow defenders to more easily procure adequate and cost appropriate insurance arrangements. Any change to permit agreements to vary prescriptive periods could lead to coverage disputes. This may result in increased litigation around the variation of terms and could lead to increase costs and delay in resolution of disputes.
Utility company:	
Scottish Water (Business Stream)	Business Stream considers that allowing parties to shorten the prescriptive period could create uncertainty and inconsistency. As noted above, the five year prescriptive period is well understood by Business Stream and our customers. Business Stream considers that the five year period is reasonable and does not see any particular advantage in allowing a shorter period to be agreed.

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	
BLM	No. Stair observed that "Prescription is the extinction and abolishing of all rights". Prescription extinguishes obligations by operation of law. As such, it does not lend itself to "contracting-out". Even if it was in the potential gift of parties to contract-out, permitting that might add unnecessary complexity and scope for further dispute.
Brodies	We proceed on the assumption that such agreements will almost always be entered into after any dispute has arisen and will largely be used to avoid the need for protective court proceedings to be raised. It is also likely that such agreements will be finalised close to the end of a prescriptive period. Historically Scottish courts have taken a relaxed approach to the progress of court actions raised to prevent the expiry of a prescriptive period. Improved (and more extensive) case management of actions by the courts has meant that parties are less likely to be allowed to let actions languish while they seek to resolve their differences. Once raised, the courts are keen to ensure that actions are processed through the courts as speedily as possible. We tend to think that many clients would like to have the option of entering into a standstill agreement in respect of the 5 year prescriptive period. This may however run contrary to the current prevailing view that stale claims and delay in settlement should be avoided. We consider that, if allowed, such agreements should only be capable of being entered into after the standard 5 year period has already started to run. Any period of standstill should be limited. We would favour a maximum 6 month period. The standstill agreement should not be capable of being renewed or extended. This will help avoid claims becoming stale. One risk that we can foresee is that a pursuer who is offered but refuses the opportunity to enter into a standstill agreement with a defender may later be accused of having raised proceedings unnecessarily or prematurely. That may seem unlikely but arguments about expenses based on prematurity or unnecessary litigation are

	now commonplace in the sheriff court (where cases settle for at or near a pre-litigation offer for example). We do not consider that pursuers who choose to interrupt the prescriptive period by court action rather than extend it by standstill agreement should run the risk that their decision will be criticised or punished by an adverse modification of recoverable expenses.
Burness Paull (Construction and Projects)	See our comments in response to Q 17.
Burness Paull (Dispute Resolution)	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.
Clyde & Co	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.
CMS	We are in favour of the introduction of standstill agreements; this would do much to minimise concerns about the raising of protective writs. As in relation to question 18, we think that the parties are best placed to decide on the period.
Craig Connal QC	When one uses the term "lengthen the statutory prescriptive period" one perhaps give a different message from that which arises from the phrase "standstill agreement". In my experience, such an agreement could be extremely useful. They are very regularly used in England and Wales. They are capable (presuming agreement) of avoiding the need to issue proceedings. The position is more critical in Scotland where service of proceedings is necessary to interrupt prescription (compared to issuing at the Court in England and Wales). Service can be problematic. Companies may have moved, changed name, turn out to be abroad or in a remote location. In circumstances where the parties are content that the time bar should not come into effect for a period they are (with the benefit of legal advice) prepared to agree, I see no reason why that should not be permitted and very strong practical reasons in favour of it. It should however only be employed in the kind of circumstances used in England i.e. where a claim or possible claim has arisen and investigations are in hand.

Faculty of Advocates	For the same reasons as we canvassed in answer to the last question, we would not favour this proposal either. It is as apt to prove subversive of statutory policy as the last one.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	The same considerations apply to extending the prescriptive period as to reducing it. We would support the possibility of 'standstill' agreements allowing parties a period of review without the need for protective proceedings. A compromise could be to allow extension of the period but only once a claim is known so, for example, it would not be possible to routinely extend the period at the outset of a contract.
Charles McGregor	See previous answer.
Morton Fraser	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.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	No. Whilst it is fine to have freedom to contract, parties often are not contracting on equal terms and there is a danger that professionals will be obliged to accept extensions to their liability. This would adversely affect the premiums and even the availability of their PII. However there is something to be said for stand still agreements to stop the short prescriptive period from running (as long as the long stop is unaffected) whilst the parties negotiate. However, this would only work in construction disputes if everyone involved entered into the agreement. Otherwise those on the periphery would need to raise actions just to protect their position.
Insurance-related interests:	
FSCM	No – please refer to answers 16 and 18 above.
NFU Mutual	No. See response to question 18 above.
Zurich	No. Please refer to answers 16 and 18 above.

