Business and Regulatory Impact Assessment

Title of Proposal

The Prescription (Scotland) Bill ("the Bill")

Purpose and intended effect

- **Background**

The Bill amends aspects of the law of negative prescription. Negative prescription is an important doctrine which establishes a time-limit within which a person who is aggrieved must raise his or her claim in court. If the time-limit is missed, the ability to pursue the claim is lost. This is because the right or obligation will be extinguished completely once the time-limit has expired. Although that may at first sight seem unfair, it should not be, providing that the time-limit in operation strikes a fair balance between the various competing interests involved.

The Bill stems from a 2017 Report of the Scottish Law Commission on Prescription (Scotlawcom No 247). The current framework of the law of prescription is provided by the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). The Act was the result of recommendations from the Scottish Law Commission.

Section 6 of the 1973 Act provides for the extinction of certain types of obligation on the expiry of a period of five years from the date on which they became enforceable. It does not apply to all obligations but only to those listed in paragraph 1 of schedule 1 of the 1973 Act.

In addition, section 7 of the 1973 Act provides for the extinction of obligations after they have subsisted for a continuous period of 20 years from the date on which they became enforceable. It is a "long-stop" period which ultimately takes effect in the event that an obligation has not already been extinguished. By contrast with the five-year prescriptive period, it applies to all obligations other than those specifically excluded from it, namely obligations to make reparation in respect of personal injuries and obligations identified in schedule 3 of the 1973 Act as being imprescriptible. Section 8 of the 1973 Act provides for a similar long-stop period of prescription in relation to the extinction of other rights relating to property.

Further sections of the 1973 Act provide for the start of the prescriptive period to be postponed in particular situations. For example, section 11(3) deals with what is required to start the running of the five-year prescriptive period where there is latent damage. This rule has been the subject of a re-interpretation by the UK Supreme Court. One of the Justices in the case of *David T Morrison & Co Limited v ICL Plastics Limited* [2014] UKSC 48 ("*Morrison*") urged that the matter should be given further consideration. Another example is section 6(4). It provides that the five-year prescriptive period will not run

during any period for which the creditor is induced by fraud or error on the part of the debtor to refrain from making a claim. The courts have criticised the wording of this subsection.

Other issues in the current law of negative prescription can also cause uncertainty and difficulty in practice.

- **Objective**

The objective is not to review the law of negative prescription in its entirety but to address certain issues within the law of negative prescription which can cause uncertainty and difficulty in practice. The aim is to refine the relevant law in order to increase legal certainty and fairness, and promote the efficient use of resources.

Prescription plays an essential part in balancing the interests of the parties on the one hand and serving the public interest on the other. Justice between the parties to a litigation means that after a certain lapse of time it is actually fairer to deprive a pursuer of a claim than to allow it to trouble a defender. That is connected with concerns about stale or missing evidence and the difficulties facing a court in trying to administer justice in those circumstances. But there is more to prescription than justice between the parties to a court case. There is a wider public interest in having litigation initiated promptly if it is to be initiated at all. The reason is that that is conducive to legal certainty. Even if in an individual case prescription may seem to involve hardship, as long as the law of prescription strikes a fair balance overall, it serves the wider interests of fairness, justice and certainty.

In the interest of fairness, obligations and rights should fall within the prescriptive periods unless there are policy reasons for excluding them. Furthermore, parties should be able to know with certainty when the risk of being subjected to litigation has passed. It is unfair that, in order to protect their interests against the running of prescription, pursuers are put in the position of having to raise proceedings against several possible defenders (by launching “protective writs” in order to interrupt the running of prescription) before the facts have been investigated; currently, it is more or less standard practice in construction cases for a pursuer to raise proceedings against all contractors, sub-contractors and members of the professional team. It is equally unfair on potential defenders that they are put to the expense and inconvenience of investigating such claims, taking legal advice regarding them and intimating them to their insurers however little merit they believe them to have. This is inconvenient and wasteful of resources. The current law generates expense and inconvenience for pursuers as well as defenders.

Identifying where the balance of interests is fairly struck involves considering matters such as which rights and obligations should prescribe after what period; when the prescriptive periods should start and whether and how they can be interrupted or suspended; whether it should be possible to contract out of the prescriptive periods; and the burden of proof. The Bill provides for all of these issues based on the objective of the need for increased clarity,

certainty, fairness and the efficient use of resources. The key provisions are:

Increased certainty and clarity

- The current narrow construction of the 1973 Act, schedule 1 paragraph 1(d) will be addressed to make it clear that obligations in delict generally are within the scope of the five-year prescriptive period.
- Obligations arising from or because of any breach of pre-contractual dealings, and obligations relating to the validity of a contract will be subject to the five-year prescriptive period.
- The five-year prescriptive period will be extended to apply to obligations to make a payment arising under any enactment (with specified exceptions justified on policy grounds).
- The five-year and the 20-year prescriptive periods (in terms of sections 6 and 7 of the 1973 Act) will not apply to rights and obligations for which another enactment either provides for a specific limitation or prescriptive period or that an obligation is imprescriptible or not subject to any period of limitation.
- For periods of prescription which are amenable to interruption, in terms of section 6 or section 8A of the 1973 Act, the effect of the making of a relevant claim on the running of prescription will be clarified.
- It will be provided that, in relation to any proceedings for implementation of an obligation to which the five-year, 20-year, two-year or ten-year prescriptive periods (in terms of sections 6, 7, 8A and 22A respectively of the 1973 Act), and any proceedings to establish a right to which section 8 (extinction of other rights relating to property by prescriptive periods of 20 years) applies, the burden of proof lies with the creditor.
- Agreements to disapply the five-year prescriptive period (section 6), and the two-year prescriptive period which applies to extinguish obligations to make contribution between wrongdoers (section 8A), or the 20-year prescriptive periods provided for by sections 7 and 8 of the 1973 Act, or to alter the effect of any of such periods, will not be competent.
- Section 6(4) of the 1973 Act (mentioned in “Background” above) will be re-cast to reflect the policy intention more accurately.

