

# The Jersey Law Commission

## Prescription and Limitation

### Consultation Paper

The Jersey Law Commission is an independent body appointed by the States Assembly to identify and examine aspects of Jersey law with a view to their development and reform. This includes in particular: the elimination of anomalies; the repeal of obsolete and unnecessary enactments; the reductions of the number of separate enactments; and generally the simplification and modernisation of the law.

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## EXECUTIVE SUMMARY

All jurisdictions have time limits within which legal claims must be brought. The law relating to such time limits is referred to as prescription in some jurisdictions (including Jersey) and limitation in others. Whilst prescription and limitation are not identical concepts, they are very closely related and the same fundamental question lies at the heart of both of them: what is the right balance between the interests of individuals and legal entities bringing legal claims, the interests of those defending claims and the interests of society as a whole?

In 2008 the Commission published a consultation paper in relation to prescription and limitation. The paper noted that Jersey law in this area had evolved in a haphazard manner and consequently suffered from a significant lack of clarity and consistency, to the detriment of parties involved in litigation and the court system as a whole. The 2008 paper recommended that the law be reformed by new legislation but did not make any detailed proposals at that stage.

Despite the Commission's recommendations, no reform has taken place and the law remains as unsatisfactory as it was in 2008. The Commission has therefore taken the opportunity to revisit the topic, with a view to putting out for consultation a detailed set of recommendations to make Jersey's prescription law simpler, clearer and more suitable for contemporary society.

Jersey is by no means the first jurisdiction to be faced with an unsatisfactory prescription/limitation system in need of reform. Recent decades have seen significant work in other jurisdictions to reform and simplify their laws in this area and the Commission has been able to draw on this work in formulating its recommendations for Jersey.

The Commission is of the view that a 'core regime', as adopted or recommended for adoption in a range of jurisdictions, would provide the appropriate basis for a reform of Jersey law.

For the majority of civil claims, the Commission recommends replacing the numerous current prescription periods with the following:

- a short basic prescription period (3 years is suggested), with time starting to run from when the plaintiff became aware, or should reasonably have become aware, of the claim;
- a longer ultimate prescription period (15 years is suggested) to act as a complete cut-off (subject to a limited discretion for the court to allow extension in exceptional cases).

The Commission also considers that, as part of these reforms, the opportunity should be taken to reduce the 40-year prescription period in property law (which enables a party in possession of property for that period to claim ownership) to 15 years.

This Consultation Paper contains hypothetical case studies explaining how the proposed reforms would affect various forms of legal claim, a tentative draft Law to illustrate how the recommendations might be implemented, and a series of questions to elicit consultees' views on the principles and details of the Commission's recommendations.

## INTRODUCTION

### Background to the Paper

1. In 2008 the Commission published Consultation Paper No 1/2008/CP: 2008 consultation paper. It reviewed the state of Jersey law regarding Prescription and Limitation and made various recommendations, principally that reforms should take place by a consolidating statute, gathering together and reforming existing periods of prescription contained in general and customary law as well as statute. The 2008 Paper did not, however, lead to any reform and in or about 2019 the Commission decided that it would be appropriate to revisit the topic.

2. This present Consultation Paper will set out a suggested approach to reform, to move consideration of the topic on from the 2008 Paper. It will be used to revisit some of the core findings made in 2008 but attempt to advance the position and to focus thought on the components of a workable legislative framework for Jersey. It will be used to engage stakeholders in the consultation process and setting out a concrete set of reform recommendations to present to Government.

3. The Paper will draw from the research carried out by the Irish Law Reform Commission in its 2011 report and the 2017 report of the Scottish Law Commission. The Irish report surveys how limitation laws have been reformed (or recommended for reform) in various jurisdictions. This report will borrow, from these reports, some of their main lines of reasoning and will conclude that Jersey should move to adopt and implement a 'core prescription regime' with provision for limited judicial oversight and exceptions established by a common statute.

4. This Consultation paper will make provisional recommendations for such a statutory scheme. It also includes a series of Consultation questions which are designed to engender debate and feedback on key elements of the regime before crystallising them into draft legislation.

### Purpose of the Paper

5. As a continuation and development of the 2008 Consultation Paper, this paper attempts to establish the core issues and questions that should be considered by stakeholders in deciding the content of the proposed new legislative measure. It sketches the framework of what the Commission considers to be a workable, effective, and sufficiently flexible construct to resolve historic issues with the application of Jersey's law on prescription. It is designed to meet the private and public interest needs of contemporary Jersey society and the requirements of its legal community. The Paper invites commentary and suggestions through selected questions.

6. This Consultation Paper is designed for a wider audience of interested parties including members of the Jersey judiciary, States members, the Law Officers Department, senior legal practitioners, representatives of rights groups and legal advice organisations based in Jersey and selected legal academics and commentators. Supplementing the main recommendations it contains detailed discussions, case studies and examinations of the key reforms and will formally invite consultees to respond. Appendix 3 contains a draft legislative measure which incorporates the main recommendations made in the Paper and gives shape to the outline proposals.



## Overview of Prescription in Jersey Law

7. The 2008 Paper is a comprehensive survey of the state of the prescription law in Jersey and this Consultation Paper will not repeat it except to outline it below for the purposes of demonstrating the patent need for reform. The Jersey law of prescription is essentially to be discovered from three sources which, in order of importance, are as follows:

- (a) Jersey customary law and particularly as evidenced by writers on Jersey law;
- (b) decisions of the Jersey Courts; and
- (c) statute, for example, the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.

The effect of these sources is that certain prescription periods can be inferred from custom or jurisprudence or, for certain causes, retrieved from statute.

8. As a general proposition, the Jersey courts will group together various actions in accordance with the classifications that can be gleaned from customary law and, also, from other relevant legal sources in so far as they can clarify or expand customary law. Judicial discretion may also be deployed in novel circumstances and prescription periods in new legislation is informed but not constrained by statutory 'precedent' and thus, presently, overall Jersey law evolves in a piecemeal manner.

9. While tracing the jurisprudential developments the 2008 Consultation Paper concluded that:

*"... for decisions prior to 1950 (and even for some until 1961) we are largely confined to the Acte of Court in any given case to discern the reason(s) for a given decision. In part, this has contributed to the difficulty in discerning coherent principle for determining the prescriptive period that should be applied to a given cause of action."*<sup>1</sup>

## The Differences between Prescription and Limitation

### General remarks

10. It is important to be aware of the related but legally distinct concepts of prescription and limitation. The Scottish Law Commission<sup>2</sup> saw the conceptual difference between prescription and limitation in its jurisdiction as follows:

*"Prescription has the effect, after a certain period of time has passed, of extinguishing a right or obligation completely. By contrast, limitation does not extinguish a right or obligation but creates a procedural bar on raising legal proceedings."*

Jersey customary law reflected the customary law of Normandy in using the term prescription (*la prescription*) to describe both –

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<sup>1</sup> 'Prescription and Limitation CONSULTATION PAPER No 1/2008/CP' (Jersey Law Commission 2008). Section 4.3(j) p.22 [https://www.jerseylawcommission.org.je/files/ugd/f5ec37\\_621c6c7e114e4ad7bee3b326038c7594.pdf](https://www.jerseylawcommission.org.je/files/ugd/f5ec37_621c6c7e114e4ad7bee3b326038c7594.pdf)

<sup>2</sup> 2016 Discussion Paper on Prescription para 1.8

[http://www.scotlawcom.gov.uk/files/3514/5614/9429/Discussion\\_Paper\\_on\\_Prescription\\_DP\\_No\\_160.pdf](http://www.scotlawcom.gov.uk/files/3514/5614/9429/Discussion_Paper_on_Prescription_DP_No_160.pdf)

- (i) acquisitive prescription *i.e.* a period of possession within which a right of ownership was gained; and
- (ii) extinctive prescription *i.e.* a period within which to enforce a right if it was not to be lost altogether.

The position is similar in Scots law under which there are two forms of prescription *viz.* (i) positive prescription, which creates certain real rights; and (ii) negative prescription, which extinguishes both personal and real rights. In Scots law, limitation periods – as such – apply principally to actions for personal injuries.<sup>3</sup>

As we shall see, and as noted in the 2008 Consultation Paper, Jersey practitioners and indeed the courts have on occasion referred interchangeably to ‘limitation periods’ and ‘prescriptive periods’ with no apparent regard to the conceptual difference between the two. Hilary Pullum has said that:

*“In Jersey it is clear that there are different periods of either extinctive prescription or limitation, according to the matter at issue, and there does not appear to be an underlying central concept. For example, although there appears to be extinctive prescription within the English law meaning of the term, there also appears to be limitation, as the Jersey Law Reports note that in the case of In re Wooley, the Court found that— ‘In a case in which the limitation period has clearly expired, the plaintiff’s cause of action is not extinguished but the availability of the remedy should be barred. . .’.”*<sup>4</sup>

Pullum concludes by suggesting that the distinction is actually less clear-cut on analysis and *“the meaning and extent of extinctive prescription appears to vary subject to the nature of the claim, so it seems best not to attempt to set out an overarching definition.”*<sup>5</sup>

11. Such a lack of conceptual clarity needs to be addressed. In the first instance, however, the following historical outline of the position in Jersey law and usage should be noted.

## The Historic Development and Utilisation of Limitation and Prescription in Jersey Law

12. Le Geyt *Les Manuscrits sur la Constitution, les Loix et Les Usages de cette Île* (Philippe Falle, St Helier, 1847) Tome IV page 423 *et seq.* contains the Chapter “DE LA PRESCRIPTION” which sets out among other things the prescription period applicable to “... *toutes obligations faites entre deux habitans ...*” which is the basis of the extinctive prescription<sup>6</sup> period of 10 years for contractual obligations<sup>7</sup>. Le Geyt also recites that *délits*, along with *injures verbales* and *nouvelles dessaisines* are “*annaux*” - *i.e.* prescribed after a year and a day (this being the original prescription period for torts).<sup>8</sup>

<sup>3</sup> See Prescription and Limitation (Scotland) Act 1973 ss 17-18 <https://www.legislation.gov.uk/ukpga/1973/52/data.pdf>

<sup>4</sup> Hilary Pullum, ‘The Meaning of Extinctive Prescription in Guernsey’, Jersey Law Review 173.

<sup>5</sup> *ibid.* p.178

<sup>6</sup> Extinctive prescription applies by denying the existence of the right once the period of prescription expires.

<sup>7</sup> Being entirely in French, the term ‘limitation’ is irrelevant (it does not translate into French other than as extinctive prescription).

<sup>8</sup> Being entirely in French, the term ‘limitation’ does not translate into French other than as extinctive prescription.

13. The *Loi (1843) sur la Prescription des Poursuites* (replaced by the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1978)<sup>9</sup> assumed the use of French word “prescription” in relation to the period of a year and a day within which actions (then) had to be instituted “*pour tous délits et torts*”.<sup>10</sup>

14. Jersey’s Post World War II statutes – by now in the English language – did not use the terminology of the English Limitation Acts: The Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 refers to –

*the “period of prescription of [civil] actions” (long title/Article 2)*

*“right[s] of action barred by prescription” (Article 2)*

*“a period of prescription provided by any ... enactment” (Article 2)*

*“pleading prescription” (Article 4 – in relation to damages claims)*

The Trusts (Jersey) Law 1984 and the Companies (Jersey) Law 1991 provide that “*No period of limitation or prescription shall apply ... etc.*” / “*... without prejudice to any lesser period of limitation or prescription, ... etc.*” but these do not make substantive provision, as such, as to ‘limitation’.

The Criminal Procedure (Prescription of Offences) (Jersey) Law 1999 made clear that “period of prescription” applied to time limits for instituting criminal proceedings and not “limitation period”.

An exception in recent years appears in the heading to Article 21 of the Referendum (Jersey) Law 2017 which reads “*Limitation period for offences under this Part*” (but the expression is not used in the substantive provision made).

15. From the above it is perhaps more accurate to say that, rather than the terms being used interchangeably, the terms “prescription” and “periods of prescription” are, in statute law at any rate, used consistently in relation to time limits for bringing proceedings, rather than “limitation” and “limitation periods”. As noted by the 2008 Consultation Paper, the terms ‘prescription’ and ‘limitation’ have on occasions been used interchangeably in practice. However, the current statutory manifestation of the concept in Jersey, as surveyed, is broadly consistent in its preference and use of the term ‘prescription’. Indeed, the current version of the Jersey Glossary of Legal Terminology refers to ‘limitation period’ as: “[t]he English term, sometimes used in Jersey also, to describe the time within which a civil claim must be commenced. The correct term in Jersey law is prescription.”<sup>11</sup>

## Recommendation

It is therefore recommended (consistently with the 2008 Consultation Paper) that the proposed statute embraces a consistent use of the term ‘prescription’. ‘Prescription’, and hence ‘prescription period’ (or ‘prescriptive period’ – as is found the in Scottish statutes), will be the predominant conceptual model in the legislation.

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<sup>9</sup> Law Reform (Miscellaneous Provisions) (Jersey) Law 1978. <https://www.jerseylaw.je/laws/enacted/Pages/L-12-1978.aspx>, <Accessed 13.06.23>

<sup>10</sup> Note that originally a délit could in Jersey law be the subject of both criminal and civil proceedings – see Advocate Pallot’s article in Journal of Civil Law Studies <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1186&context=jcls> at page 451-2.

<sup>11</sup>

Prepared by the Judicial Greffe and Law Officers’ Department (last updated on 03 July 2023) <https://www.jerseylaw.je/courts/Pages/Terminology.aspx#MainL>

## Consultation Question 1

1	Preferred Terminology	The Commission recommends that the proposed statute embraces a consistent use of the term 'prescription'. 'Prescription', and hence 'prescription (or prescriptive) period', will be the predominant conceptual model in the legislation.	The Commission asks whether consultees agree with the Recommendation that 'Prescription' (not Limitation) should be the preferred term and basis of the proposed new statute?
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16. Notwithstanding the recommendation of 'prescription' as the preferred nomenclature for the future development of Jersey law, many equivalent Law Commissions have applied and used the language of 'limitation' periods to denote and describe similar concepts within their jurisdictions. For the purposes of assessing the positions on reform taken by different jurisdictions a review of proposals has been carried out where the term 'limitation' is preferred and predominates. Therefore, while references to 'limitation' may be encountered in this Paper they should be interpreted as meaning 'prescription' for the purpose of its proposals for reform.

### Key Principles in Review of the law on Prescriptive Periods for Civil Claims and the Move to a Core Prescriptive Period

17. This Paper, and the recommendations contained herein, are concerned with the effect of the lapse of time on civil legal claims. In essence, the Paper addresses what is a reasonable period of time before a person may be prevented from initiating or continuing a civil claim. It considers not only the length of that period but also when time should start (the 'date of accrual') for the purpose of calculating that period.

28. The Paper is minded of key principles of justice when assessing and deliberating the concept of reasonableness in this context. Balance between parties is achieved by ensuring that a plaintiff does not delay unreasonably in bringing a claim and the potential defendants are assured certain claims must be brought within clearly defined time limits and they are not left waiting interminably and eventually facing unreasonably "stale" claims.