Utility company:	
Scottish Water (Business Stream)	As above, Business Stream favours clarity and consistency in the application of the 1973 Act. Business Stream can see the commercial benefit in some industries of entering into a standstill agreement to avoid the need for protective court proceedings to be raised. However, as the need for standstill agreements is not a live issue for Business Stream it has no comment to make on the time limit that should be fixed.

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

(Paragraph 8.10)

Comments on Question 20	
BLM	Yes. Whilst the law may, at present, be clear that the burden rests on the pursuer, statutory provision to remove any doubt would be conducive to legal certainty.
Brodies	We think it would be helpful to have clear statutory guidance on where the burden of proof lies.
Burness Paull (Dispute Resolution)	Yes – as noted in the discussion paper the current legal position in existing case law leaves room for uncertainty. Clarity would be welcomed.
Clyde & Co	Any statutory provision that provides for clarity where it does not already exist is to be welcomed.
Craig Connal QC	No. Issues of onus and burden of proof are, in practice, rarely decisive and I can envisage circumstances depending on the precise situation where it will be obvious one way or another where the burden in reality lies. The courts can be relied upon to deal with that. It is usually possible to ascertain without difficulty whether there is a prima facie issue of prescription and, in that event, one party will almost certainly raise it and the other be required to deal with it.
Faculty of Advocates	Yes. We favour statutory provision on the incidence of the burden of proof. The Consultation paper notes the disparity of views of judges in various Outer House proceedings. We consider that in order to reduce uncertainty about where the burden of proof lies, and to avoid court time being taken up by argument on the point, it is appropriate to take the opportunity of clarifying that matter by amendment of the 1973 Act.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	It may be helpful to do so though we are not aware of it having been a particular issue in practice. As is stated in the Discussion Paper, the burden of proving that he or she has a case to answer would usually rest on the pursuer and addressing the possibility of prescription is just one facet of that. That said, there will always be cases where it is appropriate on the facts of that case for the burden of proof to shift and we would not be in favour of any rule which prevented the court from ordaining the defender to lead.

Charles McGregor	Although the reasoning adopted by Lord Menzies in the case of *Pelagic Freezing (Scotland) Ltd v Lovie Construction Ltd* is generally regarded as being persuasive it is not universally accepted. Therefore in an effort to provide clarity and certainty then it would be helpful to include a statutory provision on the incidence of the burden of proof.
Morton Fraser	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.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes. The case law appears sufficiently confused for there to be benefit from statutory clarification.
Insurance-related interests:	
FSCM	Yes – any statutory provision that provides for clarity where it does not already exist is to be welcomed.
NFU Mutual	Yes.
Zurich	Yes. Any statutory provision that provides for clarity where it does not already exist is to be welcomed.
Utility company:	
Scottish Water (Business Stream)	Business Stream considers it would be helpful to set out clearly in statute where the burden of proof should lie.

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	
BLM	(i) that it should rest on the pursuer. Lord Menzies put the point well in *Pelagic Freezing Limited v Lovie Construction Limited* [2010] CSOH 145: "…the argument that the onus rests on the pursuer is even stronger when considering prescription, because it is pars judicis to notice that an obligation has prescribed, and a pursuer coming to court must show an extant obligation. There cannot be a burden on the defenders to aver or prove that the obligation has been extinguished by prescription. This was recognised by the Lord Justice Clerk in *Dunlop v McGowans* (at page 34) where he observes that 'The extinction of an obligation means that there is no legal right in existence, a matter of which the court can take notice *ex proprio motu*, and there is no right of action from the start.'". (para. 63).
Brodies	When a pursuer raises a court action he is positively asserting that the rights/obligations underlying his claim are still in existence. If he accepts that relevant obligations have prescribed then he is not entitled to bring proceedings to enforce them. He does not require to explicitly raise and deal with the point in his pleadings. It is implicit in the raising of the action that he considers there is an obligation to enforce. It is logical therefore that the burden of proof must rest with the pursuer. The fact that a plea of prescription is one which it is *pars judicis* to take reinforces that view. We do not see any distinction between the 5 year and 20 year prescriptive periods in this regard. Any provision whereby a prescription plea could only be sustained if a defender chooses to raise the point and goes on to prove that the obligation has been extinguished by prescription would render prescription voluntary. Agreement could be reached between parties to a dispute that no reliance would be placed on the passage of time or on the passage of certain periods of time. Prescription would become no different from limitation in that regard.