Increased fairness

- The start of the five-year prescriptive period will be adjusted to address perceived unfairness arising from a judgment of the UK Supreme Court (as mentioned in “Background” above).
- Prescription can be interrupted by the making of a “relevant claim”. The definition of relevant claim will be extended to include the submission of a claim in an administration or receivership, and the acts that trigger administration or receivership.
- The 20-year prescriptive period in terms of section 7 of the 1973 Act, in relation only to claims involving recovery of damages, will run from the date of a defender’s last act or omission rather than from the date of

loss.

- To ensure that the 20-year prescriptive periods (in terms of section 7 and section 8 of the 1973 Act) operate as true long stops, they will no longer be amenable to interruption. In the interest of fairness, an extension of these prescriptive periods will, in certain circumstances, be possible.

A more efficient use of resources

- Agreements to lengthen the five-year prescriptive period (section 6), or the two-year prescriptive period which applies to extinguish obligations to make contribution between wrongdoers (section 8A), will be competent provided that certain conditions are met.

In responding to the Scottish Law Commission's consultation on the topic, Burness Paull LLP (Dispute Resolution Team) stated:

> "The Law Commission's recommendations for clarity in this area of the law are welcomed."

In its response to the consultation on the working draft of the Prescription (Scotland) Bill, the Law Society of Scotland commented:

> "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.
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> In our previous submission we considered 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."

- **Rationale for Government intervention**

The Bill stems from a project included in the Scottish Law Commission's Ninth Programme of Law Reform. The main impetus for the project's inclusion was the decision of the UK Supreme Court in *Morrison*. This has made the issue of prescription in claims for latent damage (currently governed by the 1973 Act) a topical one. *Morrison* altered the understanding of the law on the degree of

knowledge which a pursuer must have about the existence of a claim before the prescriptive period begins to run where damages are sought for loss or damage which was initially latent. The Court's interpretation of this aspect of the law has prompted calls for a re-examination of recommendations made in relation to the topic of latent damage in a Report published by the Scottish Law Commission in 1989. The initial call for a re-examination was by one of the Justices in *Morrison*. A majority of respondents to the Scottish Law Commission's Discussion Paper of February 2016 ("Discussion Paper") also supported such a re-examination, along with the introduction of other measures aimed at increasing legal certainty and fairness, and promoting the efficient use of resources.

As the current law is statutory in nature, Government intervention is required in order to promote the necessary amendments of the 1973 Act.

A refined law of negative prescription would contribute to greater legal certainty and fairness and promote the efficient use of resources thereby making a valuable contribution to a strong sustainable economy. The Bill would therefore contribute to the overarching purpose of the Government in terms of the National Performance Framework: 'to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing economic sustainable growth' (National Performance Framework, March 2016). In terms of that overarching purpose, one of the Government's strategic objectives is creating a wealthier and fairer Scotland and by doing so to make Scotland a more attractive place in which to live, work and invest. The Bill would implement important principles for businesses and individuals which would make Scotland a more attractive place in which to live, work and invest. This is expanded upon in the "Benefits" section below.

Consultation

- **Within Government**

The project is part of the Scottish Law Commission's Ninth Programme of Law Reform which was agreed with the Scottish Government. A copy of the Scottish Law Commission's Discussion Paper was sent to the Civil Law Reform Unit of the Scottish Government Justice Directorate. On 29 September 2016, the Commission team met members of the Civil Law Reform Unit of the Scottish Government to discuss possible implementation of the project and the Unit has been kept informed about progress.

A further consultation, on a working draft of the Bill, took place from 1 to 31 March 2017. The draft Bill, a covering minute and explanatory notes were posted on the Commission's website. A link to these documents was distributed widely in addition to announcement via Twitter, the Journal Online and Scots Law Times Online. For example, it was sent to HM Revenue and Customs ("HMRC"), Revenue Scotland, the Department for Work and Pensions ("DWP") and, via the Office of the Advocate General to the Department for Business, Energy and Industrial Strategy ("BEIS"). A link was also sent to the Convention of Scottish Local Authorities and to the Directors

of Finance of all Scottish local authorities. Responses were received from HMRC, DWP, the Insolvency Service and four local authorities. All responses were carefully considered in making the final policy decisions.

- **Public Consultation**

The Discussion Paper was published in February 2016. It was circulated to individuals and organisations identified by the Scottish Law Commission as having a potential interest in the topic. It was also published on the Commission's website and was therefore freely available to the general public online. A news release publicised the paper; the matter was reported in the Herald on 22 February. The Discussion Paper sought views of stakeholders on 27 questions. The consultation was open for 12 weeks and attracted responses from 20 consultees, including a member of the public, an architectural institute, insurance-related interests, a utility company and HM Revenue and Customs as well as representatives of the legal profession.