19. The expeditious processing of claims is also important from a public policy basis as the finite and costly resources of courts should be applied to cases that can be resolved promptly, without unreasonable delay and the deterioration of evidence.

20. The law governing prescriptive periods for bringing civil proceedings is, therefore, concerned with ensuring that cases are initiated within a reasonable time from the commencement of the cause of action (the 'date of accrual'). In other words, the potential plaintiff is placed under reasonable time pressure and must act with reasonable haste from injury to the initiation of a claim if they do not wish to be barred from the opportunity of legal redress.

21. The law governing prescriptive periods should serve different purposes and must balance various conflicting interests. In general terms, limitation of actions is necessary in the interests of defendants and of the state. In formulating a regime of prescriptive periods, one must also ensure that it works fairly for plaintiffs.

Regardless of the type of prescription law constituted, the following questions must be answered satisfactorily by any applied norms:

- i. What event triggers the start of the limitation period (the prescriptive period is sometimes referred to as “the clock” or “time”, and so this is often described as “when does the clock start to run” or “when does time start to run”)?
- ii. How long is the prescriptive period (generally or specifically for different causes of action?)
- iii. What happens when the prescriptive period has passed?
- iv. Can the prescriptive period be suspended, shortened, extended or otherwise overridden?

### Is Reform necessary?

23. As far back as 2003, the Jersey Law Review was flagging the need for codification of prescription periods in the civil domain.

*“Law should provide certainty. The legislature has clearly seen the need for certainty about limitation in the context of criminal law and the [Criminal Procedure (Prescription of Offences) (Jersey) Law, 1999] is much welcomed. One can easily see that bringing such clarity in the civil jurisdiction is a much larger task. **Nonetheless, the advantage of rolling all periods into one appropriately entitled statute are surely self-apparent.** (emphasis added) Not only would we all know where to look for the applicable period, but issues of classification of such things as causes of action could also be tackled. In addition, it would also give the legislature a much-needed opportunity to bring prescription periods into line with modern practice in litigation, which as the Deputy Bailiff noted, places emphasis on speedy resolution.”<sup>12</sup>*

24. The 2008 Consultation Paper (at Annex 1<sup>13</sup>) sets out the complex, varied and diverse prescription periods that are extant within Jersey law. This has led to criticism, adverse academic commentary, and judicial anomalies. Therefore, in line with the reform pressures that have informed legislative construction in other jurisdictions in recent years, the Commission also makes the strong case for reform in Jersey.

### The requirements of Jersey as a jurisdiction

25. Jersey, like all other legal jurisdictions, requires reasoned and fair law in respect of time limits for causes of action brought. The 2008 Consultation Paper helpfully sets out the main arguments for

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<sup>12</sup> ‘EDITORIAL MISCELLANY - PRESCRIPTION PROBLEMS’ [2003] *The Jersey Law Review* <[https://www.jerseylaw.je/publications/jglr/Pages/JLR0302\\_Miscellany.aspx](https://www.jerseylaw.je/publications/jglr/Pages/JLR0302_Miscellany.aspx)>.

<sup>13</sup> ‘Prescription and Limitation CONSULTATION PAPER No 1/2008/CP’ (n 2). ANNEX 1 [https://www.jerseylawcommission.org.ie/files/ugd/f5ec37\\_621c6c7e114e4ad7bee3b326038c7594.pdf](https://www.jerseylawcommission.org.ie/files/ugd/f5ec37_621c6c7e114e4ad7bee3b326038c7594.pdf)

having rules of prescription; being issues of principle, issues of procedure and issues of economic efficiency.<sup>14</sup>

26. As has been highlighted elsewhere, the law in Jersey has been stated in recent cases by numerous Bailiffs to be inadequate.<sup>15</sup> This is, in part, due to its imprecision and unreliable historical customary precedent. The rapid changes to Jersey in the post-War period also would suggest that much of its legal custom is increasingly ill-suited to its contemporary pluralistic economic and social polity. As the 2008 Paper advised:

*“Even where Jersey law is clear as to the prescriptive period that should be applied, it seems safe to assume that the policy objectives that may have supported such periods in the 17th and 18th centuries - the days of Poingdestre and Le Geyt - are not necessarily the same as those that apply today.”*<sup>16</sup>

### Property Prescription - *possession quadragénaire*

27. A special mention should also be made here of the principle of *possession quadragénaire* in Jersey law. It is a clear example of where Jersey law is out of step with its comparator legal systems and another reason why the Commission’s case for legislative codification can be strongly made.

28. *Possession quadragénaire* means that 40 years’ peaceable and uninterrupted possession of an immovable will extinguish the title of the previous owner and will give a perfect title to the occupier. Whether one is required to show good faith appears not to be pivotal.<sup>17</sup>

29. However, modern legislatures have used newly created statutes of limitations to specify the length of time that owners have to recover possession of their property from adverse possessors. The 2008 Paper advises and recommends, *“Possession quadragénaire has a well-established pedigree in Jersey. Nevertheless, such a long period that further fails to distinguish between the different circumstances of possession justifies reconsideration in the 21st century.”*<sup>18</sup>

30. Due to the special nature of law rights and the extended period stipulated by the principle compared with other causes’ prescription periods this Paper considers the possibilities for reform of *possession quadragénaire* separately in Appendix 1 below.

### Conclusion

31 The principal ‘families’ or groups of causes of action are concerningly not aligned adequately. The periods for contract (in broad terms) and tort prescription are very different. As a general proposition, contract claims are limited to 10-year prescription period and tortious causes must be brought within 3 years. Such a prescriptive imbalance for often concurrent causes can often be problematic and the difference of 7 years is out of step with other similar jurisdictions including England and Wales.

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<sup>14</sup> ‘Prescription and Limitation CONSULTATION PAPER No 1/2008/CP’ (Jersey Law Commission 2008). pp.9-14  
[https://www.jerseylawcommission.org.je/\\_files/ugd/f5ec37\\_621c6c7e114e4ad7bee3b326038c7594.pdf](https://www.jerseylawcommission.org.je/_files/ugd/f5ec37_621c6c7e114e4ad7bee3b326038c7594.pdf)

<sup>15</sup> See *Gale and Clarke v Rockhampton & Ors* Royal Court of Jersey 8 [2006]JRC 189A (Royal Court).  
[https://www.jerseylaw.je/judgments/unreported/Pages/\[2006\]JRC189A.aspx](https://www.jerseylaw.je/judgments/unreported/Pages/[2006]JRC189A.aspx)

<sup>16</sup> ‘Prescription and Limitation CONSULTATION PAPER No 1/2008/CP’ (n 2). At paragraph 4.7 (a)  
[https://www.jerseylawcommission.org.je/\\_files/ugd/f5ec37\\_621c6c7e114e4ad7bee3b326038c7594.pdf](https://www.jerseylawcommission.org.je/_files/ugd/f5ec37_621c6c7e114e4ad7bee3b326038c7594.pdf)

<sup>17</sup> *ibid.* At para. 5.9 (g)

<sup>18</sup> *ibid.* At Para 5.9 (i)

32. The Commission has concluded that the current perception of Jersey law of prescription can be summarised as follows:

- Traditional sources of customary law such as *Charte aux Norman[d]s 1314* and subsequent interpretations no longer speak to modern circumstances.
- Jersey case law basis of prescription makes it difficult to find a “consistent theme or principle”<sup>19</sup> underlying the various prescriptive periods.
- The imprecisions identified and highlighted militate against the impartial and fair practice of justice within Jersey for both plaintiffs and defendants alike.
- Traditional approach of ‘classification’ of *actions* in Jersey law is no longer fit for contemporary purpose.
- The difficulties encountered in classification and differentiation between *voisinage* and the tort of nuisance in the *Rockhampton* case<sup>20</sup> suggests statutory codification is a preferred solution.
- Legacy Jersey legal concepts with overlong prescription periods are increasingly seen to be out of step with modern ‘notions’ of justice. For example, the doctrine of *déception d’outré moitié du juste prix* and its accompanying longer prescriptive period of 30 years received adverse comment from the majority in the Privy Council in *Snell v Beadle*.<sup>21</sup>
- That the current period of prescription in relation to adverse possessions is too long and out of step with Jersey’s comparator jurisdictions.

The 2008 Consultation Paper and this Paper both make the strong case for reform.

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<sup>19</sup> *Re: Esteem Settlement [2002]* [2002] (Royal Court) JLR 141. At paragraph 252 per Birt DB

<sup>20</sup> *Gale and Clarke v Rockhampton & Ors* (n 13).

<sup>21</sup> *Snell v Beadle [2001]* JLR 118.

## CHAPTER 1 CURRENT PRESCRIPTION LAW, SCOPE OF THE PROPOSED REFORMS, AND GUIDING PRINCIPLES

### Guiding Principles

1.1 The Commission notes that there are three clear interests involved in assessing the law on prescription from the point of view of underlying principles:

- (a) The plaintiff's interests and rights.
- (b) The defendant's interests and rights; and,
- (c) The public interest.

Essentially, a prescription period should support a plaintiff's right of access to the courts, while encouraging the plaintiff to make claims without undue delay. This also protects defendants from the unjust pursuit of old, stale, claims. It must be the aim of prescription legislation to strike a fair balance between these interests.

### European Convention on Human Rights

1.2 The Human Rights (Jersey) Law 2000<sup>22</sup> incorporates into Jersey law the rights contained in the Council of Europe 1950 Convention on Human Rights and Fundamental Freedoms (ECHR).

- Article 2 provides *"The Articles of the Convention which comprise the Convention rights (and which are set out in Schedule 1) shall have effect for the purposes of this Law subject to any designated derogation or reservation."*<sup>23</sup>
- Article 6 of the Convention, which provides for a fair and public hearing within a reasonable time, is relevant to assessing the appropriateness of limitation provisions.
- Article 6(1) of the Convention states: *"In the determination of his civil rights .... everyone is entitled to a fair and public hearing within a reasonable time by an independent and partial tribunal established by law."*

According to a leading text, this right seeks *"to protect the individual concerned from living too long under the stress of uncertainty"* and *"to ensure that justice is administered without delays which might jeopardise its effectiveness and credibility."*<sup>24</sup>

The Commission, cognisant of Jersey's obligations under the ECHR, supports the expectation that the law governing prescription must ensure that a balance is struck between the competing rights of the plaintiff and the defendant, and have regard to the public interest. Those rights are the right of the plaintiff of access to the courts and the right to litigate, the right of the defendant to a speedy trial

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<sup>22</sup> Human Rights (Jersey) Law 2000 (15.350). Article 3

<sup>23</sup> *ibid.*

<sup>24</sup> Clare Ovey, Robin CA White and Francis Geoffrey Jacobs, *Jacobs and White: The European Convention on Human Rights* (4th ed, Oxford University Press 2006). p.187



and to fair procedures, as well as the public interest in the avoidance of delayed claims and the timely administration of justice.

## Conclusion

1.3 The rationale for applying different prescription periods depending on the type of action is no longer clear. Nor is it apparent that it is advantageous for Jersey to continue to follow this approach. This multitude of varying prescription periods can lead to categorisation difficulties, which in turn gives rise to complex “satellite” litigation on issues of whether a claim is statute-barred or not.

## Developments in Limitations Law in Other Jurisdictions

1.4 The Commission, in its review, has noted that several common law jurisdictions have moved from a situation which allows limitation law to accrete and evolve with time towards a “core limitations” regime. For example, the New Zealand Limitations Act 2010, incorporates three elements: a uniform basic limitation period; a uniform commencement date; and a uniform ultimate limitation period. Certain Australian states and Canadian provinces have also legislated for core limitation laws but both ensure that their statutes build in a limited judicial discretion to extend these periods in exceptional cases.

1.6 Both the Ireland and England and Wales statutes retain the essential elements of traditional limitation laws, although they have also introduced various modifications to take account of unusual and difficult cases, such as personal injuries actions involving hidden, latent, injuries.

## England & Wales

1.7 In 2001, the Law Commission for England and Wales published a Report, *Limitation of Actions*,<sup>25</sup> in which it concluded that the 1980 Limitation Act lacks coherence owing to its *ad hoc* development; it also considered that the legislation is unfair and outdated and it was “uneven, uncertain and unnecessarily complex.” The Law Commission concluded that the case for a wide-ranging reform to be compelling and recommended the introduction of “a law of limitations that is coherent, certain, clear, just and cost-effective.”

Some of the main features of this regime were to be:

- A primary limitation period of three years starting from the date that the claimant had knowledge, or ought reasonably to have had knowledge.
- A long-stop limitation period of ten years starting from the date of the accrual of the cause of action.
- A judicial discretion to dis-apply the primary limitation period in respect of personal injuries.
- No long-stop limitation period to apply to personal injuries actions.
- In relation to adult claimants with a disability - where the claimant is under a disability and is in the care of a responsible adult ten years for ten years after the later date of (a) the act or

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<sup>25</sup> ‘Limitation of Actions’ (Law Commission for England and Wales 2001) 270.

omission giving rise to the claim, or (b) the onset of disability; then the primary limitation period runs from the date the responsible adult knew or ought to have known the relevant facts (unless the responsible adult is a defendant to the claim).

- All personal injury claims will be subject to the regime whether the claim concerned is framed in terms of negligence or trespass to the person.

Notwithstanding the recommendations, UK Government decided against making any changes to the current limitations regime in England and Wales and is unlikely to do so for the foreseeable future.

## Canadian Provinces

1.8 The leading advocate of reform of limitation law within Canada is the Alberta Law Reform Institute. In 1986, its predecessor, Alberta Institute of Law Research and Reform, published its seminal Paper "*Limitations, (Report for Discussion No. 4, September 1986)*"<sup>26</sup> In 1989, the Institute published its final Report.<sup>27</sup>

1.9 The Alberta Institute set out two basic principles in the 1989 Report, upon which they founded their recommendations in favour of a core limitation regime.

The basic principles are:

*"The first basic principle is knowledge. It is derived from the limitations strategy in equity and serves the interests of claimants. The principle of knowledge involves building in discovery by the claimant to set the limitations clock ticking. The limitation period does not begin to run until the claimant knows of the claim, that is, until he has "discovered" or "ought to have discovered (i) that the injury had occurred, (ii) that it was to some degree attributable to the conduct of the defendant, and (iii) that it was sufficiently serious to have warranted commencing a proceeding. After discovery, the claimant has 2 years within which to seek redress in a civil judicial proceeding. This 2-year period constitutes the "discovery limitation period".*

*"The second basic principle is repose. It incorporates the certainty of the fixed periods used in the limitations strategy at law, and serves the interests of defendants by providing an absolute cut-off date of 15 years within which the claimant must seek a remedial order. The 15-year period applies irrespective of whether the claimant has knowledge of the claim. The principle of repose facilitates long term planning by persons subject to potential claims. As well, at a certain stage evidence and adjudication becomes defective because of the passage of time. This 15-year period constitutes the ultimate limitation period. The defendant is entitled to a limitations defence when either the discovery limitation period or the ultimate limitation period expires, whichever occurs first. The defence must be pleaded, as the traditional approach in the limitations strategy at law currently requires. A successful defence gives the defendant immunity from liability under the claim. Immunity from liability is not conferred automatically and a successful limitations defence does not expunge legal rights."<sup>28</sup>*

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<sup>26</sup> 'Limitations (Report for Discussion No 4 1986)' (Alberta Institute of Law Research and Reform).