	The burden does not seem unduly onerous. It can be satisfied by leading evidence that establishes that the action has been raised within 5 years of the breach of the obligation or, in cases of reparation, within 5 years of the date when loss injury or damage occurred. If the pursuer wishes to rely on s.11(3) or s.6(4) then he can plead the relevant date and lead evidence in support of that later date.
Burness Paull (Dispute Resolution)	We consider that it should be (i) or (iii).
Clyde & Co	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.
Craig Connal QC	If it was to be introduced it should rest on the pursuer.
Faculty of Advocates	We consider that the burden of proof should rest on the pursuer for both the 5-year prescriptive period and for the 20-year prescriptive period. There should be no obligation on a pursuer to plead that his or her claim has not prescribed, unless and until that matter is raised by the defender in the usual way. Once the defender has put the matter of prescription in issue – by averring why the claim has prescribed and inserting a plea-in-law to that effect – it should then be for the pursuer to aver and prove why that is not the case. We consider that it is appropriate that the burden should rest on the pursuer because it is he or she who has come to court asserting that he or she has a right to which the court should give effect. If the obligation which is the correlative of that right has ceased to exist, there is no right to be enforced, and hence no right of action: *Dunlop v McGowans* 1979 SC 22 per the Lord Justice Clerk at 34. As has been observed, the general rule (with respect to both evidential and persuasive burdens of proof) is that the 'burdens rest with the party who will lose on that issue if no other evidence is led': Dickson, *Evidence*, para 25. We agree with Lord Menzies' observation in *Pelagic Freezing (Scotland) Ltd v Lovie Construction Ltd* there is no innate unfairness in requiring the pursuer to satisfy the court that he or she has a legal right of action: [2010] CSOH 145 at para 95. Indeed, a pursuer is likely to know more about when he or she first suffered loss, and therefore when there was a concurrence between loss and the breach of duty which is founded upon. We see no reason in principle why a different approach should be taken as between the 5-year and 20-year prescriptive periods.

HMRC	HMRC does not have a view on this.
Law Society of Scotland	Our provisional view is that the burden of proof should rest on the pursuer, but with the option of asking the court to consider ordaining the defender to lead in appropriate cases.
Charles McGregor	There is scope for justifiably different views to be expressed depending upon the facts of any particular case however as a matter of generality it seems appropriate that the burden of establishing a right to reparation still exists should rest on the party who is asserting that right rather than any contradictor. The burden of proof should therefore rest upon the pursuer in respect of both short and long periods of negative prescription.
Morton Fraser	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.
Senators of the College of Justice	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).
Architectural institute:	
RIAS	The burden should fall on the pursuer to prove they have a right to vindicate because they are the party averring breaches and/or wrongs and the damage flowing from them.
Insurance-related interests:	
FSCM	Option (i) is preferred.
NFU Mutual	We agree with option (i).
Zurich	Option (i) is preferred. The burden of proof should rest with the pursuer in line with other legal principles.

Utility company:	
Scottish Water (Business Stream)	Business Stream considers that the onus should rest on the pursuer. That is because it is the pursuer that is positively averring the existence of the rights or obligations which form the basis of his claim. Similarly, if the pursuer wishes to rely on section 6(4) or section 11(3) of the 1973 Act then the onus should rest on the pursuer to plead the relevant date and lead evidence to support it. Business Stream considers that the onus should rest on the pursuer for both the five year and twenty year prescriptive periods.