As stated above, a further consultation, on a working draft of the Bill, took place from 1 to 31 March 2017. The draft Bill, a covering minute and explanatory notes were posted on the Commission's website. A link to these documents was distributed widely in addition to announcement via Twitter, the Journal Online and Scots Law Times Online. For example, it was sent to those who responded to the Discussion Paper, those who have expressed an interest in the project and relevant representative bodies. In total, 15 written responses and one oral response were received.

- **Business**

In June 2015, the Scottish Law Commission held a seminar at which a number of issues subsequently raised in the Discussion Paper were discussed. Those in attendance included solicitors and advocates with an interest in relevant areas of law as well as people with backgrounds in insurance and architecture. The input by these varied interests greatly assisted the formulation of policy in relation to the recommendations reflected in the Bill. All supported a clarification of the current regime. Those who attended the seminar included:

David Wedderburn – The Royal Incorporation of Architects in Scotland (RIAS) Contracts Committee.
Lindsay Williamson - associated with the Insurance Society of Edinburgh.
Representatives of several firms of solicitors, including Karen Cornwell of TLT LLP and Douglas McGregor of Brodies LLP.
Several advocates including J Gordon Reid QC and Steven Love QC.

On 21 March 2017, a meeting took place to discuss the working draft of the Bill which was posted on the Commission's website on 1 March 2017. It was attended by David Wedderburn of RIAS and Jilly Petrie of BTO Solicitors LLP. On 6 April 2017, a similar meeting took place with Donny Mackinnon of the Royal Institution of Chartered Surveyors (RICS). All made helpful contributions which were carefully considered in making the final policy

decisions.

Options

Option 1 – Do nothing

In terms of Option 1, the Bill would not be introduced and the current provisions in the 1973 Act on negative prescription would remain. The opportunity would be lost to address the uncertainties, lack of clarity, unfairness and inefficient use of resources stemming from the current law of negative prescription, and the benefits discussed below would not be realised.

Option 2 – Introduce the Bill

In terms of Option 2, the Bill would be introduced. If implemented, the changes to the law listed under "Objective" above would be brought about resulting in increased clarity, certainty, fairness and the efficient use of resources. The benefits of Option 2 are discussed below in more detail. See "Benefits".

- **Sectors and groups affected**

Both options would be capable of impacting upon any person or body in Scotland (including professional advisers and the courts) involved in the enforcement of an obligation or right where there were issues of negative prescription. In relation to claims for latent damage, the principal sectors likely to be affected would be architects, surveyors, engineers, builders and similar professionals. Solicitors, accountants and others who give advice which may have consequences for their clients years after the advice was given may also be affected. Local authorities, public utilities and the insurance industry would be affected too.

In terms of Option 1 (do nothing), those pursuing or defending claims for the enforcement of an obligation or right would be faced with the uncertainties, lack of clarity, unfairness and inefficient use of resources stemming from the current law of negative prescription. This would result in the continuation of the current costs in connection with protective writs, investigation of claims, intimation of claims to insurers and seeking legal advice (although such claims might have no merit). Costs relating to judicial resources and to the services provided by the Scottish Courts and Tribunals Service (SCTS) would also continue. (The function of the SCTS is to provide administrative support to Scottish courts and tribunals and to the judiciary of courts.)

In terms of Option 2 (introduce the Bill), those pursuing or defending claims for the enforcement of an obligation or right would have the benefits of increased certainty, clarity and fairness and a more efficient use of resources. This would result in decreased costs: pursuers would be less likely to require to launch protective writs; correspondingly, defenders would be less likely to have to incur costs in investigating claims, intimating them to insurers and seeking legal advice although of a view that such claims had no merit.

Increased clarity of scope would reduce the number of disputes and consequential litigation. It would enable professional advisers to advise their clients more clearly. Parties would be able to agree that prescription would not run for a specified period while the parties carry out further investigations and seek to negotiate an end to their dispute. Such agreements could prevent the need for arbitration or litigation, and the consequent use of resources which resort to such procedures involves. Insurers too would benefit from the increased clarity which would enable them to offer policies for appropriate periods at appropriate premiums.

- **Benefits**

Option 1 (Do nothing)

Option 1 would not produce any benefits, given that the result would be that the uncertainties, lack of clarity, unfairness and inefficient use of resources stemming from the current law of negative prescription would continue.

Option 2 (Introduce the Bill)

The Bill if introduced and implemented would bring the following benefits:

Increased certainty and clarity

- The current narrow construction of the 1973 Act, schedule 1 paragraph 1(d) will be addressed to make it clear that obligations in delict generally are within the scope of the five-year prescriptive period.
- Obligations arising from or because of any breach of pre-contractual dealings, and obligations relating to the validity of a contract will become subject to the five-year prescriptive period.
- The five-year prescriptive period will also be extended to apply to obligations to make a payment arising under any enactment (with specified exceptions justified on policy grounds).
- The five-year and the 20-year prescriptive periods (in terms of sections 6 and 7 of the 1973 Act) will not apply to rights and obligations for which another enactment either provides for a specific limitation or prescriptive period or that an obligation is imprescriptible or not subject to any period of limitation.
- For periods of prescription which are amenable to interruption, in terms of section 6 or 8A of the 1973 Act, the effect of the making of a relevant claim on the running of prescription will be clarified.

All of the above provisions of the Bill would clarify the scope of negative prescription by extending its provisions to obligations which should be included, expressly excluding the provisions of the 1973 Act where they are not needed, and bringing increased certainty as to the policy underlying the current law.

