

## Annex B Respondent Information Form



**Please Note** this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

Individual                       Organisation

Full name or organisation's name

Faculty of Advocates

Phone number

0131 226 5071

Address

Faculty of Advocates  
Parliament Square  
Edinburgh

Postcode

EH1 1RF

Email

[andrew.tregoning@advocates.org.uk](mailto:andrew.tregoning@advocates.org.uk)

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name  
 Publish response only (without name)  
 Do not publish response

### Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes                       No

## Annex C List of consultation questions

### Question 1

We have identified three potential issues that may benefit from transitional or saving provision when the 2018 Act is commenced. These are 'overnight prescription', 'retrospective prescription' and 'revived obligations'. Are there any other issues that you consider may benefit from transitional or saving provisions?

- Yes  
 No

Please explain your answer.

We have not identified any other issues that we consider may benefit from transitional or saving provisions. We do not follow the distinction between "overnight" and "retrospective" prescription discussed in [3.5] to [3.7] of the consultation document but note that nothing appears to turn on that distinction.

### Question 2

The 1973 Act allowed those affected by the incoming regime a period of 3 years to arrange their affairs. Do you agree that 3 years is a sufficient length of time to ensure that creditors/debtors have the necessary time to arrange their affairs accordingly? If not, what period of notice would you suggest and what are your reasons for this suggestion?

- Yes  
 No

Please explain your answer.

The Faculty agrees that sufficient time should be afforded for creditors to review their affairs and raise proceedings, if necessary, before the 2018 Act comes into force. Beyond that, the appropriate duration for such a transitional period is largely a policy question which is beyond the remit of the Faculty when responding to consultations. We note that creditors in obligations previously subject to 20 year negative prescription could be subject to a significant reduction in the time available in which to raise proceedings. For example, a creditor might have 18 years in which to raise proceedings prior to commencement but only 3 years afterwards. We do not consider there to be any legal or inherent practical difficulty with that result.

### Question 3

Do you consider the savings provision proposed is sufficient to ensure that obligations which have prescribed under the 1973 Act as it stands prior to amendment by the 2018 Act will not be revived? Do you consider any further provision is required?

Yes

No

Please explain your answer.

The Faculty agrees with the intended purpose behind regulations 3 and 4 as described in the consultation document.

The Faculty considers that the wording of regulations 3 and 4 would benefit from reconsideration. Issues which might be considered as part of any such review would include: (a) clarifying the interaction between regulations 3 and 4 and (b) linking the wording of the regulations more directly to their intended purpose.

Regulation 4 provides for a transitional period, where obligations are included within the regulation based on the end of the prescriptive period calculated "*apart from this regulation*". In contrast, regulation 3 makes provisions for obligations prescribing before commencement, but does not explain whether the expiry date is calculated according to the old law or the new law. This creates a potential area of uncertainty as to the relationship between regulations 3 and 4, because if the new law is used to calculate the relevant date for the purposes of regulation 3, then both regulations are capable of applying to the same obligation.

To give an example, AB has a right currently subject to the twenty year prescription. The right arose in 2004. The prescriptive period (under the old law) will expire in 2024. The 2018 Act changes the right to be subject to the five year prescription (and so it would have expired in 2009 if the new law were applied). Regulation 4 will extend the prescriptive period to 2023. It is unclear, however, whether regulation 3 applies (as according to the old law the right has yet to prescribe but according to the new law it has already prescribed). If regulation 3 does apply, AB would have until 2024 to bring a claim (because regulation 3 would prevent the change from the 20 to the 5 year period from happening). There are therefore two potential end dates to the prescriptive period which might apply to AB's right.

It would assist the clarity of the drafting if a proviso, similar to that found in regulation 4, were included. This would make clear that regulation 3 does not apply to AB's right in the example given above, and so avoids the potential uncertainty where both regulations 3 and 4 might apply.

#### Question 4

Do you consider the transitional provision proposed to prevent the amendments made by the 2018 Act from providing for a date of prescription which pre-dates the coming into force of the 2018 Act are sufficient? Do you consider any further provision is required?

- Yes  
 No

Please explain your answer.

The Faculty considers that the wording of Regulations 3 and 4 would benefit from reconsideration. Reference is made to the Answer to Question 3 above.

#### Question 5

Do you agree that the manner in which the Scottish Government proposes to commence the 2018 Act address the potential issues highlighted in this consultation?

- Yes  
 No

Please explain your answer.

Reference is made to the foregoing answers.

#### Question 6

Are there any effects of the commencement provision proposed that are not anticipated and addressed in this consultation?

- Yes  
 No

Please explain your answer.

The Faculty is not aware of any such issues.

We note that, under the proposed transition provisions, debtors will not get “credit” for the expired portion of prescriptive periods which are in place before the 2018 Act reforms come into force.

For example, CD has a claim where the start date under present law is December 2018. It will prescribe in December 2023. Suppose that the effect of the changes to s 11(3) is that the new start date becomes December 2021 and the claim will accordingly prescribe in December 2026. In that scenario, the prescriptive period is lengthened by three years (from 2023 to 2026) and there is no protection for the debtor (who also gets no credit for the years 2018-2021 when formerly the prescriptive period was running). This may simply be a matter of policy, however.