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	
BLM	Yes.
Brodies	Yes.
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co	Yes.
Craig Connal QC	Yes.
Faculty of Advocates	Yes. We agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment. We agree with the reasons for not doing so which are set out in the Consultation paper at paras 9.18 to 9.22.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	Yes
Charles McGregor	While it seems odd to have a discoverability test in respect of obligations arising out of either contract or delict but not in respect of those arising from unjustified enrichment the difficulties articulated in paragraphs 9.17 to 9.22 of the report in seeking to identify an appropriate test are persuasive. The writer therefore agrees that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment.
Morton Fraser	We agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment.
Senators of the College of Justice	Introductory comments: 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. In response to question 22 specifically : Yes. We agree with the reasoning in this chapter. We are aware of no pressing need for reform of the law in this area.
Architectural institute:	
RIAS	We have no strong views on this matter but are inclined to agree with the Commission for the reasons stated in their discussion paper.
Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes.
Zurich	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	
BLM	No. Reformulating would dilute the legal certainty which prescription brings.
Brodies	No comment.
Burness Paull (Dispute Resolution)	Yes. It makes sense that there should be certainty on this point encapsulated in the legislation.
Clyde & Co	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.
Craig Connal QC	Yes.
Faculty of Advocates	We agree that section 6(4) should be reformulated. The Consultation paper identifies some instances where the wording has caused some difficulty. We also agree that the reformulation should be 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. The reformulated version of section 6(4) should continue to include the proviso regarding reasonable diligence and discoverability (viz, 'Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph'). In addition, we consider that there would be some justification for requiring the creditor to establish that his or her actings in not raising proceedings (because of the fraud or error) were reasonable. The test of reasonableness should be objectively judged. In other words, would the reasonable person in the position of the pursuer have considered the conduct of the debtor a basis for not raising proceedings? This would strike a balance between the rights of the creditor and those of the debtor, particularly where the debtor has acted entirely innocently. We do not consider this aspect would (at least, not always) be covered by the existing proviso in section 6(4).

HMRC	HMRC does not have a view on this.
Law Society of Scotland	Yes, for the reasons given in paragraph 10.9 of the discussion paper. This will require careful drafting and clarity will be required as to, for example, what period of time the clock stops running and how that is triggered at either end
Charles McGregor	Yes.
Morton Fraser	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.
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes.
Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes.
Zurich	Yes.
Utility company:	
Scottish Water (Business Stream)	Business Stream does not agree that section 6(4) should be reformulated in the way suggested. At paragraph 10.6 the Discussion Paper refers to the case of *Rowan Timber Supplies (Scotland) Ltd v Scottish Water Business Stream (Rowan Timber)*. As noted in the Discussion Paper, Business

	Stream did not know that Rowan Timber had no connection to the network. There was no bad faith in the issuing of invoices by Business Stream. Business Stream could also not have reasonably discovered that there was no connection unless the issue was first raised by the customer. Business Stream agrees that *Rowan Timber* places in sharp focus how broad the approach to section 6(4) should be. Business Stream favours a more restrictive approach than that set out in the Discussion Paper. Consistent with the observations in *BP Exploration Operating Co Ltd v Chevron Shipping Company* Business Stream considers that the use of the words "induced" and "refrain" lead to the need for "a more vigorous connection" between a defender's conduct and a pursuer's failure to raise proceedings than is found in *Rowan Timber*. Business Stream does not consider that the issuing of invoices on its own should be regarded as being enough to induce a customer from making a claim. Business Stream considers that what is relevant to whether a customer has been induced by a creditor is what the invoice says. If it is clear on the face of the invoice that the charges are not correct then in at least some situations the burden should rest on the customer to bring that to Business Stream's attention in order that it can correct the charges. That would arise, for example, where the customer could have discovered the issue more readily than Business Stream e.g. where an invoice charges in respect of two business units at an address but the customer knows they are only leasing one unit. Business Stream considers that its state of mind and the reasonableness of its knowledge should be factors relevant to the assessment of whether there was an induced error. While there need not be a positive intention to mislead, there should be some means of assessing whether the alleged inducing act was reasonable or not, in the same way that the creditor's knowledge is relevant to the reasonableness of having refrained from making a claim.

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	
BLM	(a) Yes (b) Yes
Brodies	Yes (to (a) and (b)) **The role of declarator in interrupting prescription** There is one issue in relation to the definition of "relevant claim" which is not touched on in the Discussion Paper but which may be worth consideration. In *Highlands & Islands Airports Ltd v Shetland Islands Council* 2015 SC 588 the Inner House held that a summons containing only declaratory conclusions was sufficient to interrupt prescription. Brodies acted for the unsuccessful defenders. As narrated in the report in Session Cases, the declarators sought were in the following terms *'(1) for declarator that the defender is in breach of its contract with the pursuer entered into in or about January 2005 for the provision by the former to the latter of professional services relative to the extension of runway 09/27 at Sumburgh Airport, Zetland, et separatim is in breach of its duty of care to the pursuer in relation to the provision of those services; and that it is accordingly liable to the pursuer in damages et separatim in reparation for the loss suffered by the pursuer as a result of those breaches or either of them;* *(2) for declarator that in the provision of services by the defender to the pursuer under the contract for the provision of professional services by the former to the latter in connection with the extension of runway 09/27 at Sumburgh Airport, Zetland, entered into between them in or about January 2005, "defects" within the meaning of clause 41 of that contract have arisen, and that the defender having failed to correct the same, it has become liable to pay the pursuer the cost of repairing the same pursuant to that clause.'* The pursuers told the court they had chosen this route because the