The resultant increased clarity of scope would reduce the number of disputes and consequential litigation. It would enable advisers such as solicitors and

advocates to advise their clients more clearly on whether it is possible to pursue implementation of a particular obligation or whether that obligation has been extinguished by prescription.

Such clarity of scope would also increase certainty for defenders seeking to establish when the potential risk of having proceedings raised against them in respect of particular obligations will pass. In turn, this would enable their insurers to offer policies for appropriate periods at appropriate premiums.

- It will be provided that, in relation to any proceedings for implementation of an obligation to which the five-year, 20-year, two-year or ten-year prescriptive periods (in terms of sections 6, 7, 8A and 22A respectively of the 1973 Act), and any proceedings to establish a right to which section 8 (extinction of other rights relating to property by prescriptive periods of 20 years) applies, the burden of proof lies with the creditor.

The current law is silent about who bears the burden of proof in the ordinary case where discoverability or alleged fraud or error are not in issue. The case law demonstrates that the matter is far from clear. Clarity in relation to this issue would therefore save court time in deciding the issue. All but one of the respondents to the relevant question in the Discussion Paper welcomed the clarity which such an express provision would bring. For example, the Senators of the College of Justice observed that such a provision "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."

- Agreements to disapply the five-year prescriptive period (section 6), and the two-year prescriptive period which applies to extinguish obligations to make contribution between wrongdoers (section 8A), or the 20-year prescriptive periods provided for by sections 7 and 8 of the 1973 Act, or to alter the effect of any of such periods, will not be competent.

The current law is unclear about whether an agreement that a shorter prescriptive period should apply is permissible. The Bill would put the matter beyond doubt so that parties would be clear that agreements to shorten the prescriptive periods are not permitted.

- Section 6(4) of the 1973 Act (mentioned in "Background" above) will be re-cast to reflect the policy intention more accurately.

Case law demonstrates that the drafting of section 6(4) has given rise to difficulties. The provision concerns the effect of fraud, concealment and error on the computation of the prescriptive period. The Bill would provide clarity; the provision is intended to reflect the policy that suspension of the running of prescription under section 6(4) may take effect where the creditor has been innocently caused by the debtor not to raise proceedings, as well as where he or she has been deliberately so caused.

Increased fairness

- The start of the five-year prescriptive period will be adjusted to address perceived unfairness arising from a judgment of the UK Supreme Court (as mentioned in "Background" above).

Although the existing rule on when the period of prescription begins to run in cases of latent damage may be clear, it does have the potential to operate harshly and unfairly on pursuers. By the time prospective pursuers have become aware of their loss, the prescriptive period could be well under way thereby reducing the time available for investigating the facts and raising proceedings, or the period could have expired thereby removing the opportunity to raise proceedings. Furthermore, where they know of the loss, but not of the identity of the person or persons who caused it, they may be forced to launch protective writs directed against numerous possible defenders before the facts are fully investigated. In the context of construction cases, it is standard practice for the pursuer to raise proceedings against all contractors, sub-contractors and members of the professional team in order to interrupt the running of the prescriptive periods against them. This inevitably causes administrative inconvenience and has cost implications.

Equally, the existing rule has the potential to be unfair on defenders. They have no choice but to investigate any claims, intimate them to their insurers and seek legal advice, no matter how little merit they think the claims have. Again, this has attendant administrative inconvenience and often unfairly as, ultimately, investigations may reveal that some (or all) of the defenders bear little or no responsibility for the loss.

The Bill would address the issue of potential unfairness. Pursuers would be less likely to require to launch protective writs against numerous possible defenders as prescription will not run until the pursuer is aware of the following facts: (i) that loss has occurred (ii) that the loss was caused by a person's act or omission, and (iii) the identity of that person. This would in turn benefit defenders who might otherwise have been, unfairly, on the receiving end of such protective writs. It would therefore be likely to alleviate administrative inconvenience for both pursuers and defenders thus resulting also in a more efficient use of resources.

Brodies LLP stated: "For legal advisers and their clients, the Supreme Court decision in *Morrison v ICL Plastics* in 2014 was an unexpected departure from the previous approach adopted by the Scottish courts. In our view the reform of s.11(3) will be welcomed since it is an opportunity to clarify the essential facts which a party must be aware of before a 5 year prescriptive period starts to run in respect of an obligation to pay damages. In the long term the changes should result in greater certainty for clients."

- Prescription can be interrupted by the making of a "relevant claim". The definition of relevant claim will be extended to include the submission of a claim in an administration or receivership, and the acts that trigger

administration or receivership.

The current law sets out in detail the procedures that fall within the definition of a "relevant claim" which will have the effect of interrupting the prescriptive period. The submission by a creditor of a claim in an administration or a receivership is not mentioned; it is therefore arguable that claims of that kind do not interrupt prescription. It seems unfair to creditors, particularly as corporate insolvency procedures are now frequently conducted within the framework of administration, that the position is different from the submission of claims in sequestrations, under trust deeds or in liquidations. The Bill would address this unfairness by extending the definition of relevant claim to include the submission of a creditor's claim in both an administration and a receivership and the acts that trigger administration or receivership. This greater clarity may result in some increased certainty as to the period for which insurance cover requires to be maintained.

- The 20-year prescriptive period in terms of section 7 of the 1973 Act, in relation only to claims involving recovery of damages, will run from the date of a defender's last act or omission rather than from the date of loss.