<sup>27</sup> 'Limitations (Report No. 55, 1989)' (Alberta Law Reform Institute 1989).

<sup>28</sup> *ibid.* pp1-2

1.10 The Alberta Institute’s Model Limitation Act was the foundation upon which a core limitation regime was introduced in Alberta in 1996, Ontario in 2002 and Saskatchewan in 2004, in New Brunswick in 2010, and the proposed model Act proposed by the Manitoba Law Commission in 2010.

#### New Zealand

1.11 The New Zealand Limitation Act 2010 Act<sup>29</sup> introduced a 6-year primary limitation period and a 15-year ultimate limitation period, both running from the date of the act or omission. After the expiry of the initial 6-year primary limitation period, a ‘late knowledge period’ allows a claimant to make a claim within 3 years of discovering their claim. However, the ultimate limitation period of 15 years still operates as against both the primary and late knowledge periods.

1.12 Section 17 of the Limitation Act 2010 introduced judicial discretion to deal with two specific categories of claims, child abuse (sexual or non-sexual) and claims for relief caused by gradual process, disease, or infection. In such types of claims, even where the relevant statute-barred defence has been or could be established, the court may “*if it thinks it just to do so on an application made to it for the purpose, order that monetary relief may be granted in respect of the claim as if no defence under this Part applies to it.*”<sup>30</sup> Section 18 of the New Zealand Limitation Act 2010 lists certain factors which the court may take into account when considering such an application.

#### Recommendation

1.13 *Having reviewed the models of reform in other jurisdictions, including England and Wales, Canada and New Zealand, the Jersey Law Commission favours the reform of Jersey law by instituting a core prescription regime.*

#### Model for Reform: A Core Prescription Regime

1.14 The Commission is of the view that the current problems with the fragmented nature of prescription law in Jersey cannot be rectified by allowing it to be further developed by judicial interpretation alone. This route is likely to lead to more, not less, divergence, an increase in the risk of injustice to the public and the unjustified increase in the cost of court administration here in the Island. This concern is amplified by the legally pluralistic traditions of Jersey’s mixed legal system. The Commission considers that a fundamental root and branch reform would be more effective, introducing a conceptually different approach to limitations. The Commission acknowledges that there is a strong case in favour of a core prescription regime.

1.15 A core regime is essentially a uniform approach to limitations/prescription law, with fairness, clarity, and simplicity at its foundation. The Commission believes that the introduction of such a ‘core regime’ would provide the fundamental reform required. The Commission recommends a prescription law in Jersey based on the model of a “core limitation regime”, consisting of a uniform basic prescription period, a uniform commencement date, a uniform ultimate prescription period and limited but prescribed situations where judicial discretion may be applied to amend or vary this uniformity.

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<sup>29</sup> Limitation Act 2010, Public Act 2010, No. 110. 2010.

<sup>30</sup> *ibid.*, Section 17(6)

## Recommendation

1.16 The Commission recommends the introduction of a prescription law in Jersey based on the model of a “core prescriptive regime”, comprising: a uniform basic prescriptive period, a uniform commencement date; and a uniform ultimate prescriptive period, and which would apply to the types of claims discussed in this Paper.

## Consultation Question 2

2	Overall Legislative Framework	The Commission recommends the introduction of a prescription law based on the model of a “core prescriptive regime”, comprising: a uniform basic prescription period, a uniform commencement date; and a uniform ultimate prescription period, and which would apply to the types of claims discussed in this Paper.	It is the Commission’s provisional view that there should be a fundamental reform of the law of prescription in Jersey in order to produce a modern code which is, so far as possible, simple, coherent, fair, clear and cost effective. We ask consultees whether they agree. If consultees disagree, we ask them to suggest any reforms they would favour.
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## Scope of Proposed Legislation: Extent of Proposed Reforms

1.17 The Commission is of the view that priority should be given, in terms of proposals for reform, to the most common types of actions that lead to civil proceedings in the courts. The Commission envisages that the core prescription regime will apply, in a uniform way, to ‘civil claims’ which are defined in the draft Law. This means all causes of action in contract, quasi-contract and tort. In other words, it will apply, for example, to an action for breach of a simple contract (including debt-related claims; to quasi-contractual actions (including, for the avoidance of doubt, *voisinage*) to an action in the tort of negligence for personal injury, property damage or pure economic loss; or to an action in tort for nuisance (including *voisinage*) or breach of statutory duty and wrongful detention or conversion of an item or chattel.

To this end, the proposed Law would define a civil claim on the following lines:

“civil claim” means a claim in respect of –

- (a) a contractual or quasi-contractual obligation; or
- (b) a civil wrong;

“contractual or quasi-contractual obligation” includes any obligation enforceable by a claim in –

- (a) an action in –
  - (i) *voisinage*;

- (ii) unjust enrichment (*enrichissement sans cause*);
  - (iii) fraud (*dol*);
  - (iv) *déception d'outré moitié du juste prix*; or
- (b) an –
- (i) *action personnelle mobilière*;
  - (ii) *action personnelle immobilière*;
  - (iii) *action en restitution de meubles*; or
  - (iv) *action possessoire*;

“civil wrong” includes any tort or breach of duty arising in law (whether or not statutory);

1.18 The Commission’s view is that breaches of trust should not be subject to the core prescription regimes, and the provisions of the Trusts (Jersey) Law 1984 should not be modified. Neither should other *statutory* time limits be affected. Thus in actions under public and administrative law such as judicial review, planning, asylum, or immigration proceedings, prescription periods are generally determined in the legislation related to those specific areas. It is not proposed that the new law will interfere with time limits for appeals or other challenges set out in public or administrative law statutes and will limit its ambit solely to civil claims as defined above.

In order to limit its scope, therefore, the draft Law would go on to provide that:

“This Law does not apply to prescriptive periods or other time limits specified by another enactment for taking any action or bringing proceedings.”

1.19 The Commission has also considered whether the proposed reduction in the current 40-year rule of *possession quadragénaire* should be incorporated within the proposed draft Law in a provision that sits outside the core prescription regime and assigned a separate time limit. As we shall see *below*<sup>31</sup> the Commission proposes to include a separate Part in the draft Law to provide for the replacement of the 40-year rule with the shorter period of 15 years peaceful possession – which would match the 15 years for the proposed ‘long stop’ (extinctive) prescriptive period for the bringing of civil claims.

### Consultation Question 3

3	Scope of Proposed Legislation	The Commission recommendations: 2) The Commission envisages that the core prescription regime will apply, in a uniform way, to ‘civil claims’ which are defined in the draft Law.	We ask consultees whether they agree with the proposals made as to scope of the proposed law under this section and to provide any comments or suggestions as to
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<sup>31</sup> Appendix 1: Property Prescription - *possession quadragénaire* (and Consultation Question 11)

		<p>b) The Commission's view is that breaches of trust should not be subject to the core prescription regimes, and the provisions of the Trusts (Jersey) Law 1984 should not be modified.</p> <p>c) that proceedings under public and administrative laws are not incorporated within the new Statute such that prescription periods for such proceedings are not brought with this regime.</p> <p>d) that the proposed reduction in the current 40-year rule of <i>possession quadragénaire</i> should be incorporated within the proposed statute but should be accommodated in provisions that sit outside the core prescription regime and assigned a separate time limit of 15 years in place of the present 40 years.</p>	<p>adjustments or improvements thereto</p>
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## CHAPTER 2 UNIFORM BASIC PRESCRIPTION/LIMITATION PERIOD

### Introduction

2.1 The advantages of a core basic prescription/limitation period are:

- i) Consistency and Clarity.
- ii) Access to justice.
- iii) Efficiency of administration of civil proceedings.
- iv) Straightforward to interpret and to apply practically.

The Alberta Institute noted in 1986 that *“there is neither a sound theoretical nor practical foundation for the practice of assigning different fixed limitation periods to different categories of claim.”* They concluded the practice results in limitation periods which are too often unreasonable for all parties involved.<sup>32</sup>

### Recommendation

*The Consultation Paper recommends a uniform basic prescription period to be applied to a wide range of civil actions which form the bulk of civil litigation in Jersey within a single statutory measure.*

### Length of the Uniform Basic Prescription Period

2.2 The length of the basic prescription period must take account of the need to do justice to the plaintiff and to the defendant. The Law Commission for England and Wales has summarised the relevant considerations as follows: -

*“The limitation period chosen needs to provide sufficient time for claimants to consider their position once the facts are known, take legal advice, investigate the claim and negotiate a settlement with the defendant, where this is possible. At the same time, it should not be so long that the claimant is able to delay unreasonably in issuing proceedings.”<sup>33</sup>*

Regard must also be had to the complexities involved in preparing different actions, from straightforward road traffic accident claims to complex contractual claims. It is imperative that any selected prescription period strikes a reasoned balance between the interests of the parties to prospective or actual civil action and is informed by public policy dimensions regarding the need for the expeditious and effective administration of civil litigation in the jurisdiction. A prescription period should support the plaintiff’s right of access to the courts and encourage them and their advocates not to delay, thus protecting defendants from the unjust pursuit of stale claims.

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<sup>32</sup> ‘Limitations (Report for Discussion No 4 1986)’ (n 24).

<sup>33</sup> ‘LIMITATION OF ACTIONS Item 2 of the Seventh Programme of Law Reform: Limitation of Actions’ (The Law Commission 2001) (LAW COM No 270). at paragraph 66

## Options for Length of Uniform Basic Prescription/Limitation Period

### *One Year*

2.3 For many Law Commissions a 12-month period is too short. The Alberta Institute argued that 12 months might in fact militate against other forms of available dispute resolution methods including mediation. It said, “A limitation period threatening such an immediate bar could encourage the hasty commencement of litigation which, with more time available, might be compromised.”<sup>34</sup>

The Committee on Court Practice and Procedures suggested a short limitation period could give rise to significant practice difficulties and may result in inconsistencies<sup>35</sup>

### *Two Years*

2.4 The Alberta Institute recommended the introduction of a two-year basic limitation period, running from the date of discoverability, supplemented by an ultimate limitation period of ten years, running from the date of accrual. The Institute was of the view that for the great majority of claims, the basic limitation period would expire first, and that the ultimate limitation period would not strike down many claims.<sup>36</sup>

### *Three Years*

2.5 A three-year limitation period applies for personal injuries actions in England and Wales. The three-year period was chosen as something of a compromise between the six-year period generally applicable to tort claims, and the one-year limitation period applicable to claims against public authorities.

2.6 The Law Commission for England and Wales has argued that a three-year limitation period running from discoverability would be sufficient for all contract and tort claims. It noted that experience in that jurisdiction suggests that “the three-year period provides sufficient time for the claimant to bring a claim in the vast majority of cases.”<sup>37</sup>

### *Four Years*

2.7 The United Nations *Convention on Limitation in the International Sale of Goods* sets a uniform limitation period of four years, within which a party to a contract for the international sales of goods must commence legal proceedings against another party in order to assert a claim arising from the contract or relating to its breach, termination or invalidity.<sup>38</sup>

2.8 The four-year period runs from the date of accrual of the claim, as defined in the Convention. The limitation period may be extended or recommence in certain circumstances. For example, while it cannot be modified by agreement of the parties, it can be extended by a written declaration of the debtor during the running of the period. The contract of sale may stipulate a shorter period for the commencement of arbitral proceeding if the stipulation is valid under the law applicable to the contract. The Convention establishes an overall time period of 10 years, from the date on which

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<sup>34</sup> ‘Limitations (Report for Discussion No 4 1986)’ (n 24). At paragraph 2.43

<sup>35</sup> ‘Commentary on the General Scheme of the Courts and Civil Liability Bill’ (Committee on Court Practice and Procedure 2003).

<sup>36</sup> ‘Limitations (Report for Discussion No 4 1986)’ (n 24). At paragraph 141

<sup>37</sup> ‘Limitation of Actions (Consultation Paper No. 151, 1998)’ (Law Commission for England and Wales) <[https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc270\\_Limitation\\_of\\_Actions.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc270_Limitation_of_Actions.pdf)>. At paragraph 283-284

<sup>38</sup> Convention on the Limitation Period in the International Sale of Goods 1974. Article 8



the limitation period originally commenced to run, beyond which no legal proceedings to assert the claim may be commenced under any circumstances.<sup>39</sup>

#### Five Years

2.9 In Scotland, the concepts of prescription and limitation are both used, prescription being a rule of substantive law, and limitation a procedural rule. A five-year ‘short negative prescription period’ was introduced in 1973<sup>40</sup> for all categories of obligation to which the provision applies.

2.10 A long-negative prescription period of 20 years applies to most of the excepted causes of action. The expiry of these prescription periods has the effect of extinguishing the plaintiff’s claim completely.

#### Six Years

2.11 The six-year limitation period applicable to the majority of contract and tort actions in Ireland under the *Statute of Limitations 1957* was deemed by the Law Commission as “unnecessarily long”, particularly in the field of commerce.<sup>41</sup>

2.12 The 1986 Alberta Institute report asserted that if a limitation period starts to run from accrual, six years duration may be a reasonable period to allow the claimant to discover the claim, attempt to settle, and then assert his or her claim. However, if the limitation period commences on discovery, it did not consider a six-year limitation period justified.<sup>42</sup>

2.13 The Law Commission asserted that “a limitation period of six years is too long (even where that period starts from the accrual of the cause of action)” and proposed the adoption of a shorter period.<sup>43</sup>

#### Selected Durations

2.14 Some of the basic limitation periods which apply in other jurisdictions are set out in the table below:

<b>Jurisdiction:</b>	<b>Uniform Basic Limitation Period:</b>	<b>Running from:</b>
England and Wales Law Commission	3 years	Discoverability
Western Australia	6 years	Accrual
New Zealand	6 years	Date of the act or omission upon which the claim is based
Alberta	2 years	Discoverability

<sup>39</sup> *ibid.* Article 23

<sup>40</sup> Prescription and Limitation (Scotland) Act 1973 (1973 CHAPTER 52).

<sup>41</sup> Great Britain Law Reform Committee, *Twenty-First Report: Final Report on Limitation of Actions* (HM Stationery Office 1977) <<https://books.google.je/books?id=aAMktAECAAJ>>.

<sup>42</sup> ‘Limitations (Report for Discussion No 4 1986)’ (n 24). At paragraph 2.52

<sup>43</sup> ‘Limitation of Actions (Consultation Paper No. 151, 1998)’ (n 34).at paragraph 10-11

Ontario	2 years	Discoverability
Saskatchewan	2 years	Discoverability

### Recommendation

***The Commission recommends the introduction of a basic prescription period of general application in respect of the civil claims referred to above, running for a period of three years.***

In order to implement this recommendation, it is submitted that the draft Law would make provision on the following lines:

“Prescriptive period of 3 years for bringing civil claims

A civil claim<sup>44</sup> may not be brought after 3 years have expired from the date on which the cause of action accrued.” (As explained below, the date of accrual would be determined on the basis of a ‘reasonable discoverability’ test.)