	extent of the alleged loss could not then be properly quantified. It was agreed that the action was raised within the prescriptive period. A subsequent Minute of Amendment intimated outwith the 5 year period added a conclusion for payment of the sum of £14,210,000. It was accepted by the Inner House that to be a relevant claim it must be "a claim made in implement or part-implement of the obligations, contractual and delictual, on which the action is founded" It would be useful if further consideration could be given by the SLC to the advantages and disadvantages of the use of actions of declarator to interrupt prescriptive periods in situations where the obligation concerned is to make reparation. In the judgment, the Lord President states: *"If the pursuer when raising this action had simply made its best estimate of its loss on the information then available and had made a formal averment that the sum sued for was a reasonable estimate of the loss and damage sustained by it, the question of time-bar would not have arisen. The pursuer would then have been free to adjust or amend the claim, even after the expiry of the prescriptive period, in the light of further and better information (Devos Gebroeder NV v Sunderland Sportswear Ltd (No 2), p 303). That, I think, indicates how contrived the case for the defender is. "* Making a best estimate of loss when raising proceedings is of course precisely what pursuers require to do on a regular basis. There seems nothing contrived about requiring a pursuer to actually sue for reparation rather than merely seeking a declarator that there is an existing obligation of reparation. It is interesting to consider what might have happened if the pursuers had not introduced a conclusion for payment and declarator in the terms sought had been granted. One possibility is that a decree of declarator would have converted the obligation to make reparation into an obligation which would subsist and be enforceable for a further period of 20 years. There may have been nothing to prevent the pursuers from delaying for up to 20 years before raising further proceedings to enforce their declared right of reparation.
Clyde & Co	(a) Yes (b) Yes
Craig Connal QC	(a) It is inevitable that I will say yes to this question! I add two things. Firstly, in my experience, administration is now the most frequent corporate insolvency process, so regulation of the effect of a claim therefore seems overdue. Administration does bring with it, at least in statutory objective, a different approach to the "wind up and

	distribute" approach of a liquidator, which may in turn militate against the administrator focussing on ordinary claims. As you will recall, the instance which led me to raise this point arose where the circumstances of the company had materially altered. It had been highly unlikely that there would be any dividend for ordinary creditors (and accordingly it would not matter whether a claim prescribed) but now there was likely to be a fund available. That led to an unholy scramble to persuade the administrator to grant a "relevant acknowledgement". That seems an unnecessary effort. The second point I would make, *quantum valeat* is to indicate that since I raised the point, it has cropped up in discussion with quite a number of colleagues. Leaving them anonymous to avoid their blushes, I can say that the vast majority seemed to be unaware that there was any distinction and they were universally horrified that it existed.
Faculty of Advocates	We agree that the definition of 'relevant claim' should extend to the submission of a claim in administration or in a receivership. These would appear to be logical extensions to the existing definitions.
HMRC	Yes.
Law Society of Scotland	Yes. There is no logical reason to treat one insolvency process differently from the other.
Morton Fraser	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.
Charles McGregor	(a) Yes (b) Yes
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes to both (a) and (b).
Insurance-related interests:	
FSCM	Yes.

NFU Mutual	(a) Yes (b) Yes
Zurich	(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	
BLM	Yes.
Brodies	Yes.
Burness Paull (Dispute Resolution)	Yes.
Clyde & Co	Yes.
Craig Connal QC	I have no view on this drafting.
Faculty of Advocates	No. Our view is that the meaning of 'act, neglect or default' is well settled and presents no difficulties. The substitution of the term 'act or omission' in its place is likely to lead to litigation on a matter which is clearly settled and presents no difficulties in practice.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	Yes, we consider this to be a clearer formulation.
Charles McGregor	Yes.
Morton Fraser	We agree with the proposed change to replace the words "act, neglect or default" with "act or omission."
Senators of the College of Justice	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.