- To ensure that the 20-year prescriptive periods (in terms of section 7 and section 8 of the 1973 Act) operate as true long stops, they will no longer be amenable to interruption. In the interest of fairness, an extension of these prescriptive periods will, in certain circumstances, be possible.

The current law provides that the 20-year prescriptive period in terms of section 7 of the 1973 Act begins on the same date as the five-year prescriptive period, that is to say, the date on which loss or damage flows from the act or omission in question. Scots law is unusual in this regard. It has the result that a considerable period of time could pass without the prescriptive period even starting to run. This could undermine one of the principal rationales of prescription, namely that after a certain period of time a defender should be able to arrange his or her affairs on the assumption that the risk of litigation has passed. The Bill would change the law to the effect that the starting date for the 20-year prescriptive period in terms of section 7 of the 1973 Act, in relation only to claims involving recovery of damages, is the date of the defender's last act or omission. Whilst it is difficult to quantify the potential benefit of such a change of starting date in economic terms, as the Bill could result in a bringing forward of the starting point (to the last act or omission of the defender rather than the date of the loss) it may decrease the overall period for which insurance has to be taken and would result in a fairer balance between the interests of pursuer and defender.

Difficulties for defenders in arranging their affairs on the basis that risk has passed are compounded by the possibility of the prescriptive period being interrupted by a relevant claim or acknowledgement. The effect of such an interruption could be that a new 20-year period begins to run very shortly – perhaps less than a year – before the original 20-year period was due to come to an end. The Bill provides that the 20-year prescriptive periods (in terms of section 7 and section 8 of the 1973 Act) are not to be capable of interruption

(though there would be the possibility of extending the period to enable the claim to be disposed of finally). Again this benefit does not lend itself to quantification in economic terms but could help to redress the balance of interests as between pursuer and defender.

In responding to the Scottish Law Commission's consultation on this topic, Scottish Water Business Stream Limited agreed that "as long as the law of prescription strikes a fair balance overall, it serves the wider interests of fairness, justice and certainty."

A more efficient use of resources

- Agreements to lengthen the five-year prescriptive period (section 6), and the two-year prescriptive period which applies to extinguish obligations to make contribution between wrongdoers (section 8A), will be competent provided that certain conditions are met.

The Bill would bring the benefit of parties being able to enter into what are known as "standstill agreements". These enable parties to agree a short extension to the prescriptive period; the status quo is preserved while the parties carry out further investigations and seek to negotiate an end to their dispute. Such agreements can prevent the need for arbitration or litigation, and the consequent use of resources and costs which resort to such procedures involves.

Brodies LLP observed: "We think that the move to allow parties to agree to allow additional time to resolve disputes without requiring them to raise or defend expensive protective court proceedings will generally be welcomed by clients. The extra flexibility that the reform provides should be of economic benefit particularly for those involved in complex commercial disputes since currently the costs of raising protective proceedings can be very significant."

- The start of the five-year prescriptive period will be adjusted to address perceived unfairness arising from a judgment of the UK Supreme Court (as mentioned in "Background" above).

Furthermore, pursuers would be less likely to require to launch protective writs against numerous possible defenders as, where damages are sought for loss or damage which was initially latent, prescription will not run until the pursuer is aware of the following facts: (i) that loss has occurred (ii) that the loss was caused by a person's act or omission, and (iii) the identity of that person. This would in turn benefit defenders who might otherwise have been, unfairly, on the receiving end of such protective writs. It would therefore be likely to alleviate administrative inconvenience for both pursuers and defenders thus resulting also in a more efficient use of resources. The reforms would also address concern about the amount of judicial resources, and the amount of time of the SCTS, taken up by what can transpire to be pointless litigation.

- **Costs**

Option 1

As Option 1 is to do nothing, there would be no additional costs or savings associated with this option. Given the need for change outlined by the chosen Option 2 however, the lack of additional costs imposed by Option 1 would not add any positive value. By choosing Option 1, the additional costs in connection with protective writs, investigation of claims, intimation of claims to insurers and seeking legal advice (although such claims might have no merit), and judicial and SCTS resources would continue.

Option 2

The increased clarity and certainty which the implementation of Option 2 would bring would reduce costs.

Protective writs/response of defenders

As discussed above, the introduction of Option 2 would have the benefit that pursuers would be less likely to require to launch protective writs against numerous possible defenders to protect their interests as, where damages are sought for loss or damage which was initially latent, it would be clear that prescription will not run until the potential pursuer is aware of the following facts: (i) that loss has occurred (ii) that the loss was caused by a person's act or omission, and (iii) the identity of that person. This would, in turn, benefit defenders who might otherwise have been, unfairly, on the receiving end of such protective writs. Defenders would be less likely to have to bear the costs of investigation of claims, intimation of claims to insurers and seeking legal advice (although such claims might have no merit). It would therefore be likely to alleviate administrative inconvenience for both pursuers and defenders thus resulting also in a more efficient use of resources and a reduction in costs, both administrative and legal. The cost of judicial resources in hearing such claims, and the cost of the services provided by the SCTS, would also be saved.

The Law Society of Scotland raised particular concern about the time and resources associated with protective writs. It commented as follows:

> "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."

