Response of Malcolm M Combe and Dr Andrew R C Simpson of the School of Law at the University of Aberdeen to the Call for Evidence by the Delegated Powers and Law Reform Committee on the Prescription (Scotland) Bill

Do you have any concerns about the approach taken in the Bill?

Not particularly. If it had notably deviated from the draft Bill proposed by the Scottish Law Commission (“the SLC”) in its Report 247 this would have been a concern in itself, but it does not do so. In due course, it may be prudent to consolidate the legislation so as to tidy up the provisions that can be difficult to follow (witness Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (“the 1973 Act”) and the fact that the Bill will repeal two sub-paragraphs that had been bestowed the same name), but such a consolidation exercise might properly follow by way of an Act that does not make substantive changes to the law.

In passing, we note that the proposed sub-paragraph (fe) which related to (i) proceedings for forfeiture under the customs and excise Acts (within the meaning of the Customs and Excise Management Act 1979); or (ii) proceedings in respect of the forfeiture of a ship (that is, any description of vessel used in navigation and not propelled by oars) has not been included. This is not a statute we have any experience of, but any deviation from the Scottish Law Commission proposal is something we would instinctively question.

Do you think that negative prescription produces harsh results in individual cases? (You could illustrate by way of examples if you think that would be helpful to the Committee). If so, is this acceptable in policy terms?

This is not a new question. A range of different rationales have been offered to justify negative prescription in the past. One of the most convincing can be explained as follows. Suppose A seeks to assert some right against B that has lain unenforced for many years. For the sake of argument, let us say that the period is more than twenty years. In that situation, B may find it difficult to defend himself due to the loss of evidence in the intervening years. In that situation, is it fair to allow A to press a claim to assert his right? Note that that may well be based on a debt which B has actually discharged without retaining evidence of discharge. Alternatively, is it fairer to give B some protection, by providing that he should not have to answer claims that are more than a certain number of years old?

As a general – albeit not absolute – rule, we believe that it is fairer to protect B here. In civil matters, defenders should not have to answer claims based on alleged rights where mere passage of time is likely to have destroyed or obscured evidence crucial to their case. Such arguments lie at the root of much of the law of rules of prescription in the Scottish tradition (for the historical background, see David Johnston’s Prescription and Limitation (2nd edn, Edinburgh, 2012) paras 1.55-1.56); see also Andrew Simpson’s articles ‘Positive Prescription of Moveables in Scots law’, (2009) 13 Edinburgh Law Review 445-476 and ‘Legal Learning and the Prescription of Rights in Scotland’, in H Dondorp, D Ibbetson and E Schrage (eds), Prescription and Limitation (Berlin, forthcoming)). That is not to say that the debates of past generations of lawyers should constrain the present discussion. However, it does elucidate why things are as they are in our law at present. The same debates gave rise to the related point that, after a certain period of time, an individual should be certain that he or she will not face claims based on dealings that took place many years earlier. We agree with past generations of lawyers there is a public interest in such legal certainty.

Sometimes it is said that the doctrine is designed to “punish” the “negligence of proprietors, when the great purposes of government demand it” (so wrote the eighteenth-century authoritative
Institutional Writer Erskine in his *Institute* at III, 7, 1). The “negligence” referred to is the supposed “negligence” in asserting one’s right. That rationale for prescription is found elsewhere in the Scottish tradition (see the sources cited in Johnston, *Prescription and Limitation*, para.1.48-1.54). By contrast, we prefer to emphasise the justifications for prescription already mentioned – i.e. the protection it provides where evidence has been lost through the passage of time, and the related importance of legal certainty. Our reasoning is simple. Some failures to assert rights may be little to do with the negligence of the (alleged) holder of the right. Nonetheless, it seems in general unfair to require an individual to face the uncertainty involved in defending a claim based on dealings that may have happened many, many years earlier.

**Do you agree to the proposed extension in section 3 to the scope of the 5-year negative prescription, so it would apply to all statutory obligations to make payment (unless there are policy reasons to except them)?**

Generally, yes. The distinction drawn in the SLC Report between statutory rights of a private-law nature, which should be subject to the five-year negative prescription, and statutory rights of a public-law nature, seems to provide a satisfactory basis for drawing the distinction in relation to most exceptions to the general rule.

**Do you agree with the list of exceptions to the general rule relating to statutory payments set out in section 3 of the Bill?**

We have no strong views, save for the note above about the omission of the proposed sub-paragraph (fe).

**Do you have any concerns about the proposed new discoverability test in section 5?**

No. We agree with the SLC’s conclusion that the three-part test is an improvement both on the position prior to the decision in *David T Morrison and Co Limited v ICL Plastics Limited* [2014] UKSC 48 and also on the situation as it stands following that decision. We do not think it is appropriate that the prescriptive period should begin once the creditor is aware that he or she has suffered loss and nothing else besides that (e.g. what caused the loss in question).

**Do you agree with the proposed change to the starting date of the prescriptive period in relation to obligations to pay damages in sections 5 and 8?**

Yes. We find the reasoning of the SLC convincing in this regard.

**Do you agree with the proposal in sections 6 and 7 to make the 20-year period no longer amenable to interruption by a relevant claim or relevant acknowledgement?**

Yes. We see these provisions as having the effect of bolstering legal certainty. In the context of the long prescriptive period, this seems consistent with an overall objective of fairness.

**Do you agree with the proposal to allow the extension of the 20-year period in certain circumstances as set out in sections 6 and 7?**

Yes. This addresses the technical issue dealt with in paras 4.28-4.41 of the SLC Report.

**Do you have any concerns about those sections of the bill (sections 4, 13 and 14) that seek to clarify the law on prescription?**

In general, no. We agree that section 4 is correct to ignore the intentions of the debtor who induces the creditor not to press his or her claim; the fact of the inducement in itself should suspend the
prescriptive period. We also agree with the reasoning in paragraph 5.23 of the SLC Report, to the effect that agreements to shorten the prescriptive period should generally not have legal effect. However, we would like to tease out a little more the reasoning behind the allocation of the burden of proof in section 14. This is perhaps something that could be addressed further in oral evidence.

**What are the financial implications of the Bill?**

We have no specific comments on this.

*The Scottish Government says that the Bill will increase clarity, certainty and fairness. It also says it will promote a more efficient use of resources (in that people will be less likely to have to raise court proceedings to preserve rights) and will reduce costs for those involved in insurance and litigation. Do you agree with this assessment?*

Overall, we agree with this assessment. In our opinion, the Bill will increase clarity, certainty and fairness. Logically that should result in a more efficient use of resources, reducing costs for those involved in litigation and, presumably, those involved in insurance. In passing, it can be noted that late payment of insurance claims is now provided for in section 13A of the Insurance Act 2015, and it can also be noted that insurance contracts will invariably make provision for how (and when) claims should be intimated to an insurer. None of this will be particularly affected by the Bill.

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