Architectural institute:	
RIAS	Yes, for the reasons given in the discussion paper (focussing on fact rather than looking at the legal liability).
Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes.
Zurich	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	
BLM	Reference is made to the comments on questions 9, 10 and 11 (no need to revisit the discoverability formula). On any view, knowledge of actionability should be irrelevant.
Brodies	Yes.
Burness Paull (Dispute Resolution)	Yes, such a provisio should be included.
Clyde & Co	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.
Craig Connal QC	See again answer to question 25 above.
Faculty of Advocates	No. The interpretation of Section 11 is well settled on this point, and it was accepted in *David T Morrison & Co Ltd v ICL Plastics Ltd* that knowledge of actionability is not relevant to the question of when a prescriptive period commences. In our view such a proviso is therefore unnecessary.
HMRC	HMRC does not have a view on this.
Law Society of Scotland	Yes.
Charles McGregor	Yes.
Morton Fraser	We agree 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 purpose of applying the discoverability formula under section 11(3).
Senators of the College of Justice	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.
Architectural institute:	
RIAS	Yes. It is noted that sections 22B and 22C (relative to limitation) contain similar provisions.
Insurance-related interests:	
FSCM	Yes.
NFU Mutual	Yes, although the amendment to the wording of section 11(3) with which we agreed in response to question 25 makes it clear that it is the act or omission which is relevant.
Zurich	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	
BLM	The *Morrison* case has brought the benefit of legal certainty. Revisiting the discoverability formula and qualifying that would risk creating uncertainty where none need exist. Reformulation also risks adding unnecessary complexity and scope for further dispute. With uncertainty, complexity and scope for further dispute inevitably comes cost.
Brodies	No.
Burness Paull (Dispute Resolution)	The Law Commission's recommendations for clarity in this area of the law are welcomed.
Clyde & Co	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.
Craig Connal QC	No comment.
Faculty of Advocates	We have no observations.
HMRC	No
Law Society of Scotland	We consider that there is much wasted time and expense in raising protective proceedings against parties which would be unnecessary were the starting date for the prescriptive period clearer and an ability to postpone the period by use of standstill agreements. Currently the costs are borne by commercial parties, individuals' insurers and the public purse by the use of judicial resources.
Charles McGregor	As mentioned above there is a significant benefit to be attached to certainty in the drafting of not only legislation but also any legal agreement. Litigation generally only occurs when both parties reasonably believe that the position adopted by them is the correct one. The present judicial interpretation of Section 11(3) introduces a measure of certainty into the calculation of prescriptive periods that

	was previously lacking. It should therefore go some way towards discouraging litigation in cases where there might otherwise be an argument as to whether or not a right of action remained available to the creditor. In the immediate aftermath of the decision by the Supreme Court in *ICL* then this may have resulted in hardship where creditors who had previously proceeded by reference to the earlier interpretation of Section 11(3) found that by virtue of the new interpretation then claims which might otherwise have been available to them were now treated as having prescribed. Since then all lawyers have, however, been able to offer straightforward advice to their clients about the enforceability of their legal rights. That should not result in any increase or reduction in the number of claims pursued; it should simply reduce the scope for any dispute as to whether or not a right of action remained available at the date when a claim is presented. It therefore serves to reduce unnecessary argument and/or litigation. Any alteration in the operation of Section 11(3) is certain to generate additional argument and litigation with all of its attendant expense.
Morton Fraser	No comments.
Senators of the College of Justice	No.
Architectural institute:	
RIAS	If the Longstop had a more certain starting point, and if any interruption of that period did not lead to the period starting again from scratch, then this could have an effect on the availability and cost of PII.
Insurance-related interests:	
FSCM	We have no observations to make.
NFU Mutual	The effect of prescription is to make the parties aware that there is a finite period of time in which a claim has to be brought. Any uncertainty with regard to when prescription starts and/or ends will be to the disadvantage of the parties. In terms of cost implications if a claim has to be held open for a longer period of time than would otherwise have been the case because of uncertainty to do with prescription, this will mean potentially higher costs for the parties and higher premiums for policyholders.
Zurich	We have no observations to make.