Insurance

Overall, the increased clarity and certainty which Option 2 would bring would benefit both insurers and policy holders. The current mechanism whereby

pursuers launch a raft of protective writs to protect their interests is likely to increase insurance premiums in the sense that defenders may be deemed to pose a greater, and more uncertain, risk due to uncertainty as to both potential liability and the duration of the period of risk. Defenders may require to extend their policies at increased cost even although, ultimately, investigations may reveal that they bear little or no responsibility for the loss.

Greater clarity as to when the five-year prescriptive period does, and does not, apply, and as to what amounts to a relevant claim, would mean that there would be increased certainty as to the period for which insurance cover has to be maintained. Clarity as to the period for which the risk of being potentially subject to litigation runs would enable insurers to assess risk more accurately and hence offer appropriately priced policies.

In responding to the Discussion Paper, NFU Mutual Insurance Society Ltd said:

> "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."

A further consideration is that a potential claimant's prospects of obtaining reparation from the person responsible depend to a considerable extent upon insurance being available to meet the cost of any claim, which in turn depends on whether the cost of indemnity insurance is affordable. In responding to the Discussion Paper, the Royal Incorporation of Architects in Scotland stated:

> "If the Longstop had a more certain starting point, and if any interuption 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."

The Bill would provide more certainty as to the starting point of the 20-year prescriptive period in terms of section 7 of the 1973 Act, in relation to claims involving recovery of damages; as the Bill could result in a bringing forward of this starting point (to the last act or omission of the defender rather than the date of the loss), this may also have the effect of decreasing the overall period for which insurance has to be taken. Furthermore, the Bill also provides that the 20-year prescriptive periods in terms of sections 7 and 8 of the 1973 Act will no longer be amenable to interruption. This could make indemnity insurance more available.

Allowing standstill agreements, and the 20-year prescriptive periods to be extended in certain circumstances to allow a relevant claim to be finally disposed of, might result in additional insurance costs to cover the extended periods. In the case of standstill agreements, this would be limited by the fact

that the maximum period of these (non-renewable) agreements would be one year. This has also to be balanced by the fact that allowing standstill agreements, the purpose of which is to enable parties to negotiate a settlement, would save potentially high legal costs and the costs of the use of judicial and SCTS resources. In its response to the working draft of the Prescription (Scotland) Bill, the Law Society of Scotland stated that section 13 of the draft Bill (allowing standstill agreements) "should reduce the requirement to raise protective proceedings". In the case of an extension of the 20-year prescriptive periods, the benefit of an extension would arise only if an existing relevant claim had not been finally disposed of and the proceedings in which it was made had not otherwise come to an end. In other words, if the proceedings have ended by the time the prescriptive period expires, it does not matter that there has not been a final disposal of the relevant claim; it is enough that the proceedings have ended. This ensures that what is intended to be a narrow exception from the long-stop prescription is kept within tight bounds. It is an exception which is based on fairness. It would scarcely be consistent with the underlying principles of the law of prescription for a right or obligation to be extinguished when the holder of the right or creditor in the obligation was taking active steps to enforce it.

Savings from reducing the need to resort to court action

A previous section of this paper has mentioned that the introduction of Option 2 would have the benefit that pursuers would be less likely to require to launch protective writs against numerous possible defenders to protect their interests as, where damages are sought for loss or damage which was initially latent, it would be clear that prescription will not run until the potential pursuer is aware of the following facts: (i) that loss has occurred (ii) that the loss was caused by a person's act or omission, and (iii) the identity of that person. This would, in turn, benefit defenders who might otherwise have been, unfairly, on the receiving end of such protective writs. Defenders would be less likely to have to bear the costs of investigation of claims, intimation of claims to insurers and seeking legal advice (although such claims might have no merit). It would therefore be likely to alleviate administrative inconvenience for both pursuers and defenders thus resulting also in a more efficient use of resources and a reduction in costs, both administrative and legal. The cost of judicial resources in hearing such claims, and the cost of the services provided by the SCTS, would also be saved.

Furthermore, the ability to enter into a standstill agreement and thereby negotiate a settlement of a dispute without resorting to court action would create savings as judicial and SCTS resources would not be required. In addition, other provisions of the Bill would bring clarification which would also assist in keeping disputes out of court; for example, clarification of the scope of the five-year prescription, and what does and does not amount to a relevant claim. Two further examples are:

- The Bill provides that, if a question arises as to whether an obligation or right has been extinguished by the expiry of prescription, the burden of proof lies on the pursuer. This would result in a saving of costs and court

time in establishing where the burden of proof lies.

- Section 6(4) of the 1973 Act is amended by the Bill. The Bill clarifies the scope of the subsection: suspension of the running of prescription under that subsection will take effect for any period during which a creditor has been innocently caused by the debtor not to raise proceedings, as well as where he or she has been deliberately so caused. Clarification of the scope of section 6(4) would reduce the need to resort to court action over scope.

Litigation can continue over a considerable period resulting in high costs in terms of legal fees payable to solicitors and Counsel. The costs of initial advice and preparatory work by such professionals must also be taken into account. In addition, court fees are not insubstantial. The current fees in the Court of Session are set out in the Court of Session etc. Fees Order 2015 as amended by the Court Fees (Miscellaneous Amendments) (Scotland) Order 2016. Some examples may be illustrative of potential savings from the provisions of the Bill which would be likely to reduce the need to resort to court action: a fee of £300 is payable where proceedings are initiated; a fee of £200 is payable by each party for every 30 minutes or part thereof of a court hearing before a single judge; the latter fee for a hearing before three or more judges is £500 payable by each party for every 30 minutes or part thereof.

