Further to my letter of 12 September 2017, I would like to thank the Scottish Law Commission again for your Report on Prescription\(^1\) and update you on our consideration of your recommendations and the draft Prescription (Scotland) Bill.

As you know, the Prescription (Scotland) Bill featured in the Programme for Government announcement on 5 September 2017 as par: of the Scottish Government’s legislative programme.

We are very grateful to the Commission for your work in this area. As the Report notes, there are a number of issues in the current law on prescription that have caused or may cause difficulties in practice. These issues are likely to cause uncertainty and unfairness and could end up wasting resources. I believe the recommendations in the Report go a long way to address these concerns by increasing clarity, certainty and fairness, and by promoting a more efficient use of resources, such as pursuers being less likely to have to raise court proceedings to preserve a right, and reduce costs for those involved in litigation and insurance.

I consider this Bill a suitable candidate for consideration by the Delegated Powers and Law Reform Committee (DPLRC) under the terms of Rule 9.17A of the Parliament’s Standing Orders and the Presiding Officer’s determination under that Rule. That is the position that the Scottish Government intends to take when the Parliamentary Bureau considers referral of the Bill for Stage 1 scrutiny in due course. In Annex A I set out more detail on how I see the Bill meeting the criteria for this process. I will therefore arrange to have this letter copied to the Scottish Parliament.

My officials and I have carefully considered the details of the Report, including the draft Bill, and we are content to accept its recommendations, with one minor change (see below). We

\(^1\) Report on Prescription No 247 July 2017
agree that the package of reforms strikes an appropriate balance between the interest of creditors on one hand and debtors on the other. Moreover, it carefully balances the interests of individuals against the wider public interest which is essential when considering the law of prescription.

I therefore intend to introduce a Bill in the same terms as the one included in the Report subject to one minor change. This is the removal of provisions on proceedings for forfeiture which were originally included among the exceptions from the five-year prescription period. These are removed as the policy intention in this regard is already covered by provision in the Bill excepting obligations to pay tax from the five-year prescription period. My officials have discussed this with your colleagues in the SLC and they have confirmed they are content with this change. For completeness, I include a copy of the Bill without these provisions. We will be continuing to refine the Bill in the period up to introduction and there may therefore be further small changes. We do not anticipate there will be anything that would alter our assessment that the Bill will give effect to all or part of the SLC recommendations.

I would be grateful if you could confirm that you are content that this slightly revised Bill gives effect to your recommendations and that you agree that it meets the necessary criteria for consideration by the DPLRC as set out in Annex A.
ANNEX A

ASSESSMENT OF THE BILL AGAINST STANDING ORDERS RULE 9.17A AND THE CRITERIA AS DETERMINED BY THE PRESIDING OFFICER FOR QUALIFICATION AS A ‘SCOTTISH LAW COMMISSION’ BILL.

The Bill must implement all or part of the recommendations of a Scottish Law Commission (SLC) report.

The Bill will implement all of the recommendations contained in the SLC’s Report on Prescription\(^2\) which was published 14 July 2017 as part of the SLC’s Ninth Programme of Law Reform, except minor provisions on forfeiture, which the SLC have agreed to the removal of. The report makes recommendations which address a number of issues within the law of negative prescription that have caused or may cause difficulty in practice to increase clarity, certainty and fairness and to promote a more efficient use of resources such as pursuers being less likely to have to raise court proceedings to preserve a right.

There must be a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended.

The SLC has carried out comprehensive consultation in accordance with the SLC’s established practice in conducting law reform projects.

The SLC published a Discussion Paper on Prescription\(^3\) in February 2016. 20 responses were received, amongst them were responses from solicitor firms, insurance providers, the Senators of the College of Justice, the Faculty of Advocates, the Law Society of Scotland, HMRC, Royal Incorporation of Architects in Scotland (‘RIAS’), one utility company, and individuals. There was wide support for reform of the aspects of prescription law considered in the Paper and there was clear agreement with the recommended approach on a vast majority of the issues raised.

