Written Response to the Delegated Powers and Law Reform Committee on the
Prescription (Scotland) Bill on behalf of Shepherd and Wedderburn LLP

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

Shepherd and Wedderburn’s principal concern arises out of the drafting of section 13 of the Bill. In its report, the Scottish Law Commission specifically confirms that the provisions in section 13 are not intended to disturb the ability of commercial parties to enter into contractual limitation clauses. However, as drafted, section 13 does not make that clear. This is likely to give rise to argument in court over the interpretation of proposed new section 13(4)(b) of the 1973 Act, as inserted by section 13 of the Bill, and whether or not that strikes down contractual limitation clauses. Shepherd and Wedderburn would prefer to see section 13 clarified to specifically state that contractual limitation clauses are not intended to be struck down by the provision. This could be achieved by additional wording to remove the current ambiguity.

It might be said that as a general rule statutory drafting should avoid “for the avoidance of doubt” provisions, however, there are already examples of that in the Bill at sections 1(3)(a) and 5(5) of the Bill which inserts proposed new section 11(3B) into the 1973 Act. Shepherd and Wedderburn would prefer to see a similar provision in section 13 of the Bill to clarify that contractual limitation clauses are unaffected.

Separately, Shepherd and Wedderburn has concerns regarding the commercial efficacy of standstill agreements as currently proposed in section 13 of the Bill. Limiting the standstill agreement to one year would, in practice, undermine the utility of such agreements. The investigation of building and engineering defects, for example, can take much longer than a year, because of the complexities that are involved. If standstill agreements were restricted to a year, then in such cases, protective court proceedings would need to be raised at the end of that year. That would defeat the purpose of standstill agreements which is to avoid the need to raise protective proceedings to allow investigations and or discussions to take place without the five year or two year prescriptive periods continuing to run. If standstill agreements are to be permitted, they need to have a commercial utility. We do not consider that the permitted duration of standstill agreements should be open ended but we would prefer to see the option for parties to agree to interrupt the prescriptive period for up to two years.

2. 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?
It is well understood that negative prescription produces harsh results in some individual circumstances and the Committee has already considered examples where this is the case, in residential conveyancing, for example. There will always be difficult cases which produce apparently unfair results but these are outweighed by the policy reasons for having a clear and robust law of prescription to encourage parties to bring claims promptly and to provide legal certainty regarding historic claims.

3. **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)?**

Shepherd and Wedderburn agree that extending the scope of the five year negative prescription to all statutory obligations to make payment (unless there are policy reasons to except them) provides greater certainty and consistency.

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

Shepherd and Wedderburn has no particular issue with the approach that has been taken regarding the stated exceptions to the five year negative prescription period. The exceptions that are listed are policy based and we can understand the policy behind them. It is a matter for parliament to decide whether or not these are correct.

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

Shepherd and Wedderburn supports the three-limbed discoverability test as set out in the proposed new section 11(3A) and (3B) of the 1973 Act. We consider that this option represents the best balance in respect of curing the current situation and moving back to where the law was thought to be before the ICL Plastics case. It also includes a new ingredient of needing to know the identity of the person in question. We understand concern has been expressed that this will unduly lengthen the time before the five year period starts to run, but, in our opinion, the reality is that once the party with the potential claim knows that “loss, injury or damage was caused by a person’s act or omission”, the time between becoming aware of that and knowing the identity of the person tends to be short and in most cases coincidental.

Shepherd and Wedderburn agrees that someone who does not pursue their rights within a certain period should lose those rights, but the corollary is that a person must be allowed to discover that a loss has occurred due to someone’s “act or omission” and to know the identity of the person so that they can pursue their rights in court. The balance, therefore, is a fair one. The fact that the twenty year period is, arguably, becoming shorter as a result of the proposed changes, is a counteracting aspect that helps to keep the balance to the perceived extension of the five year period.
6. **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?**

In short, yes. Our comments regarding section 5 of the Bill are as set out at 5 above. In respect of section 8 of the Bill, Shepherd and Wedderburn agrees with the approach. It has the benefit of certainty, which is the overriding aim of the proposed changes, as expressed in the Scottish Law Commission’s report. It is likely that the proposed approach of tying the start date to the act or omission, rather than the loss, will shorten the twenty year prescriptive period overall. However, Shepherd and Wedderburn considers this is unlikely to cause a problem in practice in many cases. Difficulties in relation to the twenty year prescriptive period are rare. The proposed approach has the benefit of certainty and means that the twenty year period is a truer longstop period than at present.

Shepherd and Wedderburn recognises the difficulty of identifying a start date where the claim arises in respect of an omission. An omission is, by definition, something that has not been done that ought to have been done. If it has not been done, it is difficult to know that it is absent. This is a conceptually difficult area and we do not see an obvious solution, other than to say that it will depend on the circumstances of the individual case. Shepherd and Wedderburn agrees with the approach that is taken in section 8 as drafted.

7. **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?**

Shepherd and Wedderburn considers that the twenty year period should start and run over the twenty years continuously, without interruption or extension, as proposed. It would thereby be the true longstop period that many presently assume it to be.

8. **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?**

Notwithstanding the response at 7 above that the twenty year period should be a true longstop, Shepherd and Wedderburn agrees that in circumstances where, for example, there are proceedings ongoing at the end of the twenty year period, the rights which are being litigated should not come to an end mid-court case just because the twenty year period has come to an end. We consider it good common sense to permit a short extension until proceedings have been concluded in such circumstances.

9. **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 respect of section 4, Shepherd and Wedderburn agrees with the approach and the clarification regarding innocent misrepresentations.
In respect of section 13, Shepherd and Wedderburn has concerns (as outlined at 1 above) regarding the doubt that is likely to arise as to the position of contractual limitation clauses.

In respect of section 14, this is the position as currently understood. The burden of proof falls to the creditor (usually the pursuer but, in the case of a counter claim, the defender) to prove its claim. Shepherd and Wedderburn has no further comment on these provisions.

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

Shepherd and Wedderburn agree that the improved certainty provided by the Bill ought to reduce the costs of assessing the application of prescription to client's circumstances. Subject to our comments on the commercial utility of the proposed standstill agreement provisions, which are detailed at 1 above, the introduction of standstill agreements should operate to reduce the number of protective actions that are presently raised purely to “stop the clock”.

11. **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?**

Shepherd and Wedderburn agrees that the Bill will improve clarity, certainty and fairness in the application of the law of prescription. This is welcome.

Shepherd and Wedderburn considers that overall resources will be more efficient and costs reduced. It is likely that advising clients on potential prescription will be less complex whilst still not straightforward. Also, whilst drafting and agreeing standstill agreements will involve resources and costs, these are likely to be less than is currently involved in raising and serving protective court proceedings, although these benefits are likely to be restricted if the currently proposed one year limit on stand still agreements is maintained.