The Law Society of Scotland, in responding to the Discussion Paper, commented:

> "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."

Brodies LLP observed:

"We think that the move to allow parties to agree to allow additional time to resolve disputes without requiring them to raise or defend expensive protective court proceedings will generally be welcomed by clients. The extra flexibility that the reform provides should be of economic benefit particularly for those involved in complex commercial disputes since currently the costs of raising protective proceedings can be very significant."

Training costs

An initial training cost and familiarisation cost, principally for solicitors but

perhaps also for other professionals in the relevant fields, would be likely. The costs would be small, and would be incurred only on first implementation. Any such costs would be quickly offset by the savings made under the Bill.

Generally, familiarisation costs of any change in the law will be incurred by those providing the training within the solicitors' firm. Professional Support Lawyers could, for example, prepare a seminar which will explain the reforms to fee-earners. However, the provision of such training is typically already provided for within a firm's budget. It is probable that a proportion of the fee that a lawyer charges represents the cost of maintaining the fee-earner's current legal knowledge. For the fee-earners, there is a requirement that 20 hours of Continuing Professional Development is completed throughout the year so the additional time taken by familiarisation will count towards this figure. It is therefore unlikely that initial training on this Bill would represent a significant additional cost to law firms.

It is likely that initial training would also be provided to the judiciary. We understand that the average daily cost (as opposed to cost per head) of providing training to the judiciary by the Judicial Institute at Judicial Institute premises is £913.66. Training on the Bill would comprise, it is anticipated, a session of no more than one hour in a half day's training on assorted issues.

Scottish Firms Impact Test

No Scottish Firms Impact Test was carried out. The aim of the Bill is principally to provide clarification. Such clarification was highlighted by stakeholders as an area in need of reform and we anticipate that the Bill would be beneficial to relevant professionals and individuals alike.

Competition Assessment

It is not anticipated that the Bill would have an impact on competition within Scotland. The recommendations reflected in the Bill do not create a competitive advantage for any particular sector or individual; they simply offer benefits for professionals and individuals alike.

- As discussed above, the legal sector and other relevant professionals would be positively affected by the Bill. We do not anticipate an impact upon any other particular markets or products.
- The Bill would not result in any restrictions on competition in the legal services market or in other relevant professional markets. The number and range of suppliers would not be affected, nor would the ability of suppliers to compete be limited. We do not consider that the proposal would reduce incentive to compete vigorously.

No new business forms would be introduced.

Legal Aid Impact Test

Recommendations reflected in the Bill should result in a reduction in resort to court action because of increased clarification of the current law; examples of such clarification are clarification of the starting date of the five-year prescription where damages are sought for loss or damage which was initially latent; clarification of the scope of the five-year prescription; and clarification of what does and does not amount to a relevant claim. The introduction of standstill agreements would also reduce the need to resort to court action. For further details, see "Costs/ *Savings from reducing the need to resort to court action*" above. Accordingly, implementation of the Bill is not expected to have any adverse impact on legal aid. The Access to Justice team is content that the Bill would not adversely affect either the legal aid scheme or the legal aid fund.

Enforcement, sanctions and monitoring

The Bill does not require public enforcement and imposes no sanctions. The Bill clarifies and adds to an existing statutory regime. Ultimately, any disputes concerning the provisions in the Bill would be resolved by litigation between the affected parties.

Implementation and delivery plan

If passed by the Scottish Parliament, sections 15, 16 and 17 will come into force on the day after Royal Assent while the remaining provisions will come into force on the day or days appointed by Scottish Ministers.

- **Post-implementation review**

  Given the length of the short negative prescription (5 years), it is anticipated that a review of the legislation by the Scottish Ministers would be appropriate 10 years from the date on which it is brought into effect.

Summary and recommendation

Option 1 was dismissed as it would preserve the status quo; the additional costs in connection with protective writs, investigation of claims, intimation of claims to insurers and seeking legal advice (although such claims might have no merit), and judicial and SCTS resources would continue. It would not produce the benefits offered by Option 2 with the result that the uncertainties, lack of clarity, unfairness and inefficient use of resources stemming from the current law of negative prescription would continue.

Option 2 is being recommended as it would bring to the current law of negative prescription increased clarity, certainty, fairness and enable more efficient use of resources. Costs (administrative and legal, and in relation to the use of judicial resources and the resources of the SCTS) would be reduced: pursuers would be less likely to require to launch protective writs; consequently, defenders would be less likely to have to incur costs in investigating claims, intimating them to

