

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

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DWP

**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?**

Yes.

**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?**

We can see the value of this in general but have concerns around the recovery of social security debt. We are concerned about risks to long-term recovery plans. We understand the rationale of the prescription period to prevent obligations being pursued where there has been no acceptance and no enforcement action or other steps to recover the debt have taken place. Social security and child maintenance debt recovery often takes place over long periods of time however and we are concerned about the impact of the legislation if a five year rule were to apply instead of the current twenty year rule. Under the law of England and Wales recovery of sums due under social security legislation and tax credit legislation was exempted from the six year limitation period by section 38(11) of the Limitation Act 1980, and child maintenance debts are also not subject to the six year period as is set out in our response to Q3.

**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?**

In line with our response to Q.2 we are concerned about the long term nature of social security debt recovery. It is not clear whether recovery by compulsory deduction from on-going benefit payments or earnings would interrupt the prescriptive period. Given the long term nature of Social Security debt recovery we would wish to see social security debt recovery excepted from the five year period. We suggest that retaining the current twenty year prescription period applying to Social Security debt and Tax Credit debt would be appropriate. Also, it would maintain the current rough equivalence with the position in England and Wales, where, as set out in the response to Q2, such debt recovery is not subject to the 6 year Limitation period.

Secondly, we would wish to see obligations in relation to arrears of child maintenance arising under Child Support legislation excepted from five year prescription, and remain subject to the twenty year period. Our policy with regard to arrears of child maintenance is that it is the responsibility of both parents to maintain their children. Some non-resident parents go to great lengths to avoid payment and the proposed change will provide an incentive for those individuals to avoid payment, in the knowledge that their arrears will become unenforceable. Arrears of Child Maintenance can be enforced in the courts once a Liability Order is obtained. As

regards England and Wales Regulation 28 of the Child Support (Collection and Enforcement) Regulations 1992 states that there is no period of limitation in relation to an application for a Liability Order, except where payment became due on or before July 12 2000. Although the positions in Scotland and England and Wales are not the same at present, preserving the current position will maintain some form of equivalence.

**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?**

DWP has no view on this.

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

DWP has no view on this.

**6. Do you agree that Schedule 1 paragraph 1 should include rights and obligations relating to the validity of a contract?**

DWP has no view on this.

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

DWP has no view on this.

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

Yes. We would favour Option 3 as we are unable to consider debt recovery until we were aware that a debt had arisen, how that debt arose and who was responsible for repayment. In practice it is usual for all three of these to be answered at the same time.

**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)?**

Yes.

**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?**

Yes. In benefit overpayment cases for example there can be a delay between the error that gave rise to the overpayment and its discovery.

**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?**

Yes

**12. Do you agree that the present formulation of the test of “reasonable diligence”**

Yes

**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? is satisfactory?**

We consider that the starting point should remain the point at which an obligation has become enforceable.

**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?**

No

**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?**

Yes

**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?**

DWP has no view on this.

**17. (a) Do you regard 20 years as the appropriate length for the prescriptive period under section 7?**

Yes

**(b) If not, would you favour reducing the length of that period?**

**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?**

DWP has no view on this.

**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?**

DWP has no view on this.

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

DWP has no view on this.

**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?

**22. Do you agree that no discoverability test should be introduced in relation to obligations arising from unjustified enrichment?**

DWP has no view on this

**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?**

Yes

**24. (a) Do you agree that “relevant claim” should extend to the submission of a claim in an administration?**

Yes

**(b) Do you agree that “relevant claim” should extend to the submission of a claim in a receivership?**

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”?**

DWP has no view on this.

**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?**

DWP has no view on this.

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

Only in relation to the potential cost of any impact on Social Security debt recovery. We are concerned that due to the nature of Social Security debt recovery there could be significant costs if a five year prescription period were applicable to Social Security debt recovery or child support.