### Consultation Question 4

4	Basic Prescription period	The Commission recommends the introduction of a basic prescription period of general application in respect of the civil claims referred to above, running for a period of three years.	We ask consultees: (1) Do they agree with that recommendation? (2) What period (other than three years) do they consider is more appropriate?
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### Reasonable Discoverability: Starting date of the Uniform Basic Prescription Period

2.15 There are four possible options, from which a uniform basic prescription period could run, namely:

- (1) Date of accrual, i.e., the date on which the cause of action is complete, that is, when it becomes possible for a plaintiff to commence proceedings.
- (2) Date of the act or omission giving rise to the cause of action.
- (3) Date of discoverability.
- (4) Alternative starting dates (a combination of the above).

2.16 Discoverability rules are based solely on the state of the plaintiff’s knowledge. Therefore, the defendant’s conduct is irrelevant for triggering the prescription period. Within the proposed new Jersey framework, the prescription period would start to run from the date when the plaintiff becomes aware – or could have become aware if exercising reasonable diligence – of the existence of the cause

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<sup>44</sup> As defined: see para 1.17 above

of action. Put simply, the date of the plaintiff’s knowledge would become the date of accrual of the cause of action.

2.17 There are significant advantages to adopt a universal start date for all causes of action which hinges on discoverability test. Rather than distinguishing between different types of damage (patent and latent) or adopting a form of classification as to originating breach (contractual or tortious) the adoption of a legislative settlement of a uniform prescription period supports the objectives of clarity and robustness which are to be the hallmarks of the new legislation.

2.18 Other comparative jurisdictions have adopted similar formulations for their simplicity, clarity, and equity.

### Recommendation

*The Commission recommends, **for all causes of action within the scope of the proposed legislation**, a start date of the date of discoverability. In effect, the prescription period runs from the date when the plaintiff becomes aware – or could have become aware if exercising reasonable diligence – of the existence of a cause of action and the relevant facts relating to the cause of action. This is deemed the “reasonable discoverability test.”*

In order to implement this recommendation, it is proposed that the draft Law would make provision on the lines set out *below* under para 2.21:

### Consultation Question 5

5	Reasonable Discoverability: Starting date of the Uniform Basic Prescription Period	The Commission recommends, <b>for all causes of action within the scope of the proposed legislation</b> , a start date of the date of discoverability. In effect, the prescription period runs from the date when the plaintiff becomes aware – or could have become aware if exercising reasonable diligence – of the existence of a cause of action and the relevant facts relating to the cause of action.	We ask consultees whether they agree with the proposals that:  (1) the definition of the date of discoverability) should focus on three main factual elements:  (a) that the plaintiff becomes aware of a cause of action  (b) that the plaintiff is knowledgeable as to the facts relating to the cause of action and  (c) that there is a defendant against whom action can be taken.
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## What Constitutes Knowledge for the Reasonable Discoverability Test

2.19 The Commission is of the view that to achieve maximum clarity, it is essential that the ingredients of the “date of knowledge” are spelled out precisely in legislation. The legislation should state – clearly and directly – what knowledge is required for the prescription period to run. At the same time, it is important for the date of knowledge test to be simple and easily understood.

2.20 The Commission also concludes that the discoverability or date of knowledge test should be primarily an objective test supplemented with a subjective element of considering what a reasonable person ought to have known, in the particular circumstances of the plaintiff.

### Recommendation

2.21 *The Commission recommends that the basic prescription period should run from the date of knowledge of the plaintiff, and that the date of knowledge should be calculated by reference to the date on which the plaintiff first knew, or ought reasonably to have known, the following:*

*(a) that the injury, loss, or damage had occurred;*

*(b) that the injury, loss, or damage is attributable to the conduct of the defendant;*

*(c) that the injury, loss, or damage warrants bringing proceedings, assuming liability on the part of the defendant;*

*(d) the identity of the defendant; and*

*(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.*

In order to implement the above recommendations (under paras 2.18 and 2.20), it is proposed that the draft Law would make provision on the following lines:

#### “Accrual of causes of action

(1) The cause of action in relation to a civil claim<sup>45</sup> accrues when the plaintiff first knew, or ought reasonably in the circumstances to have known–

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage warranted the bringing of proceedings against the defendant;

(c) that the injury, loss or damage was attributable in whole or in part to the conduct of the defendant;

(d) the identity of the defendant; and

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<sup>45</sup> As defined: see para 1.17 above

- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that other person and the additional facts supporting the bringing of an action against the defendant, and knowledge that any act or omission did or did not, as a matter of law, involve a breach of an obligation or duty is irrelevant.
- (2) The date of the plaintiff’s knowledge is determined by reference to actual and constructive knowledge.
- (3) Constructive knowledge is knowledge that a plaintiff might reasonably have been expected to acquire either—
  - (a) from facts observable or ascertainable by the plaintiff; or
  - (b) from facts ascertainable by the plaintiff with the assistance of medical or other appropriate professional expert advice.
- (4) In spite of paragraph (4) —
  - (a) a person will not be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and
  - (b) a person injured shall not be fixed under this Article with knowledge of a fact relevant to the injury which the person has failed to acquire as a result of that injury.”

Consultation Question 6

6	Reasonable Discoverability: Plaintiff Knowledge	<p>The Commission recommends that the basic prescription period should run from the date of knowledge of the plaintiff, and that the date of knowledge should be calculated by reference to the date on which the plaintiff first knew, or ought reasonably to have known, the following:</p> <ul style="list-style-type: none"> <li>(a) that the injury, loss, or damage had occurred;</li> <li>(b) that the injury, loss, or damage is attributable to the conduct of the defendant;</li> <li>(c) that the injury, loss, or damage warrants bringing proceedings, assuming liability on the part of the defendant;</li> <li>(d) the identity of the defendant; and</li> <li>(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and</li> </ul>	<p>We ask consultees whether they agree with our views that: (1) actual knowledge should be treated as a straightforward concept and should not be defined in the proposed statute and (2) constructive knowledge should be defined in the measure as “what the plaintiff in his circumstances and with his abilities ought to have known had he acted reasonably.”</p> <p>If consultees do not agree with the Commission’s views please explain why not, and what alternative approach they would prefer.</p>
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		the additional facts supporting the bringing of an action against the defendant.	
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## Impact of Reasonable Discoverability Test on Existing Jersey Law

### *Empêchement d'agir* or Impediment to Action

2.22 The Court of Appeal of Jersey has held that prescription will not run against a person who is subject to an impediment which prevents him from bringing a claim or otherwise acting in the prosecution or defence of his rights.<sup>46</sup>

There are two types of impediment: (i) an *empêchement de fait* and (ii) an *empêchement de droit*.

2.23 According to the Jersey Law Commission's 2008 Paper there was, at that time, a recent resurgence in the application of *empêchement de fait* and the authors of the Paper were supportive of its contemporary relevance, vitality and hence maintenance. They suggested:

*"Further, the inherent flexibility for a Court in determining whether or not a litigant suffered from a practical impossibility in pursuing his/her claims may be seen as a positive element to the application of this principle that still maintains well defined limits."*<sup>47</sup>

(i) *an empêchement de fait*

2.24 An *empêchement de fait* assists those with a practical impossibility of commencing or continuing legal proceedings due to their ignorance of the facts giving rise to the cause of action and such ignorance is objectively reasonable.<sup>48</sup>

### Assessment

2.25 The Commission considers that the *empêchement de fait* principle resembles closely the reasonable discoverability test which has been enshrined in other jurisdictional frameworks and the adoption of which by Jersey is a key recommendation of this Paper. By legislating a useful and reasonable pre-existing Jersey customary principle the Commission recommends the retention of the principle in its entirety but to provide the necessary certainty that stems from its codification. The community of litigants, practitioners and judiciary will also benefit from the stability and certainty of the test of reasonable discoverability. The concept of *empêchement de fait* – in terms of the plaintiff's knowledge of the facts – would be redundant in determining the date of accrual of the cause of action. But, once the cause of action had accrued, and prescription had therefore started to run, *empêchement de fait* could still come into play in (albeit rare) cases *e.g.* of a plaintiff being unlawfully detained and unable to bring proceedings. In that event the draft Law still needs to make provision for suspension of prescription, as distinct from the provision already made in relation to the accrual of the cause of action.

<sup>46</sup> *Public Services Committee v Maynard* (1996) JLR 343 at 351 (Court of Appeal Jersey).

<sup>47</sup> 'Prescription and Limitation CONSULTATION PAPER No 1/2008/CP' (Jersey Law Commission 2008), at paragraph 5.11 (e)

<sup>48</sup> *Boyd v Pickersgill & Le Cornu* [1999] JLR 284 (Jersey), at 291

## *ii) an empêchement de droit*

2.26 An *empêchement de droit* is a legal disability. There are generally two types of legal disability: minority and lack of legal capacity. In Jersey, where a party is a minor, time will not run unless the minor has a *tuteur*<sup>49</sup>. If a person lacks mental capacity in circumstances where a delegate, (previously a curator) has not been appointed, time will also not run.

2.27 Thus, *empêchement de droit* establishes the generally accepted principle that, unless there has been the appointment of a *tuteur* or delegate, the prescription periods will not run if the plaintiff is a minor or is not able to make a reasonable judgement with respect to his or her position during the prescription period in question. This is because prescription law tends to operate only when a person has the capacity to determine whether to commence proceedings during the relevant period.

2.28 The Commission's view is that such disability should suspend the prescription periods so that the periods run only when the plaintiff's disability has ceased or is no longer deemed to exist.

2.29 It is proposed that the operation of any prescription period established by the new law is suspended during any period in which the claimant is a minor without a *tuteur* or is a person who, by reason of mental disability, is not competent to manage his or her affairs or estate and is not represented by a delegate. In both cases the delegate or the *tuteur* must have discovered that the claim exists.

## *Other Jurisdictions*

### *Canadian Provinces*

2.30 In two of the surveyed Canadian legislatures, the suspension of prescription periods has been handled slightly differently. In Alberta's 2000 Act there is a clear differentiation between disability and minority. In the Act<sup>50</sup> the limitation periods are suspended during any period that the claimant is a "person under disability", defined as

*"(i) a represented adult as defined in the Adult Guardianship and Trusteeship Act or a person in respect of whom a certificate of incapacity is in effect under the Public Trustee Act, or*

*(ii) an adult who is unable to make reasonable judgments in respect of matters relating to a claim;"*<sup>51</sup>

2.31 However, in respect of a minor, the law allows for the suspension to be lifted by intervention by a potential defendant. The limitation periods are suspended during the period of time that the claimant is a minor but can be made to run by issuing a notice against the minor's parents, guardian, or their equivalent of a *tuteur*.

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<sup>49</sup> *Letto v Stone* [1890] Jersey 48H 473., "prescription ne court pas contre un mineur dépourvu de tuteur"

<sup>50</sup> Limitations Act, RSA 2000, (c L-12).s.5(1).

<sup>51</sup> *ibid.*s.1(h)

2.32 In Saskatchewan, however, Section 8(1) of its law suspends the limitation periods provided equivalently between minors and persons under disability with no provision to ‘kick start’ it against the guardian or Public Trustee.’<sup>52</sup>

## New Zealand

2.33 The New Zealand Limitation Act 2010<sup>53</sup> clearly differentiates in Sections 44 and 45 between minority and adult disability for the purposes of suspending limitation periods and in Section 46 defines incapacity for the purpose of the Act. Section 44 provides that the universal basic or long stop periods will not commence against a claimant until they reach 18 years of age. However, for adults under disability, a ‘specified court or tribunal’ is to determine whether to order the suspension of the limitation periods against the claimant taking into account certain factors.

## Analysis

2.34 The Commission determines that,

- 1) considering the special nature of such cases there should be provision for suspension of the legislative prescription periods where legal disability is present.
- 2) there is merit in differentiating clearly within the Law between minority and adults under disability.
- 3) the safeguards currently provided by the *empêchement de droit* in respect of minors without *tuteurs* can be maintained in the new Law, such that, for such cases, both prescription periods are suspended until the minor reaches 18 years of age.
- 4) due to the introduction of Article 28 of the Capacity and Self-Determination (Jersey) Law 2016<sup>54</sup> (“The Capacity Law”) the suspension of prescription periods for adult persons under disability should only be available in the absence of a Delegate.
- 5) a new definition of incapacity is not required for this new Law and it can be aligned with the definition provided by Article 4 of the Capacity Law.

It is for these reason that it is the Saskatchewan model that the Commission provisionally favours and has, with necessary drafting adjustments, been proposed in the draft Law.

## Recommendation

2.35 *There should be, within the proposed new Law, a provision governing suspension of prescription. This is to ensure that time does not run against a plaintiff who is unable to act, even though the plaintiff’s knowledge is sufficient for the cause of action to have accrued. Suspension of*

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<sup>52</sup> The Limitations Act, SS 2004, c L-16.1, (SS 2004). s.8(1)

<sup>53</sup> Limitation Act 2010, Public Act 2010, No. 110.

<sup>54</sup> The Capacity and Self-Determination (Jersey) Law 2016. Article 28, A Court or delegate may exercise “all such powers as P might, on his or her own behalf and in accordance with the law of Jersey, exercise in relation to –

....

(h) the conduct of legal proceedings in P’s name or on P’s behalf.



*prescription is required also to identify a separate category of parties requiring different treatment for prescription purposes e.g. those who have legal disability due to minority or lack requisite mental capacity. Further, that the proposed new Law should provide that for this category the uniform basic and the ultimate prescription periods should be suspended for minors without a tuteur until they reach 18 and for adults under disability lacking a Delegate.*

*It is also recommended that express provision be made to protect a potential plaintiff who has been induced by fraud or deception on the part of a defendant not to bring proceedings.*

In order to implement the above recommendations, it is proposed that the draft Law would make provision on the following lines:

“Suspension of prescription after accrual

(1) In computing the period of 3 years under Article 3, no account is to be taken of any period or periods during which the plaintiff is prevented –

- (a) by a practical impossibility (*empêchement de fait*), other than lack of knowledge; or
- (b) by a legal impediment (*empêchement de droit*),

from exercising his or her right to commence or to continue legal proceedings.

(2) Legal impediments include cases in which the plaintiff –

- (a) is under the age of 18 years and is a person for whom a *tuteur* has not been appointed; or
- (b) is a person who, by reason of lack of capacity, as defined by Article 4 of the Capacity and Self-Determination (Jersey) Law 2016, is not competent to manage his or her affairs or estate and who is not represented by a delegate who –
  - (i) is aware of the claim; and
  - (ii) has the legal capacity to commence the proceeding on behalf of that person or the person’s estate.

(3) For the avoidance of doubt, any period during which the plaintiff is induced to refrain from bringing a civil claim by reason of –

- (a) fraud on the part of the debtor or any person acting on the debtor’s behalf; or
- (b) error induced by words or conduct of the debtor or any person acting on the debtor’s behalf,

is not to be reckoned as, or as part of, the prescriptive period under Article 3.”