General Comments	
BLM	Para. 1.7 of the Discussion Paper refers to claims of historical sexual abuse only being affected by the law on limitation of actions. As seen in *DK v The Marist Brothers* CSOH, 15 April 2016, the law of prescription is also of relevance to that kind of claim and should be considered before limitation.
Craig Connal QC	<u>Preliminary</u> No doubt I am telling you something you know already, (given David Johnston's involvement) but *Gordons Trustees* looks likely to go to the Supreme Court. Given that a significant part of the impetus for the present paper was ICL, that may have some impact on how the Commission proceeds. I have been acting in another case in which it has been accepted that if *Gordons Trustees* stands, the claim fails. The central issue seems to focus around the identification of- a cost as a loss. There are different categories, for instance, replacing items at a point before it was known that these demonstrated a failure which would be subject of legal proceedings or, perhaps, incurring investigatory costs into the cause of a problem. As the law stands, the matter is of significance. <u>The Balance</u> The Paper discusses the balance between different interests. To an extent it suggests that there may be something desirable in, for instance, being more generous to claimants with the 5-year rule and less generous with the 20-year rule. The observation I offer is that in the real world (at least so far as indicated by my years in practice) cases which could conceivably fall within the ambit of the 20-year rule are rare, whereas those which could fall within the 5-year rule are depressingly common. Accordingly, if the balance is to be tilted, a claimant-friendly concession on 5 years is in the real world far more significant than a defendant-friendly concession on 20 years (I touch on recent experience on the 20-year rule elsewhere). <u>Paragraph 5.2 (Observation in the DP re fact that prescription in terms of section 11(3) does not start to run until the pursuer is aware of the loss or damage means that a prior question arises, namely: what is loss or damage?)</u> I agree this is a prior question. It continues to cause difficulties. Let me illustrate by three current examples:- (1) A claim is made that a firm of lawyers, when drafting a will, have drafted it in such a way that in certain circumstances the intended beneficiary will not receive the benefit. Is that an immediate

	failure giving rise to loss or is it one which does not give rise to loss until many, many years later, perhaps when the testator dies and the intended beneficiary at that stage receives the unwelcome news? That is perhaps not the best example. (2) Perhaps more reflective of the issue, changes require to be made to a pension scheme to meet the equal pay rules imposed by Barber under EU law. That requires certain steps to be taken. The obligations to do so are incumbent on the trustees but the ultimate funding obligation in due course will fall on the employing company. The steps are not taken. Does that immediately give rise to a loss on the basis that at that point there is immediately a contingent liability on the employer or that in some way the trustees suffer a loss? and; (3) In the case I mentioned earlier under the 5-year rule, bolts were subject to inappropriate stresses. That created micro-cracking. Was that loss? If not, when did it become loss? (The bolts were in a critical location where failure could lead to catastrophic consequences). I do not seek answers to any of these questions. Mainly these are to illustrate that there are very different scenarios but it does remain a problematic area of debate. Reluctantly I have to come to the same view that it would be difficult to regulate this by statute.
Law Society of Scotland	We are wholly supportive of the Scottish Law Commission's review of this area of law. For many years in Scotland we consider that parties have been exposed to unnecessary legal costs due to the absence of standstill agreements and therefore the need for protective proceedings to be raised. This, and other issues, has been exacerbated by the UK Supreme Court decision in *David T Morrison & Co Ltd v ICL Plastics Ltd*, which has led to considerable uncertainty surrounding the commencement date for prescriptive periods. It seems to us that many actions are currently being raised to avoid a time-bar argument that could otherwise be dealt with out of court.
Charles McGregor	The comments set out in this response represent my own personal views rather than the views of Clyde & Co or their clients.
Douglas McGregor	One issue which has not been raised in the Discussion Paper on Prescription is the question of the effect of raising court proceedings on the running of prescription. Chapter 5 of David Johnston's book, Prescription & Limitation 2nd Ed (at paras 5.33 to 5.44), looks at the arguments for and against treating the raising of proceedings as a continuing event/process as opposed to viewing it as a single event. At para 5.42 it is suggested that clarification of the law is required. The difference between the two approaches is perhaps most starkly apparent in cases in which decree of dismissal is sought on the basis

