

RESPONSE TO THE ONLINE CONSULTATION ON THE WORKING DRAFT OF THE PRESCRIPTION (SCOTLAND) BILL

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BURNES PAULL LLP

We have considered the draft Bill and explanatory notes.

We have some further comments on **Draft Section 13 – Restrictions on contracting out**

We feel that the proposed wording could leave room for doubt over the distinction between (1) extinguishing rights or obligations as a result of the passage of time (negative prescription); and (2) contractually waiving a right to bring a claim (limitation).

Recognising the distinction, the SLC's explanatory material which accompanies the draft Bill states in relation to the proposed contracting out wording:

- ℞• “This will not impact on the current practice in fields such as conveyancing where the parties enter into contractual limitation provisions. Such provisions do not extinguish obligations and, accordingly, are not provisions relating to prescription.”

However, a reading of the original discussion paper responses indicates that there was a mixed understanding amongst responders as to what was being asked regarding contracting out of prescriptive periods (question 18).

It is also of note in this context that the SLC's original discussion paper stated re contracting out (Chapter 7, p51):

- ℞• “An agreement that a shorter prescriptive period should apply is not clearly an infringement of [current 1973 Act] section 13, although the reality is that it does disapply the relevant statutory prescriptive period..... In conveyancing, it is common for missives to contain what is in effect a two-year contractual prescription.”

then, at p52

- ℞• “The justification advanced [for the current 1973 Act section 13 prohibition on contracting out] is.... apparently the wish to achieve clarity and uniformity. So it may indeed be that the intention was that [current 1973 Act] section 13 should invalidate not just agreements to lengthen the prescriptive period but also some of the other kinds of agreement mentioned above.” (this would include missives as mentioned in the above bullet point)

We think that the draft wording could leave room for doubt as to whether a contractual agreement between parties to waive/limit/change/alter timescales for assertion and enforcement of contractual rights and obligations might fall foul of the proposed legislation.

In short, we feel that the draft wording of section 13 may leave contractual limitation periods open to challenge on the basis that they effectively “alter the operation of” the prescriptive period.