## CHAPTER 3 UNIFORM ULTIMATE PRESCRIPTION PERIOD- “LONG-STOP”

### Introduction

3.1 An ‘ultimate limitation/prescription period’ is a limitation/prescription period which acts as a final cut-off point or ‘long-stop’ for the bringing of legal proceedings. Beyond this ultimate prescriptive

period – measuring the lapse of time from date of the act or omission that gave rise to the right of action, regardless of what the plaintiff did or didn't know – no action can be brought. This is, however, subject to the consideration of exceptional circumstances, which the Commission discusses in Chapter 4, *below*.

3.2 The purpose of an ultimate limitation/prescription period is to achieve certainty and fairness in the legal system. It is argued that, while the introduction of a discoverability test tips the balance in favour of plaintiffs, the introduction of a complementary ultimate limitation/prescription period functions as a safeguard for defendants against the risk of liability for an indefinite period.<sup>55</sup> The Alberta Institute supported the inclusion of ultimate limitation periods into balanced limitation regime deeming them “*essential for the achievement of the objectives of a limitations system.*”<sup>56</sup>

3.3 In general, the longer the time that elapses after an event, the greater the chances of stale testimony and evidence being adduced before the courts. With an ultimate limitation/prescription period it is argued that the original objectives of limitation/prescription periods are met, that is, that legal actions be brought within a reasonable period such that people are not subject to an indefinite liability.

#### Recommendation

3.4 *The Commission recommends the introduction of a uniform ultimate or ‘long-stop’ prescription period, which would apply to the civil actions as defined in this Report (subject to a limited discretion for the court to allow extension in exceptional cases).*

#### Length of an ultimate prescription period

3.5 In general, the ultimate limitation periods enacted in other jurisdictions have been of 10-, 15-, or 30-years’ duration. The Commission is of the view that 10 years would be too short in duration to provide claimants with adequate time to commence proceedings. The Commission notes that most jurisdictions applying an ultimate limitation period have opted for 15 years.

#### Recommendation

3.6 *The Commission recommends the introduction an ultimate prescription period of 15 years’ duration the start date of which being the date of the act or omission giving rise to the cause of action.*

In order to implement the above recommendation, it is proposed that the draft Law would make provision on the following lines:

“Extinction of underlying obligation by prescriptive period of 15 years

- (1) Subject to paragraph (2) and to Article 7<sup>57</sup>, an obligation giving rise to the right to bring a civil claim is extinguished altogether at the end date, that is to say, when 15 years has expired from the date of the act or omission that gave rise to that right.
- (2) Paragraph (1) applies only if at the end date –

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<sup>55</sup> ‘Limitation of Actions (Consultation Paper No. 151, 1998)’ (n 34). at paragraph 284

<sup>56</sup> ‘Limitations (Report for Discussion No 4 1986)’ (n 24).

<sup>57</sup> *i.e.* the Article which will provide for an exceptional judicial discretion to disapply or extend the 15 year long stop

- (a) no civil claim has been made in relation to the obligation; and
  - (b) the obligation has not been acknowledged.
- (3) An obligation is acknowledged if either –
- (a) there has been such performance by or on behalf of the debtor towards discharging the obligation as clearly indicates that the obligation still subsists; or
  - (b) there has been made by or on behalf of the debtor to the creditor or the creditor’s agent an unequivocal written admission clearly acknowledging that the obligation still exists.
- (4) In computing the period of 15 years under this Article, no account is to be taken of any period or periods during which the plaintiff is prevented by a legal impediment (*empêchement de droit*) within the meaning of Article 5 from exercising his or her right to commence or to continue legal proceedings.”

### Consultation Question 7

7	Ultimate Prescription Period	The Commission recommends the introduction an ultimate or ‘long-stop’ prescription period of 15 years’ duration.	The Commission proposes that this ultimate prescription period should run from the date of the act or omission of the defendant which gives rise to the claim. We ask consultees whether they agree.
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### Application of the Ultimate Prescription Period to Personal Injuries Actions

3.8 The Commission considers that special consideration ought to be given to the application of the ultimate prescription period to personal injuries actions. Many forms of personal injury are latent in nature and can lay dormant for many years without being discovered by the injured party. Therefore, to impose an ultimate prescription period in such cases would ostensibly risk injustice for those who do not discover their injuries until after that period has expired.

3.9 Equally, the Commission recognises that a claim that is brought decades after the original act or omission that caused the injury may cause unfairness to the defendant and may not further the public interest.

3.11 In its 2001 Report, the Law Commission of England and Wales was of the view that their recommended ultimate limitation period of 10 years should not apply to personal injuries claims. The Law Commission claimed that different considerations applied to personal injuries claims and that, despite the arguments it made in favour of the long-stop generally, the Law Commission “*was minded to exempt such claims from the long-stop period*”.<sup>58</sup>

<sup>58</sup> ‘Limitation of Actions (Report No. 270, 2001)’ (n 22). para 3.101

3.12 The New Zealand Limitation Act 2010 enshrined its Justice and Electoral Committee recommendation that a judicial discretion be retained to allow the courts to grant relief in cases involving child abuse (sexual and/or non-sexual), or claims of gradual process, disease, or infection *“even when a limitation defence had been or could be established against the claim”*. Thus, the court could still grant relief to a claimant in such a case, though the case is statute barred by the expiry of the ultimate limitation period. *“The specified court or tribunal may, if it thinks it just to do so on an application made to it for the purpose, order that monetary relief may be granted in respect of the claim as if no defence under this Part applies to it.”*<sup>59</sup>The 2010 Act goes on to set out a list of factors which the court *“must take into account”* in coming to its decision about whether or not to grant this relief to the statute-barred claimant.

3.13 Thus the Limitation Act 2010 adopted the approach of applying the ultimate limitation period generally to personal injuries claims but with two narrow exceptions to this general rule, the parameters of which are clearly defined by way of legislative provision.

#### Recommendation re Personal Injury

3.14 *The Commission recommends that the ultimate prescription period of 15 years should also apply to personal injuries actions.* The Commission is of the view that any concerns relating to the application of an ultimate prescription period to personal injuries action can be dealt with by the introduction of a statutory discretion, (see Chapter 4 below).

#### Consultation Question 8

8	Recommendation re Personal Injury	The Commission recommends that the ultimate or ‘long-stop’ limitation period of 15 years should also apply to personal injuries actions.	We ask consultees whether they agree that the proposed long-stop of 15 years should also apply for personal injury claims. If consultees disagree, we ask them whether they would favour a long-stop except for personal injury claims.
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<sup>59</sup> Limitation Act 2010, Public Act 2010, No. 110. Section 17(6)

## CHAPTER 4 DISCRETION TO DISMISS CLAIMS, DISCRETION TO EXTEND PRESCRIPTION PERIODS IN EXCEPTIONAL CIRCUMSTANCES, MULTI-JURISDICTIONAL TRANSACTIONS

4.1 In this Chapter, the Commission outlines its thoughts as to how unusual and exceptional instances are to be dealt with in the proposed core prescriptions regime and raises for consideration the implications of the proposed reforms for multi-jurisdictional transactions.

### Inherent Judicial Discretion to Dismiss Claims

4.2 Judicial discretion naturally plays a significant role in determining the fair and equitable determination of these case when brought before the courts. An element of judicial discretion will always be present in any reformed system of prescription arising from the court's inherent jurisdiction to regulate its proceedings. This inherent jurisdiction protects the interests of the defendant in striking out claims for want of prosecution where there has been inordinate and inexcusable delay, even where a prescription period has not yet expired.

4.3 The Commission considers that a provision in respect of judicial powers should be included in the proposed prescription legislation recommended in this Paper. The Commission also considers that reference should also be included to the jurisdiction to dismiss claims for inordinate, inexcusable and prejudicial delay, or for abuse of process or the vexatious nature of the claim.

### Recommendation

4.4 *The Commission recommends that the proposed prescription legislation recommended in this Paper should include an express provision or article that it is without prejudice to any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal, or for inordinate, inexcusable and prejudicial delay, or for abuse of process or the vexatious nature of the claim.*

In order to implement the above recommendation, it is proposed that the draft Law would make provision on the following lines:

“Jurisdiction of court to dismiss claim

Nothing in this Law affects any power of a court –

- (a) to dismiss a claim on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal;
- (b) to dismiss a claim where this arises from—
  - (i) such inordinate, inexcusable and prejudicial delay that a hearing of the claim would not be consistent with the administration of justice or fair procedures, or

- (ii) abuse of process or the frivolous or vexatious nature of the claim.”

#### Consultation Question 9

9	Inherent Judicial Discretion	The Commission recommends that the proposed prescription legislation should include an express provision or article that it is without prejudice to any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal, or for inordinate, inexcusable and prejudicial delay, or for abuse of process or the vexatious nature of the claim.	The Consultees’ views are sought whether such a provision in the proposed measure would assist or inhibit the exercise by the Court of that which is inherent.
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#### Statutory Discretion to Extend Prescription Periods

4.5 Conversely, the Commission must also consider whether a specific statutory discretion to “postpone” or otherwise extend the “back-stop” ultimate prescription period is required by proposed prescription legislation. Sub-strands of this examination are whether a limited “safety valve” provision would operate by reference to a limited discretion for “exceptional circumstances” or by reference to specific instances.

4.6 The Commission notes in its review that some states favour including explicit provisions in their limitation legislation allowing for the courts to exercise judicial discretion to extend or dis-apply a limitation period. Others do not allow for any judicial discretion in relation to limitation periods, and strictly observe their expiry, while others allow for a limited discretion in certain circumstances.

4.7 In England and Wales, the court has a discretion under the Limitation Act 1980<sup>60</sup> to disapply the relevant limitation period in respect of personal injuries or death. What this does is allow the court to extend the relevant limitation period beyond its expiry date, thus preventing the limitation period from extinguishing the claim. Each of the provisions relevant to personal injuries claims or claims for defamation, contain a list of factors which the court can take account of in exercising this discretion.

4.8 The English Law Commission considered the equity of the exercise of this judicial discretion in personal injury actions arguing that a plaintiff who has suffered a personal injury can be viewed as having suffered a more extreme form of harm than someone who has suffered purely economic loss or property damage and recommended its retention in any forthcoming measure.<sup>61</sup>

4.9 In its 2007 report, the Scottish Law Commission argued that statutory discretion-based provisions could be employed by the courts without necessarily creating greater uncertainty or inconsistency. It stated that “*several Inner House appellate decisions*” gave rise to “*a number of settled*

<sup>60</sup> Limitation Act 1980 (<https://www.legislation.gov.uk/ukpga/1980/58/contents>).

<sup>61</sup> Plans to introduce the proposed reform of introducing a core limitations regime as recommended by the Law Commission of England and Wales in its 2001 Report Limitation of Actions appear to have been postponed indefinitely.

*propositions*<sup>62</sup> However, the potential risks of inconsistencies and wide variances in practice and exercise of the discretion are offset by i) the statutory provision of a non-exclusive set of factors that the Court must exercise and ii) a convergence on ‘settled propositions’ based on fairness between the parties. These propositions include considerations such as, where the equities of the situation lie, the conduct of the plaintiff’s solicitor, and the conduct of the plaintiff since the accident which caused the injury.

4.10 The Scottish Law Commission observed:

*“Although the very nature of an unfettered discretionary power means that the outcome of each case turns on its facts, judges have tended to develop similar approaches to some of the settled propositions mentioned above.”*<sup>63</sup>

4.11 However, there are disadvantages of allowing judicial discretion into a core limitation/prescription system. It undermines its primary purpose, which is the certainty for litigating parties in commencing, conducting, and defending claims. Ultimately, when available in the system, how judicial discretion is applied depends upon a judge’s perception of the relative credibility and conduct of the parties, the balance of prejudice caused by the exercise of that discretion, and the equity of the situation. The subjective assessment of different judges is likely to vary. This leaves a large margin for variation between cases which could affect both plaintiffs and defendants and challenge the credibility of the underlying core prescription system.

4.12 It might also be observed that the 2008 review of Jersey jurisprudence on this matter strongly advocated for reform to establish certainty for stakeholders. This can only be brought about, it is submitted, by way of fixed prescription periods and the Commission is of the view that wholesale availability of an open-ended discretion for all causes of action could result in unnecessary uncertainty. Hence the need to assist the judiciary by providing a set of non-exhaustive, non-hierarchical factors it needs to weigh in its decision.

4.13 The Commission considers that this list of factors should be modelled on the statutory guidance provided for in England and Wales, New South Wales, Victoria, New Zealand, and as recommended in Scotland.

4.14 The Commission agrees with the Scottish Commission statement:

*“The purpose of a list of factors in a provision [within a core prescription framework] is to provide clear and simple guidelines to aid practitioners in focusing their pleadings, evidence and arguments; that should assist the courts in performing their task of assessing whether the case before them warrants the exercise of the discretion. Our strong preference is for the listed guidelines to be as straightforward as possible.”*<sup>64</sup>

## Recommendation

4.15 a) *The Commission recommends that the proposed legislation should include a provision for a narrow statutory discretion to either extend or disapply the ultimate prescription period in exceptional circumstances. The exercise of a narrow statutory discretion would allow a prescription period to be*

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<sup>62</sup> ‘Discussion Paper on Personal Injury Actions: Limitation and Prescribed Claims’ (Scottish Law Commission 2006) 132. Para. 3.9.

<sup>63</sup> *ibid.* Para 3.11.

<sup>64</sup> ‘Scottish Law Commission Report on Personal Injury Actions: Limitation and Prescribed Claims’ (Scottish Law Commission 2007) 207. para 3.33.

*extended beyond its expiry. It would be applicable in circumstances where a plaintiff has run out of time, and a defendant seeks to rely on a defence of the matter being statute-barred. The Commission is of the view that this statutory discretion to extend an ultimate prescription period should be available for all causes of action incorporated in these proposed reforms.*

*b) Further, the Commission recommends that, to assist the courts in exercising this discretion, a non-exhaustive list of factors to which the court must have regard before exercising this discretion should be included.*

4.16 In order to implement the above recommendation, it is proposed that the draft Law would make provision on the following lines:

“Judicial discretion in exceptional cases

- (1) The court may extend or disapply a prescriptive period of 15 years under Article 6 if, but only if, the court is satisfied that because of exceptional circumstances it would be unjust not to give such a direction having regard to—
  - (a) any hardship which would be caused to the defendant if the direction were given;
  - (b) any hardship which would be caused to the plaintiff if the direction were not given; and
  - (c) the overall lapse of time between the date of the act or omission giving rise to the cause of action, and bringing of proceedings, and the impact which this lapse of time may have upon the rights of both the plaintiff and the defendant.
  
- (2) In considering whether or not to exercise its discretion under paragraph (1), the court shall have regard to all of the circumstances of the case and in particular to the following (each of which is to be treated as of equal significance)—
  - (a) the length of, and reasons for, the delay on the part of the plaintiff;
  - (b) the effect of the passage of time on the ability of the defendant to defend the claim;
  - (c) the effect of the passage of time on the cogency of any evidence which might be called by the claimant or the defendant;
  - (d) the conduct of the defendant after the cause of action arose, including the extent (if any) to which the defendant responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claim;
  - (e) the extent to which the plaintiff acted promptly and reasonably once the plaintiff knew that the facts gave rise to a claim;
  - (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice the plaintiff may have received;
  - (g) any alternative remedy or compensation available to the plaintiff;
  - (h) the strength of the plaintiff’s case;
  - (i) any conduct of the defendant that induced the plaintiff to delay bringing the action; and
  - (j) the nature and extent of the plaintiff’s injury (including whether it was latent).”