insurers and seeking legal advice although of a view that such claims had no merit. Increased clarity of scope would reduce the number of disputes and consequential litigation. It would enable professional advisers to advise their clients more clearly. Parties would be able to agree a short extension to the prescriptive period while the parties carry out further investigations and seek to negotiate an end to their dispute. Such agreements could prevent the need for arbitration or litigation, and the consequent costs and use of resources. Insurers would also benefit from the increased clarity which would enable them to offer policies for appropriate periods at appropriate premiums.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	£0 Option 1 would not produce any benefits, given that the result would be that the uncertainties, lack of clarity, unfairness and inefficient use of resources stemming from the current law of negative prescription would continue.	£0 There would be no direct cost in choosing Option 1 as Option 1 represents the status quo. However, the costs in connection with protective writs, investigation of claims, intimation of claims to insurers, seeking legal advice (although such claims might have no merit), and judicial and SCTS resources would continue.
2	Option 2 would bring (i) *increased certainty and clarity*: It would clarify the scope of prescription by extending its provisions to obligations which should be included, expressly excluding the provisions of the 1973 Act where they are not needed, and bringing increased certainty as to the policy underlying the current law. The resultant increased clarity of scope would reduce the number of disputes and consequential litigation. It would enable advisers to advise their clients more clearly on whether it is possible to pursue implementation of a particular obligation or whether that obligation has been extinguished by prescription. Such clarity of scope would also increase certainty for defenders seeking to establish when the potential risk of having	The increased clarity and certainty which Option 2 would bring would (i) *reduce costs*. Option 2 would have the benefit that pursuers would be less likely to require to launch protective writs against numerous possible defenders to protect their interests as, where damages are sought for loss or damage which was initially latent, prescription would not run until the potential pursuer is aware of the following facts: (i) that loss has occurred (ii) that the loss was caused by a person's act or omission, and (iii) the identity of that person. This would in turn benefit defenders who might otherwise have been, unfairly, on the receiving end of such protective writs. Defenders would be less likely to have to bear the costs of investigation of claims, intimation of

		proceedings raised against them in respect of particular obligations will pass. In turn, this would enable their insurers to offer policies for appropriate periods at appropriate premiums. Clarity as to the burden of proof would save court time (and consequently cost) in deciding where the burden lies. Parties would be clear that agreements to shorten the prescriptive periods are not permitted; (ii) *increased fairness*: Pursuers would be less likely to require to launch protective writs against numerous possible defenders as, where damages are sought for loss or damage which was initially latent, prescription would not run until the pursuer is aware of the following facts: (i) that loss has occurred (ii) that the loss was caused by a person's act or omission, and (iii) the identity of that person. This would, in turn, benefit defenders who might otherwise have been, unfairly, on the receiving end of such protective writs. It would be likely to alleviate administrative inconvenience for both pursuers and defenders thus resulting in a more efficient use of resources. It would also address concern about the amount of judicial and SCTS resources taken up by what can transpire to be pointless litigation. Also, Option 2 would address unfairness by extending the definition of relevant claim to include similar processes, namely the submission of a creditor's claim in both an administration and a receivership and the acts that trigger administration or receivership. And by altering, in relation to claims involving recovery of damages, the start date of the 20-year prescription, Option 2 could result in a bringing forward of the starting	claims to insurers and seeking legal advice (although such claims might have no merit). It would be likely to alleviate administrative inconvenience for both pursuers and defenders thus resulting also in a more efficient use of resources and a reduction in costs, both administrative and legal. The cost of judicial resources in hearing such claims, and the costs of the SCTS, would also be saved. The increased clarity and certainty which Option 2 would bring would also generally benefit insurers and policyholders. Allowing standstill agreements, and the 20-year prescriptive periods to be extended in certain circumstances to allow a relevant claim to be finally disposed of, might in limited circumstances result in additional insurance costs to cover the extended periods. In the case of standstill agreements, this would be limited by the fact that the maximum period of these (non-renewable) agreements would be one year. This has also to be balanced by the fact that allowing standstill agreements, the purpose of which is to enable parties to negotiate a settlement, would save potentially high legal costs and the costs of the use of judicial and SCTS resources. Also, it must be noted that the possibility of an extension of the 20-year prescriptive periods is intended to be a narrow exception from the long-stop prescription based on fairness. Option 2 would also result in (ii) *savings from reducing the need to resort to court action*. The ability to enter into a standstill agreement and thereby negotiate a settlement of a dispute without resorting to court action would create savings as judicial and SCTS resources would	

		point and so decrease the overall period for which insurance has to be taken, and would result in a fairer balance between the interests of pursuer and defender. A further measure to redress the balance of interests as between pursuer and defender would result from making the 20-year prescriptive periods true long stops; (iii) *a more efficient use of resources*: Option 2 would bring the benefit of parties being able to enter into what are known as "standstill agreements". These enable parties to agree a short extension to the prescriptive period; the status quo is preserved while the parties carry out further investigations and seek to negotiate an end to their dispute. Such agreements can prevent the need for arbitration or litigation, and the consequent use of resources and costs which resort to such procedures involves. Furthermore, pursuers would be less likely to require to launch protective writs against numerous possible defenders as, where damages are sought for loss or damage which was initially latent, prescription would not run until the pursuer is aware of the following facts: (i) that loss has occurred (ii) that the loss was caused by a person's act or omission, and (iii) the identity of that person. This would in turn benefit defenders who might otherwise have been, unfairly, on the receiving end of such protective writs. It would therefore be likely to alleviate administrative inconvenience for both pursuers and defenders thus resulting also in a more efficient use of resources. The reforms would also address concern about the amount of judicial and SCTS resources taken up by what can transpire to be	not be required. In addition, Option 2 would bring clarification which would also assist in keeping disputes out of court; for example, clarification of the starting date of the five-year prescription where damages are sought for loss or damage which was initially latent, of the scope of the five-year prescription, and of what does and does not amount to a relevant claim. An additional initial training cost and familiarisation cost would be likely, principally for solicitors but perhaps also for other professionals in the relevant fields. The costs would be small and would be incurred only on first implementation. They would be quickly offset by the savings made under Option 2.	

	pointless litigation.	

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Lord Pentland, Chairman, Scottish Law Commission

3 July 2017