	of inordinate and inexcusable delay in terms of rule 21A.1 of the Rules of the Court of Session or rule 15.7 of the sheriff court Ordinary Cause Rules. In such cases the court action is likely to have been dormant for an extended period of time. See, for example, *Abram v British International Helicopters* Ltd [2014] CSIH 53 and the recently issued sheriff court decision, *Sultana v General Accident Fire & Life Assurance Corporation plc* [2016] SC EDIN 40. Not all cases involve such lengthy delays though – see the decision of Sheriff Principal Scott QC in *Fox v United Biscuits (UK) Ltd* 17 June 2014 Sheriffdom of Glasgow & Strathkelvin 2014 SC GLA 20 where the period of delay was much shorter. The pursuer in *Sultana* was seeking payment from insurers after a fire destroyed shop premises. A proof diet had been assigned for 22 October 2001 but was discharged after agents withdrew from acting. A further proof was allowed to be assigned on a date to be afterwards fixed. No steps were taken to fix a diet and the case did not call again until 2016 when it was put out by order. The pursuer appeared in person. The defenders were represented and confirmed to the court that they had taken an informed decision not to take steps to fix a diet. Sheriff Mackie exercised her discretion and dismissed the action under rule 15.7 after being satisfied that there had been inordinate and inexcusable delay resulting in unfairness. As in previous cases, the sheriff in *Sultana* puts considerable store by the undoubted difficulties that the lengthy period of delay would cause at proof. In particular, evidence would be likely to be vague and uncertain. She concluded that justice could not be done. It seems to me that the question of whether prescription runs during the course of proceedings may be of considerable importance to parties in cases decided under rules 21A.1 and 15.7. (The issue of imprescriptible obligations in the context of rule 15.7 was looked at by the Sheriff Principal in *Hardie v Morrison & Anr* 10 July 2012 but otherwise prescription does not appear to have featured in the case law on inexcusable and inordinate delay) In cases like *Sultana*, if the pursuer's claim has prescribed during the course of proceedings then dismissal of the action is an end to the matter. If it has not prescribed then there would seem to be nothing to prevent a pursuer from raising fresh proceedings the following day and heading to proof despite any evidential difficulties. In such cases the court might question the benefit of dismissal as opposed to simply relying on an award of expenses of process to mark disapproval. At present, decisions in *Hood v Dumbarton District Council* 1983 SLT 238 and *GA Estates Ltd v Caviapen Trs Ltd* 1993 SLT 1045 & 1051 seem to indicate that prescription does not run while proceedings are

	ongoing but in *GA Estates* there is a particular emphasis on the need for the pursuer to take a step in process as a positive assertion or re-assertion of his claim. That would tend to suggest that prescription may have been running in the *Sultana* case since no steps were taken to fix a proof. Hood on the other hand seems to place greater store on the initial raising and continued existence of the action rather than the taking of any procedural steps during the course of proceedings. Given modern case management procedures and the keenness of courts themselves to insist on progress being made with actions, cases involving delay of the type seen in *Sultana* are likely to be rare in future. The vast majority of cases are likely to be disposed of in a relatively short timescale. In the circumstances, it might be more straightforward if the raising of an action were sufficient to interrupt and suspend prescription with a fresh prescriptive period commencing only on disposal of proceedings. If the position is clear then all parties to the action (except perhaps party litigants) will be aware of the consequences of failing to make progress. As an alternative, consideration might be given to allowing a limited period after dismissal in which fresh proceedings could be raised. Issues surrounding amendment of pleadings as occurred in *GA Estates* may also have to be addressed. Other approaches may be preferred but, in any event, it seems to me that the current consultation represents an ideal opportunity to clarify the law in this area.
Morton Fraser	No comments.
Hugh Paterson	If there are any other suggestions as to how title deed holders may be protected in terms of our comments under question 13 we shall be pleased if you will advise us.
Architectural institute:	
RIAS	Our only comment is to note that in section 9 (by way of section 4) 'appropriate proceedings' expressly includes arbitration along with court proceedings as interrupting prescription. Should the status of adjudication under the Housing Grants Construction and Regeneration Act 1996 relative to the interruption of prescription be addressed?
Insurance-related interests:	
FSCM	We would be happy to discuss any aspect of our response if that were deemed of assistance.
NFU Mutual	None.

Zurich	We have no general comments.
Utility company:	
Scottish Water (Business Stream)	Introductory comments: Scottish Water Business Stream Limited (Business Stream) supplies water and waste water services to business customers in Scotland and to a limited number of sites in England. Business Stream has the largest market share of Scotland's competitive water retail market. Business Stream has prepared this response to the questions in the Scottish Law Commission Discussion Paper No 160 (the Discussion Paper). We have sought to answer only the questions that are most relevant to Business Stream and our customers. We hope that the comments will prove helpful. Response to the Discussion Paper: Business Stream agrees that prescription plays an important role in the legal system. Business Stream has a settled policy on the application of the five year negative prescriptive period provided for by section 6 of the Prescription and Limitation (Scotland) Act 1973 (the 1973 Act), which is understood by our customers. We would also agree that as long as the law of prescription strikes a fair balance overall, it serves the wider interests of fairness, justice and certainty. We consider that the current five year negative prescriptive period strikes the right balance and provides for fairness, justice and certainty for Business Stream and its customers.