10a	Statutory Discretion to Extend Prescription Periods	The Commission recommends that the proposed legislation should include a provision for a narrow statutory discretion to either extend or dis-apply the ultimate prescription period.	We ask consultees whether they agree with the Commission’s provisional view that the courts should have a discretion to disapply the ultimate prescription period.
10b		The Commission recommends that, to assist the courts in exercising this discretion, a non-exhaustive list of factors to which the court must have regard before exercising this discretion should be included.	The Consultees are asked whether such a list would be welcomed or helpful.

### Multi-jurisdictional transactions

4.17 It is of course common for contractual documents governed by Jersey law to be used for the purposes of financing and other transactions in which other contractual documents, often the principal documents, are governed by the laws of other, generally onshore, jurisdictions. For example, a financing transaction may have the facility agreement and certain related documents governed by the law of England and Wales but a security interest agreement governed by Jersey law due to the relevant collateral (such as bank accounts or shares) being situate in Jersey.

### Implications

4.18 The Commission is keen to hear from consultees who are involved in such multi-jurisdictional transactions as to the perceived implications of the proposed adoption of a three-year basic prescription period for civil claims including claims in contract. If the difference between the proposed period and the limitation or prescription period in other relevant jurisdictions is considered to be likely to have materially adverse effects, the Commission would welcome suggestions as to how to address the issue. For example, might a possible solution be to make express provision in the proposed Law to permit contracting parties to agree the prescription period for a particular contractual arrangement? Thus, in a case where it was considered material to the operation of other, foreign law, transaction documents, the contracting parties could choose to agree a contractual prescription period to align with that of the other transaction documents, thereby displacing for the purposes of the relevant Jersey law contractual document(s) the three-year basic prescription period that would otherwise apply.

## Consultation Question 11

11	Multi-jurisdictional transactions	Consultees' views are sought on the implications of the proposed introduction of a three-year basic prescription period for multi-jurisdictional transactions where some contractual documents are governed by Jersey law and others are governed by the laws of other jurisdictions.	If materially adverse effects are considered likely, consultees are asked for suggestions as to how to address the issue.
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## CHAPTER 5 MISCELLANEOUS AND TRANSITIONAL PROVISIONS

### Commencement – Appointed Day Order

5.1 If the draft Law were to make merely the customary provision that it should come into force 7 days after it is registered by the Royal Court, commencement would be dependent upon whatever date the Law, once it received Royal Assent, happened to return through the official channel for registration. In that event the profession would have scant notice of the date on which prescriptive periods had suddenly (in most cases) shortened.

5.2 If on the other hand a commencement Order were required, practitioners would have proper notice and would be able to prepare. Thus, if the Law were to be registered on (say) Friday 20 September 2024, without needing a commencement Order, the new prescriptive periods would be effective on 27 September 2024. It is recommended therefore that a commencement Order should be used to allow the Minister to provide for the Law to come into force on (say) 1 January 2025, providing proper notice to practitioners etc. and a disciplined run-up to implementation of the new regime.

### Transitional provisions – prescriptive periods already in train

5.3 When the new Law comes into force, there will be many cases in which prescription is already running under existing Jersey law. If the new Law were to leave such cases out of account – i.e. if it were to apply only to civil claims that arose, or to periods of possession that commenced, after it came into force – this could produce unsatisfactory results. For example:

- (i) in the case of a claim in contract, where the loss had occurred 1 month before the Law came into force, the 'old' 10-year (extinctive) prescriptive period would continue for 9 years and 11 months;
- (ii) in the case of peaceable possession of land, where possession had commenced 1 year before the Law came into force, the 'old' 40-year (acquisitive) prescription period would persist for 39 years.

5.4 It is recommended that the most appropriate approach to transitional provisions would be to provide that time occurring before the commencement of the new Law should be reckonable towards

the new prescriptive period in the same manner as time occurring after commencement, but only if any time reckoned in this way was less than the prescriptive period (i.e. as long as this did not have the effect of bringing the prescriptive period to an end at the moment the new Law came into force). The effect of this proposal on the examples given above would be –

- (i) in the case of a claim in contract, where the loss had occurred 1 month before the Law came into force, the ‘new’ core (extinctive) prescriptive period of 3 years would start to run from the date of knowledge of the plaintiff (whether that date was before or after the commencement date of the new Law);
- (ii) in the case of peaceable possession of land, where possession had commenced 1 year before the Law came into force, the ‘new’ 15-year (acquisitive) prescription period would continue until perfected in 14 years’ time.

### Consequential amendments and repeals

5.5 At the same time as the introduction of the new law would be the specific repeal of the customary law prescriptive periods –

- (a) of 30 years for claims of *déception d’outré moitié du juste prix*;
- (b) of 10 years for claims –
  - (i) in contract (and specifically *actions personnelles mobilières*);
  - (ii) for *restitution de meubles*;
  - (iii) in relation to *voisinage*; and
- (c) of a year and a day for claims –
  - (i) in *actions personnelles immobilières*; and
  - (ii) in *actions possessoires*.

Article 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 would also need to be repealed.

5.6 In respect of the reduction of the 40-year period in relation to immeubles/servitudes, consequential amendments to the Code of 1771 will be required, so that the following (in translation) –

*“Persons who have been in peaceful possession of an immovable, without interruption, for 40 years or more shall not be challenged, or disturbed as regards title to that which they possess, forty years’ possession conferring a perfected and unchallengeable right, in accordance with the ancient Custom of the Island, except in relation to servitudes, title to which cannot be acquired by prescription, be it of*

*100 years: from which it is possible to be released, or to acquire release by prescription, that is to say, where the servitude has not been exercised for a continuous period of 40 years.”<sup>65</sup>*

would become, again in translation –

*“Persons who have been in peaceful possession of an immovable, without interruption, for 15 years or more shall not be challenged, or disturbed as regards title to that which they possess, except in relation to servitudes, title to which cannot be acquired by prescription, be it of 100 years: from which it is possible to be released, or to acquire release by prescription, that is to say, where the servitude has not been exercised for a continuous period of 15 years.”<sup>66</sup>*

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<sup>65</sup> <https://www.jerseylaw.je/laws/current/Pages/15.120.aspx>;

<sup>66</sup> [HTTPS://WWW.JERSEYLAW.JE/LAWS/TRANSLATED/PAGES/15.120.ASPX](https://www.jerseylaw.je/laws/translated/Pages/15.120.aspx)

## CHAPTER 6 EFFECT OF THE PROPOSED CORE PRESCRIPTION REGIME

It is worth noting the effect of the core prescription regime recommended in the Paper. The application of the proposed 15-year long-stop enables the basic prescription period of 3 years to commence at any point within the 15-year period. For example, a plaintiff could become aware of (“discover”) the claim at any stage during this 15-year period and, by virtue of that discovery, the plaintiff starts the 3-year period running.

Time would then “run” for the plaintiff and could result in their claim being “statute-barred” in one of two ways: firstly, the plaintiff could discover their cause of action but fail to commence proceedings within 3 years of this discovery, or secondly, the plaintiff might fail to bring proceedings within 15 years of date of the act or omission that gave rise to the right of action, whether or not they had by then discovered it.

In this respect, the potential defendant is offered greater certainty in that, after discovery of the cause of action the plaintiff only has a finite period (3 years) to bring the claim and after 15 years (even if the cause has not been discovered) (being the end of the ultimate prescription period), the defendant receives the benefit that the claim is statute-barred. The advantage for the plaintiff is that the basic prescription period runs from the plaintiff’s discovery of the action, which places emphasis on the state of knowledge of the plaintiff rather than a potentially unknowable date of accrual. For exceptional cases, the 15 year long-stop can be extended under the proposed limited judicial discretion (subject to the otherwise general discretion of the courts to stop a claim if it would be unduly prejudicial to the defendant to allow it to proceed).

Please see Appendix 2 for a series of case studies which demonstrate how the new regime will work in different ‘real life’ scenarios.

## CHAPTER 7 CONSULTATION QUESTIONS

Ref	Subject	Recommendation	Consultation Questions
1	Preferred Terminology	The Commission recommends that the proposed statute embraces a consistent use of the term 'prescription'. 'Prescription', and hence 'prescription period', (or prescriptive) period', will be the predominant conceptual model in the legislation.	The Commission asks whether consultees agree with the Recommendation that 'Prescription' (not Limitation) should be the preferred term and basis of the proposed new statute?
2	Overall Legislative Framework	The Commission recommends the introduction of a prescriptions law based on the model of a "core prescriptive regime", comprising: a uniform basic prescription period, a uniform commencement date; and a uniform ultimate prescription period, and which would apply to the types of claims discussed in this Paper.	It is the Commission's provisional view that there should be a fundamental reform of the law of prescription in order to produce a modern code which is, so far as possible, simple, coherent, fair, clear and cost effective. We ask consultees whether they agree. If consultees disagree, we ask them to suggest any reforms they would favour.
3	Scope of Proposed Legislation	<p>The Commission recommends:</p> <p>a) The Commission envisages that the core prescription regime will apply, in a uniform way, to 'civil claims' which are defined in the draft Law.</p> <p>b) The Commission's view is that breaches of trust should not be subject to the core prescription regimes, and the provisions of the Trusts (Jersey) Law 1984 should not be modified.</p> <p>c) that proceedings under public and administrative laws are not incorporated within the new Statute such that prescription periods for such proceedings are not brought with this regime.</p>	We ask consultees whether they agree with the proposals made as to scope of the proposed law under this section and to provide any comments or suggestions as to adjustments or improvements thereto.

		d) that the proposed reduction in the current 40-year rule of <i>possession quadragénaire</i> should be incorporated within the proposed statute but should be accommodated in provisions that sit outside the core prescription regime and assigned a separate time limit of 15 years in place of the present 40 years.	
4	Basic prescription period	The Commission recommends the introduction of a basic prescription period of general application in respect of the civil claims referred to above, running for a period of three years.	We ask consultees: (1) Do they agree with that recommendation? (2) What period (other than three years) do they consider is more appropriate
5	Reasonable Discoverability: Starting date of the Uniform Basic Prescription Period	The Commission recommends, <b>for all causes of action within the scope of the proposed legislation</b> , a start date of the date of discoverability. In effect, the prescription period runs from the date when the plaintiff becomes aware – or could have become aware if exercising reasonable diligence – of the existence of a cause of action and the relevant facts relating to the cause of action.	We ask consultees whether they agree with the provisional proposals that: (1) the definition of the date of discoverability) should focus on three main factual elements: (a) that the plaintiff becomes aware of a cause of action (b) that the plaintiff is knowledgeable as to the facts relating to the cause of action and c) that there is a defendant against whom action can be taken.
6	Reasonable Discoverability: Plaintiff Knowledge	The Commission recommends that the basic prescription period should run from the date of knowledge of the plaintiff, and that the date of knowledge should be calculated by reference to the date on which the plaintiff first knew, or ought reasonably to have known, the following: (a) that the injury, loss, or damage had occurred; (b) that the injury, loss, or damage is attributable to the conduct of the defendant; (c) that the injury, loss, or damage warrants bringing proceedings, assuming liability on the part of the defendant; (d) the identity of the defendant; and	We ask consultees whether they agree with our provisional views that: (1) actual knowledge should be treated as a straightforward concept and should not be defined in the proposed statute and (2) constructive knowledge should be defined in the measure as “what the plaintiff in his circumstances and with his abilities ought to have known had he acted reasonably.”  If consultees do not agree with the Commission’s

		(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.	views please explain why not, and what alternative approach they would prefer.
7	Ultimate Prescription Period	The Commission recommends the introduction an ultimate or 'long-stop' prescription period of 15 years' duration.	The Commission propose that this ultimate prescription period should run from the date of the act or omission of the defendant which gives rise to the claim. We ask consultees whether they agree
8	Recommendation re Personal Injury	The Commission recommends that the ultimate or 'long-stop' prescription period of 15 years should also apply to personal injuries actions.	We ask consultees whether they agree that the proposed long stop of 15 years should also apply for personal injury claims. If consultees disagree, we ask them whether they would favour a long-stop except for personal injury claims.
9	Inherent Judicial Discretion	The Commission recommends that the proposed prescription legislation should include an express provision or article that it is without prejudice to any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal, or for inordinate, inexcusable and prejudicial delay, or for abuse of process or the vexatious nature of the claim.	The Consultees' views are sought whether such a provision in the proposed measure would assist or inhibit the exercise by the Court of that which is inherent.
10a	Statutory Discretion to Extend Prescription Periods	The Commission recommends that the proposed legislation should include a provision for a narrow statutory discretion to either extend or dis-apply the ultimate prescription period.	We ask consultees whether they agree with the Commission's provisional view that the courts should have a discretion to disapply the ultimate prescription period.
10b		The Commission recommends that, to assist the courts in exercising this discretion, a non-exhaustive list of factors to which the court must have	The Consultees are asked whether such a list would be welcomed or helpful-



		regard before exercising this discretion should be included.	
11	Multi-jurisdictional transactions	Consultees' views are sought on the implications of the proposed introduction of a three-year basic prescription period for multi-jurisdictional transactions where some contractual documents are governed by Jersey law and others are governed by the laws of other jurisdictions.	If materially adverse effects are considered likely, consultees are asked for suggestions as to how to address the issue.
12	Property Prescription - <i>possession</i> <i>quadragénaire</i>	The Commission's recommendations are to bring forward in the proposed draft Law a reduced period of 15 years in place of 40 years in relation to (i) ownership of land by peaceful possession and (ii) the extinguishment of servitudes.	We ask consultees whether they agree that the 40 years established in Jersey law should be replaced by a shorter prescription period of 15 years in relation to (i) ownership of land by peaceful possession and (ii) the extinguishment of servitudes. We would ask if there is an alternative period that consultees would consider appropriate.

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## Appendix 1: Property Prescription - *possession quadragénaire*

### Consultation Paper Recommendations

This Appendix considers the possibilities for reform of *possession quadragénaire*.

Due to the incongruent nature of this right in the context of other prescription periods (addressed by the Consultation Paper) for other causes of action this Appendix will examine the principle of *possession quadragénaire* in more detail, and, cognisant of these differences, make recommendations as to whether a reform should be proposed within the proposed statute or within a separate and future measure, possibly following a broader survey of the Jersey law of immovable property.

### Prescription de Quarante ans (or Possession Quadragénaire)

The 2008 Paper provides a comprehensive review of the principle. In summary, the Code of 1771 states the legal position and, in essence, 40 years' peaceable and uninterrupted possession of an immovable will extinguish the title of the previous owner, and will give a perfect title to the occupier. In respect of servitudes, however, this principle will not allow a servitude to be acquired, although a servitude can be extinguished by its non-exercise for 40 years.

In Jersey, this right is perceived, as per Le Geyt, to exist regardless of the demonstration of 'good faith' by the occupier or 'usurper' of title.