The SLC published a draft Bill for further comments in March 2017\(^4\). 16 responses were received, some raising some policy issues and others focusing on details of the drafting. In response to comments made, the SLC made a few further changes to the Bill. When commenting on the draft bill, the Law Society of Scotland said:

“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.”

The Report on Prescription was published in July 2017. It contained a final draft of the Bill which was the product of the consultation process described above. At each stage of this process, stakeholders were able to comment on the proposals. In completing the Business and Regulatory Impact Assessment (BRIA), the SLC also consulted with a range of business interests.

In addition, the Minister for Community Safety and Legal Affairs, on 14 September 2017, wrote to a number of key stakeholders highlighting the Scottish Government’s intention to take forward the Bill and inviting comment. Comments were received from COSLA on behalf

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\(^4\) [https://www.scotlawcom.gov.uk/files/2914/8829/5225/Consultation_Draft_March_2017_A06.pdf](https://www.scotlawcom.gov.uk/files/2914/8829/5225/Consultation_Draft_March_2017_A06.pdf)

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of some of their members which were supportive of the approach in the Bill and raised some minor points about the current operation of the law.

The Bill must not relate directly to criminal law reform.

The Bill relates to civil law reform and does not relate in any way to criminal law reform.

The Bill must not have significant financial implications.

There are no notable financial or resource implications. Those pursuing or defending claims for the enforcement of an obligation or right will have the benefits of increased certainty, clarity and fairness and a more efficient use of resources. This should result in decreased costs: creditors will be less likely to require to raise court proceedings to preserve a right and correspondingly, debtors will be less likely to have to incur costs in investigating claims, intimating them to insurers and seeking legal advice on claims that turn out to have no merit. This could reduce the number of disputes and the consequential expenses (administrative and legal) in resolving disputes. Certainty as to when prescription begins and ends will enable insurance policies to be restricted to a clearly defined period of prescription.

The areas where possible financial implications have been identified are nonetheless few and in those areas, the Scottish Government does not consider that the financial implications could be categorised as significant. The package of reforms is carefully balanced in terms of the interest of creditors and debtors and there are no clear and readily identifiable financial implications for specific groups, nor government, local government, or other bodies.

The Bill must not have significant ECHR implications.

The Scottish Government does not consider that the Bill’s provisions have significant ECHR implications.

The Bill will affect obligations and rights under the Prescription and Limitation (Scotland) Act 1973 Act which may be considered ‘possessions’ within the meaning of article 1 of protocol 1 of the ECHR.

So far as it affects rights or obligations this is limited to how certain aspects of negative prescription applies to rights and obligations caught by the 1973 Act. The Bill does not remove substantive rights. The Bill addresses three kinds of issues. First, to bring consistency to the law by, for example, treating statutory obligations to make payment (with exceptions) the same as obligations of a similar nature which are subject to the five year prescription under the 1973 Act. Second where the law may be considered to be unfair to creditors or debtors, in certain circumstances, adjustment to the law is made on equitable grounds to address the balance of fairness. Third where there may be doubt as to how certain aspects of prescription law operate, adjustment is made to improve clarity and legal certainty.

The Bill will have an effect on certain existing rights but this will only be done prospectively.

Therefore so far as the Bill engages article 1 of protocol 1 this is in relation to certain existing rights or obligations with a view to ensuring consistency with rights or obligations of a similar nature; improving the balance of fairness as between creditors and debtors; and improving
the clarity and certainty of the law, and care has been taken to interfere with those rights or obligations to the minimum extent possible to achieve that aim and to ensure the changes are not retrospective. The Government is therefore satisfied that the Bill does not have significant ECHR implications.

**The Scottish Government should not be planning wider work in that particular subject area.**

The Scottish Government is not planning any wider work in the area of the law on prescription.

**Other**

The Bill is not a Consolidation Bill, Codification Bill, Statute Law Repeals Bill or Statute Law Revisions Bill.