### Adverse Possession- General Comments

Adverse possession rests at the intersection of limitation/prescription law and the law of immovable property and is of significant importance in conveyancing practice. The 40-year prescription period in Jersey means that it is necessary, when checking title to a property (in a system where there is no state guarantee of title), to examine the contents of contracts and other title instruments going back at least 40 years in order to be certain of having good title, to the exclusion of potential competing claims. Furthermore, encroachments onto neighbours' properties, or breaches of negative servitudes such as building restrictions, cannot be regarded as safe from legal action by the relevant neighbour unless one can be satisfied that they have been in place for at least 40 years. The effect on the time required to check title, and consequently the cost of the process, is significant and the position is often less than certain, entailing legal risk and recourse in appropriate cases to title indemnity insurance.

### The Principle of 'Adverse Possession' in Comparative Jurisdictions

#### England and Wales

In England and Wales, the Land Registration Act 2002<sup>67</sup> regulates adverse possession in relation to registered land.<sup>68</sup> The Act provides that anyone who occupies registered land without permission from the owner and treats it as his own for 10 years is entitled to apply to be registered as owner. Specifically, according to paragraph 1(1) of Schedule 6 to the Act:

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<sup>67</sup> Land Registration Act 2002.

<sup>68</sup> the rules applicable to unregistered land remain the same, and 12 years possession is still required to obtain title.

*A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application.*

## Guernsey

In Guernsey, the period of *prescription immobilière* was previously determined by Order in Council of 13 March 1852, in which the 40-year prescription period in “matters concerning the Realty” was reduced to 30 years.

This 30-year period has been subsequently reduced to 20 years by a later Order in Council *Loi relative à la prescription immobilière* (Ordres en Conseil, Vol IV) which provides that:

*“toutes choses immobilières, et actions réelles ou dépendantes de la réalité, qui se prescrivent maintenant par le laps de trente ans seront prescrites par le laps de vingt ans; et suffira la tenue de vingt ans, bien entendu qu’elle soit de bonne foi, pour titre compétent en matière héréditaire.”*

In its 2006 report on Adverse Possession the British Institute of International and Comparative Law observed the spectrum of periods that different jurisdictions have established for the extinguishment of the previous owner’s right to realty but notes a discernible ‘clustering’ around periods between 20-30 years periods.

*“The period after which the ‘real’ owner may no longer bring an action to repossess his land varies widely among jurisdictions from 5 years in the United States to 60 years in the case of claims by the crown; the most typical period being 20-30 years. Where legislatures have amended the limitation period, it has usually been on the ground that the earlier period was ‘too long’, while recognizing that any period is necessarily arbitrary.”<sup>69</sup>*

## Adverse Possession (post-Land Registration Act 2002) and Article 1, Protocol 1 of the European Convention on Human Rights 1950

In *J.A. Pye (Oxford) Ltd v United Kingdom*<sup>70</sup>, the European Court of Human Rights Grand Chamber overturned the original decision of its junior Chamber and held that the automatic termination of a registered owner's title after 12 years possession was not a violation of Article 1, Protocol 1 ECHR<sup>71</sup>.

It decided, determining whether there existed a “*reasonable relationship between the means employed and the aim sought to be realised*”<sup>72</sup>, that effectively there was no violation of Article 1 of

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<sup>69</sup> ‘Adverse Possession-Report by the British Institute of International and Comparative Law for Her Majesty’s Court Service’ (British Institute of International and Comparative Law 2006).

<sup>70</sup> *JA Pye (Oxford) Limited v United Kingdom* [2008] European Court of Human Rights (Grand Chamber) (44302/02) 46 E.H.R.R. 45.

<sup>71</sup> “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

<sup>72</sup> *J.A. Pye (Oxford) Limited v United Kingdom* (n 62). para 75

Protocol 1 in that the English law on adverse possession as a means of control on the use of land (acknowledging at the same time that land was a scarce resource) was proportionate.

The Grand Chamber appears to acknowledge that a domestic state should be given leeway in interpreting Article 1. As specifically stated by the Grand Chamber in its judgment: *“States enjoy a wide margin of appreciation with regards both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified for the purpose of achieving the object of the law in question.”*

## Conclusion

Under Article 4 (1) of Human Rights (Jersey) Law 2000 *“So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.”*<sup>73</sup>

Jersey Courts may be required to consider the compatibility of the new statute under Article 5 of the Human Rights (Jersey) Law and in doing so must take into account *“a judgment, decision, declaration or advisory opinion of the European Court of Human Rights”* and ensuring that the *“reasonable relationship is struck in the proposed statute (by virtue of the chosen length and mechanism deployed)”*.

However, the Commission, considering the judgement of the Grand Chamber, is of the view that so long as a reasonable and balanced reform is brought forward to the 40-year rule, the new law should be sufficiently resistant to meet any such challenge.

## Recommendation

It can therefore be stated that international trends support the case for a significant reduction in the Jersey period. The Jersey Law Commission previously recommended reducing the period to 10 years in its September 2002 Consultation Paper No.6.<sup>74</sup>

*The Commission’s recommendations are to reduce the 40 year period of prescription to 15 years, both in relation to ownership of land by peaceful possession and in relation to the extinguishment of servitudes, and so align it with the 15 year period recommended above as the ‘long-stop’ (extinctive) prescription period in relation the bringing of civil claims.*

In order to implement the above recommendations, it is proposed that the draft Law would make provision on the following lines:

“Acquisition of title to immovables

- (1) If an immovable has been possessed by any person, or by any person and his or her successors, for a continuous period of [15 years], peaceably and without judicial

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<sup>73</sup> Human Rights (Jersey) Law 2000.

<sup>74</sup> Jersey Law Commission, ‘The Jersey Law of Real Property Including the Use of English in Conveyancing’ (2002) Consultation Consultation Paper No.6  
<[https://www.jerseylawcommission.org.je/\\_files/ugd/f5ec37\\_9975147983334fea86f8ec3a638434e3.pdf](https://www.jerseylawcommission.org.je/_files/ugd/f5ec37_9975147983334fea86f8ec3a638434e3.pdf)> accessed 27 June 2023.

interruption, then, as from the expiry of that period, the person shall have good and incontrovertible title to that immovable.

- (2) Accordingly, in the Code of Laws of 1771, under the heading A LA COUR DU SAMEDI for the words from “Les personnes qui ont possédé un immeuble” to “selon l’ancienne Coutume de l’Isle” there are substituted the words –

“Les personnes qui ont possédé un immeuble paisiblement, et sans interruption, [quinze ans], ou au-delà, ne pourront être inquiétés, ni molesté à l’égard de la propriété dans la chose possédée.”

#### Extinguishment of servitudes

- (1) A servitude is extinguished by non-use for a continual period of [15 years].
- (2) Accordingly, in the Code of Laws of 1771, under the heading A LA COUR DU SAMEDI for the words “la servitude n’a point été exercée par quarante ans continuels” there are substituted the words “la servitude n’a point été exercée par [quinze ans] continuels”.

#### Consultation Question 12

12	<u>Property Prescription</u> - <u>possession quadragénaire</u>	The Commission’s recommendations are to bring forward in the proposed draft Law a reduced period of 15 years in place of 40 years <i>in relation to (i) ownership of land by peaceful possession and (ii) the extinguishment of servitudes, .</i>	We ask consultees whether they agree that the 40 years established in Jersey law should be replaced by a shorter prescription period of 15 years in relation to (i) ownership of land by peaceful possession and (ii) the extinguishment of servitudes. We would ask if there is an alternative period that consultees would consider appropriate.
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## Appendix 2: Case Studies

### Case Study 1: Application of the Law of Prescription in a Personal Injury Claim in Jersey

Parties Involved:

Claimant: John Smith

Defendant: XYZ Manufacturing Company

#### **Background**

John Smith, a resident of Jersey, sustained injuries while working for XYZ Manufacturing Company on May 1, 2016. The accident occurred due to a faulty machine, resulting in significant physical and emotional harm to Mr. Smith.

#### **Applicable Law**

In Jersey, the law of prescription governs the time limits within which legal actions must be initiated. The Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 sets out the relevant time periods for tortious claims, including personal injury claims.

#### **2 Extension of period of prescription of actions founded on tort**

*(1) The period within which actions founded on tort may be brought is extended to 3 years from the date on which the cause of action accrued.*

#### **Factual Timeline**

May 1, 2016: The accident occurs, causing injuries to John Smith.

May 1, 2019: John Smith seeks medical treatment and consults with a personal injury lawyer to discuss his potential claim against XYZ Manufacturing Company.

June 1, 2019: John Smith instructs his lawyer to proceed with filing a personal injury claim.

September 1, 2019: The lawyer initiates legal proceedings by filing a claim in the Royal Court of Jersey on behalf of John Smith.

June 1, 2020: XYZ Manufacturing Company raises a preliminary defence, arguing that the claim is time-barred under the law of prescription.

#### **Legal Analysis**

The Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 states that claims against a tortfeasor must be brought within a prescribed time limit. According to Article 2(1) of the law, the time limit for personal injury claims is three years from the date on which the cause of action arose. In this case, the cause of action arose on May 1, 2016, when John Smith sustained his injuries.



However, John Smith filed his claim on June 1, 2019, which falls outside the three-year time limit set by the Act. Therefore, XYZ Manufacturing Company argues that the claim is time-barred and should be dismissed.

### **Outcome**

The Royal Court dismisses John Smith's personal injury claim, stating that the claim was not filed within the three-year time limit specified by Article 2(1) of the law. The court's decision is based on the fact that the claim was filed on June 1, 2019, which is beyond the expiration of the three-year period from the date of the cause of action.

### **Conclusion**

This case study demonstrates how the law of prescription operates in a personal injury claim in Jersey.

### **Proposed Reform**

On the facts the proposed reform would generate the same outcome. It is proposed that the basic prescription period in the new law is the same (3 years) as currently for tortious claims. As John Smith became aware of his injury at the same time as the accident the relevant prescription period begins at the time of the accident. However, had John Smith not become aware of the full extent of his injuries until 36 months later when an occupational doctor examined him fully and he consulted a lawyer then, instead of the prescription period running from the date of injury (the date the cause of action accrued), it will run from the date that John Smith became aware of the extent of his injuries and that he had a claim against the defendant. The principle of reasonable discoverability proposed to be embodied in the new statute will provide a more certain basis for the accrual of the action in such circumstances.

As a result, the prescription period for John Smith's claim commences in May 2019, 3 years after the date of the accident in May 2016. Therefore, as he subsequently brings the claim in September 2019 (within 3 years) he is not time barred and XYZ Company's defence would fail.

## Case Study 2: Application of the Law of Prescription in a Breach of Contract Claim in Jersey

Parties Involved:

Claimant: Sarah Thompson

Defendant: ABC Construction Company

### Background

Sarah Thompson, a resident of Jersey, entered into a contract with ABC Construction Company on June 1, 2018, for the renovation of her property. The contract stipulated a completion date of September 30, 2018. However, ABC Construction Company failed to complete the renovation within the agreed-upon timeframe, resulting in financial losses and inconvenience for Ms. Thompson. Consequently, she decided to pursue a claim against the company for breach of contract.

### Applicable Law

In Jersey, in an action for breach of contract, the prescriptive period in Jersey is commonly stated to be 10 years.<sup>75</sup>

In *Boyd v Pickersgill & Le Cornu (1999) JLR 284* the Court of Appeal assumed that the period automatically commenced on the date of the breach of contract being the date upon which the cause of action is said to arise.

In essence, therefore, Sarah Thompson has a period of 10 years from October 1, 2018 to bring her claim.

### Factual Timeline

June 1, 2018: Sarah Thompson enters into a contract with ABC Construction Company for the renovation of her property, with a completion date of September 30, 2018.

October 1, 2018: ABC Construction Company fails to complete the renovation within the agreed-upon timeframe.

October 1, 2018 - September 30, 2019: Sarah Thompson contacts ABC Construction Company multiple times, urging them to complete the renovation as per the contract.

October 1, 2019: Sarah Thompson consults with a lawyer to discuss her potential claim for breach of contract against ABC Construction Company.

November 1, 2019: Sarah Thompson instructs her lawyer to proceed with filing a breach of contract claim.

November 11, 2020: The lawyer misplaces the instruction and only now initiates legal proceedings by filing a claim in the Royal Court of Jersey on behalf of Sarah Thompson.

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<sup>75</sup> *Racz v Perrier (1979) JJ 151 at 152*: "It is further agreed that if a cause of action founded on contract arises more than ten years before the commencement of proceedings it is barred by prescription...". See also *Maynard v Public Services Committee (1995) JLR 65 at 78*; on appeal, sub nom *Public Services Committee v Maynard (1996) JLR 343*; *Boyd v Pickersgill & Le Cornu (1999) JLR 284 at 287* "The prescriptive period in contract is 10 years"; *Kinsella v Lido Bay Hotel (Jersey) Ltd. (2001) JLR 247 at 253*, in which the longer (contractual) prescriptive period was noted.

November 1, 2021: ABC Construction Company raises a preliminary defence, arguing that the claim is time-barred under the law of prescription.

### **Legal Analysis**

According to customary Jersey law, the time limit for bringing an action for breach of contract in Jersey is ten years from the date on which the cause of action accrued. In this case, the cause of action arose on October 1, 2018, when ABC Construction Company failed to complete the renovation within the agreed-upon timeframe.

As per the law, Sarah Thompson had ten years from the date of the breach to initiate legal proceedings against ABC Construction Company. Sarah Thompson consulted her lawyer and filed the claim on November 11, 2020, well within the ten-year time limit.

### **Outcome**

The Royal Court of Jersey considers the arguments presented by both parties. After careful consideration, the court determines that Sarah Thompson's breach of contract claim is within the applicable time limit.

Consequently, the court allows Sarah Thompson's claim to proceed, rejecting ABC Construction Company's defence of prescription. The court's decision is based on the fact that the claim was filed within ten years of the breach.

### **Conclusion**

In this particular case, Sarah Thompson successfully initiated the claim within the ten-year time limit, enabling her to seek redress for the breach of contract by ABC Construction Company.

### **Proposed Reform**

On the facts the proposed reform would generate the same outcome but the prescription period for this type of contractual claim is reduced from 10 years to 3 years. Hence while Sarah Thompson managed to bring her claim within the new prescription period, she did so with just under one year left. The new prescription period ran from October 1 2018 to October 1 2021.

## Case Study 3: Variant for Latent Damage to Immovable Property

Parties Involved:

Claimant: Emily Thompson

Defendant: XYZ Construction Company

### **Background**

Emily Thompson (Sarah's sister) owns a property in Jersey. Twelve years after XYZ Construction Company completed construction work on her property, she discovers latent damage that was not apparent at the time of completion. Emily believes that the damage is a result of the construction work performed by XYZ Construction Company and decides to pursue a claim for latent damage against them.

### **Applicable Law**

In Jersey, the law of prescription governs the time limits within which legal actions must be initiated, including claims for latent damage.

### **Factual Timeline**

January 1, 2008: XYZ Construction Company completes construction work on Emily Thompson's property.

January 1, 2008 - January 1, 2020: Emily is unaware of any latent damage caused by the construction work.

January 1, 2020: Emily discovers significant structural damage to her property, which she believes is a result of the construction work performed by XYZ Construction Company.

February 1, 2020: Emily consults with a lawyer to discuss her potential claim for latent damage against XYZ Construction Company.

March 1, 2020: Emily instructs her lawyer to proceed with filing a claim.

March 15, 2020: The lawyer initiates legal proceedings by filing a claim in the Royal Court of Jersey on behalf of Emily Thompson.

February 1, 2022: XYZ Construction Company raises a preliminary defence, arguing that the claim is time-barred under the law of prescription.

### **Legal Analysis**

A claim for latent damage must be brought within a period of 10 years from the date on which the cause of action accrued. In this case, the cause of action accrued when the construction work was completed on January 1, 2008.

Emily Thompson had 10 years from the completion of the construction work to initiate legal proceedings against XYZ Construction Company. However, Emily discovers the latent damage on January 1, 2020, which is 12 years after the completion of the work, exceeding the 10-year time limit.

## **Outcome**

The Royal Court determines that Emily Thompson's claim for latent damage is time-barred under the law of prescription.

Consequently, the court dismisses Emily's claim, accepting XYZ Construction Company's defence of prescription. The court's decision is based on the fact that the claim was filed more than 10 years after the completion of the construction work, exceeding the time limit of 10 years under Jersey law.

## **Conclusion**

This case study demonstrates how the law of prescription operates in a claim for latent damage in Jersey. Emily Thompson's claim is dismissed as it was filed more than 10 years after the completion of the construction work, exceeding the applicable time limit. Emily's only hope of having her claim preserved would be if the Court accepted that the principle of *empêchement de fait* had operated to suspend the running of time.

## **Proposed Reform**

The proposed law will contain a provision that, for all causes of action within the scope of the law, the start date shall be the date of discoverability. In effect, the prescription period runs from the date when the plaintiff becomes aware – or could have become aware if exercising reasonable diligence – of the existence of a cause of action and the relevant facts relating to the cause of action.

In the above case, Emily Thompson discovered the damage to her property in January 2020. It is at that point when the clock starts running and, also under the proposed reform, the core prescription period is 3 years from that start date. Therefore, as she brought her claim in the Royal Court in March 2020 she is within both the core prescription period, and also the ultimate 15 year prescription period, for her claim and the defence raised by ABC Construction company would, on the face of it, fail.

## Case Study 4: Application of the Law of Prescription in a Personal Injury Claim by a Former Minor

### Parties Involved:

Claimant: John Adams

Defendant: LMN School

### Background

John Adams was a student at LMN School in Jersey during his teenage years. He endured severe bullying during his time at the school, which had a lasting impact on his mental and emotional well-being. John decides to pursue a claim against LMN School for the bullying he experienced during his time as a minor.

### Applicable Law

In Jersey, the law of prescription governs the time limits within which legal actions must be initiated, including claims for personal injury such as bullying.

In Jersey the relevant statute The Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 which sets out the relevant time periods for tortious claims, including personal injury claims.

### Factual Timeline

September 2011 - July 2016: John Adams attends LMN School and experiences severe bullying during his time as a pupil.

July 2016: John Adams leaves LMN School upon completing his education.

September 2018: John reaches the age of majority (18 years old).

September 2016 - September 2022: John struggles with the emotional and psychological effects of the bullying but does not take any legal action against LMN School.

February 2023 - John begins to have treatment for mental health issues and, soon after, a diagnosis of PTSD is made founded on his childhood experiences at LMN School.

October 2023: John consults with a lawyer to discuss the possibility of pursuing a claim against LMN School for the bullying he experienced during his time as a minor.

November 2025: The lawyer initiates legal proceedings by filing a claim in the Royal Court of Jersey on behalf of John.

### Legal Analysis

The Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 states that claims against a tortfeasor must be brought within a prescribed time limit. According to Article 2(1) of the law, a personal injury claim, including bullying, must be brought within a period of 3 years from the date on which the cause

of action accrued. In this case, the cause of action accrued during the period of bullying, which took place from September 2011 to July 2016.

Therefore, John Adams had 3 years from the date he reached the age of majority, in September 2018, to initiate legal proceedings against LMN School for the bullying he experienced as a minor. However, he did not take any legal action within that timeframe, the proceedings not being brought until 4 years later in November 2025.

### **Outcome**

The court considers whether John Adams's claim for bullying is time-barred under the law of prescription.

Technically, the court might dismiss John's claim, accepting LMN School's defence of prescription. The court's decision would be based on the fact that the claim was filed more than 3 years after John Adams reached the age of majority, exceeding the time limit stipulated by Article 2(1) of the Law.

### **Conclusion**

Under the current law and in this particular case, John Adams's claim might be dismissed as it was filed more than 3 years after he reached the age of majority, exceeding the applicable time limit.

### **Proposed Reform**

Under Article 4 (3) of the proposed statute the basic prescription period for personal injuries does not begin to run until the date on which the person first knew, or ought reasonably to have known of the injury. In the present case it can be ascertained that John Adams first became aware of his PTSD in February 2023. It is at this point that the clock starts ticking not at the date he reached majority as the injury had not yet been discovered.

Therefore, by bringing his claim in November 2025 (less than 3-years after the discovery of the injury period) his claim will not be statute barred.

## Case Study 5: An Examination of Prescription Periods in Voisinage and Tort

### Introduction

This case study looks into the disparities in prescription periods between the causes of action of *voisinage* (neighbour disputes) and tort (specifically, the tort of nuisance) under Jersey law. It explores a scenario involving a dispute between neighbouring property owners and examines the difference in applicable prescription periods for claims brought under *voisinage* as an *action personnelle mobilière* and under the tort of nuisance, as outlined in Article 2(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960. Furthermore, it explores the authority of *Vardon v Holland*, which establishes that infringements on rights in the possession or enjoyment of an immovable result in an "*action possessoire*" that is prescribed after a year and a day. Finally, the study will address the anomalies arising from these different prescription periods and suggest potential remedies through a new statute.

### Case Background

In this case, we have two neighbouring property owners, Mr. T and Mr. S. A dispute arises between them due to activities carried out on Mr. T's property that allegedly cause physical damage, nuisances and disturbances to Mr. S's property, impacting his possession or enjoyment of the immovable. The issue at hand involves both the principles of *voisinage* and the tort of nuisance.

In this case Mr S, depending on the fact may seek three potential remedies; through *voisinage*, nuisance and *action possessoire* each of which he must bring within different prescription periods from the date of the injury to his property. For both Mr T and Mr S these different periods can lead to incongruous outcomes and could be viewed a contrary to the public interest of establishing clear and consistent legal rights.

### **Action Personnelle Mobilière and Prescription Period**

*Voisinage*, as an *action personnelle mobilière*, refers to legal actions related to disputes between neighbours, at least those involving physical damage. In the case of *Clarke v Rockhampton and Antler*<sup>76</sup> the Jersey Court of Appeal provided guidance on the prescription period for claims under *voisinage*. the Bailiff (and subsequently the Court of Appeal) held that the applicable prescription period was ten years.

### **Tort of Nuisance and Prescription Period**

Under the tort of nuisance, individuals can bring claims for damages resulting from an unreasonable interference with the use or enjoyment of their property. In Jersey, Article 2(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960<sup>77</sup> governs the prescription period for the tort of nuisance. It states that actions for nuisance shall be prescribed after the expiration of three years from the date when the cause of action accrued.

### **Action Possessoire and Prescription Period**

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<sup>76</sup> *Gale and Clarke v Rockhampton & Ors* (n 13). [2007] JCA 117B (Court of Appeal),

<sup>77</sup> Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.



According to the authority of *Vardon v Holland*<sup>78</sup>, when an infringement occurs on a party's rights in the possession or enjoyment of an immovable, the resulting action is an "*action possessoire*." In Jersey, an *action possessoire* must be brought within a year and a day from the date of the infringement, such period commencing from the date of the Plaintiff's demand to the Defendant.

### **Conclusion**

The disparities between the prescription periods for *voisinage* (10 years) and the tort of nuisance (3 years) can lead to incongruous outcomes. These anomalies create difficulties for individuals seeking legal recourse for neighbour disputes and nuisances, as the applicable prescription period can significantly impact their ability to bring a claim.

### **Proposed Reform**

Claims that are founded on quasi-contract (including claims in *voisinage*), and those founded on tort are both subject to the same prescription periods under the proposed new Law.

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<sup>78</sup> *Vardon v Holland* (1964) JJ 375.



Jersey

## **PRESCRIPTION (JERSEY) LAW 202-**

**A LAW** to reform the law relating to prescription.

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<i>Adopted by the States</i>	<i>[date to be inserted]</i>
<i>Sanctioned by Order of His Majesty in Council</i>	<i>[date to be inserted]</i>
<i>Registered by the Royal Court</i>	<i>[date to be inserted]</i>
<i>Coming into force</i>	<i>[date to be inserted]</i>

**THE STATES**, subject to the sanction of His Most Excellent Majesty in Council, have adopted the following Law –

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### **PART 1**

## **CORE PRESCRIPTIVE PERIOD FOR CIVIL CLAIMS**

### **1 Interpretation and application**

- (1) In this Part, unless the context otherwise requires –
- “appointed day” means the day appointed by the Chief Minister by Order under Article 15;
- “civil claim” means a claim in respect of –
- (a) a contractual or quasi-contractual obligation; or
  - (b) a civil wrong;
- “contractual or quasi-contractual obligation” includes any obligation enforceable by a claim in –
- (a) an action in –
    - (i) *voisinage*;
    - (ii) unjust enrichment (*enrichissement sans cause*);
    - (iii) fraud (*dol*);

(iv) *déception d'outré moitié du juste prix*; or

(b) an –

(i) *action personnelle mobilière*;

(ii) *action personnelle immobilière*;

(iii) *action en restitution de meubles*; or

(iv) *action possessoire*;

“civil wrong” includes any tort or breach of duty arising in law (whether or not statutory);

“plaintiff” means the person exercising a right to bring a civil claim.

- (2) This Part applies to any civil claim in respect of an act or omission whether the act or omission occurred before or after the appointed day, but this is subject to Article 12.
- (3) This Part does not apply to –
  - (a) prescriptive periods or other time limits specified by another enactment for taking any action or bringing proceedings;
  - (b) prescriptive periods for which this Law (other than this Part) makes provision.

#### **Explanatory Note**

**The definition of civil claim implements the recommendation in Chapter 2 of the Consultation Paper that the core Prescription Period regime should apply to the most commonly litigated civil claims, namely, claims concerning: (a) contracts (including debt-related claims), (b) quasi-contract (sometimes referred to as claims for restitution); (c) torts (that is, non-contractual obligations), for example to an action in the tort of negligence for personal injury, property damage or pure economic loss; or to an action in tort for nuisance (including *voisinage*) or breach of statutory duty and wrongful detention or conversion of an item or chattel and d) actions founded on the principle of unjust enrichment.**

## **2 Guiding rights and interests**

Every person concerned in the application of this Law shall have regard to the following guiding rights and interests—

- (a) the right of a person bringing a civil claim to litigate and of access to the courts;
- (b) the right of the person against whom a claim is initiated to have the claim heard within a reasonable period and to fair procedures; and
- (c) the public interest in the avoidance of delayed claims and the timely administration of justice.

#### **Explanatory Note**

**This article implements the recommendations in Chapter 1 on the guiding rights and interests to be applied in the legislation on prescription periods.**

### **3 Prescriptive period of 3 years for bringing civil claims**

A civil claim may not be brought after 3 years have expired from the date on which the cause of action accrued.

#### **Explanatory Note**

**Article 3 implements the recommendations in Chapter 2 on the introduction of a 3 year uniform basic prescription period of general application, which would apply to the civil claims/ causes of action defined in Article 1 of the draft law.**

### **4 Accrual of causes of action**

(1) The cause of action in relation to a civil claim accrues when the plaintiff first knew, or ought reasonably in the circumstances to have known—

- (a) that the injury, loss or damage had occurred;
- (b) that the injury, loss or damage warranted the bringing of proceedings against the defendant;
- (c) that the injury, loss or damage was attributable in whole or in part to the conduct of the defendant;
- (d) the identity of the defendant; and
- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that other person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any act or omission did or did not, as a matter of law, involve a breach of an obligation or duty is irrelevant.

(2) The date of the plaintiff's knowledge is determined by reference to actual and constructive knowledge.

(3) Constructive knowledge is knowledge that a plaintiff might reasonably have been expected to acquire either—

- (a) from facts observable or ascertainable by the plaintiff; or
- (b) from facts ascertainable by the plaintiff with the assistance of medical or other appropriate professional expert advice.

(4) In spite of paragraph (4) —

- (a) a person will not be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as the person has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and

- (b) a person injured shall not be fixed under this Article with knowledge of a fact relevant to the injury which the person has failed to acquire as a result of that injury.

### Explanatory Note

Article 4 implements the recommendations in Chapter 2 that the basic prescription period should run from the date of knowledge of the plaintiff; and that this should be calculated based on the date on which the plaintiff first knew, or ought reasonably to have known, the following: (a) that the injury, loss, or damage had occurred; (b) that the injury, loss or damage warrants bringing proceedings, assuming liability on the part of the defendant; (c) that the injury, loss, or damage is attributable to the conduct of the defendant; (d) the identity of the defendant; and (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant. Paragraphs (3) and (4) implement the recommendations concerning constructive knowledge.

### 5 Suspension of prescription after accrual

- (1) In computing the period of 3 years under Article 3, no account is to be taken of any period or periods during which the plaintiff is prevented –
- (a) by a practical impossibility (*empêchement de fait*), other than lack of knowledge; or
  - (b) by a legal impediment (*empêchement de droit*),
- from exercising his or her right to commence or to continue legal proceedings.
- (2) Legal impediments include cases in which the plaintiff –
- (a) is under the age of 18 years and is a person for whom a *tuteur* has not been appointed; or
  - (b) is a person who, by reason of lack of capacity, as defined by Article 4 of the Capacity and Self-Determination (Jersey) Law 2016, is not competent to manage his or her affairs or estate and who is not represented by a delegate who –
    - (i) is aware of the claim; and
    - (ii) has the legal capacity to commence the proceeding on behalf of that person or the person's estate.
- (3) For the avoidance of doubt, any period during which the plaintiff is induced to refrain from bringing a civil claim by reason of –
- (a) fraud on the part of the debtor or any person acting on the debtor's behalf; or
  - (b) error induced by words or conduct of the debtor or any person acting on the debtor's behalf,
- is not to be reckoned as, or as part of, the prescriptive period under Article 3.

## Explanatory Note

Article 5 provides for the suspension of the running of the basic prescription period when the plaintiff is prevented by a form of legal or practical impediment (akin to customary *empêchement d'agir*) from exercising his or her right to commence or pursue proceedings. Paragraph 4 establishes that any fraudulent or inaccurate representation by a debtor which induces a plaintiff not to pursue a claim will be discounted for the purposes of calculating the relevant prescription period.

### 6 Extinction of underlying obligation by prescriptive period of 15 years

- (1) Subject to paragraph (2) and to Article 7, an obligation giving rise to the right to bring a civil claim is extinguished altogether at the end date, that is to say, when 15 years has expired from the date of the act or omission that gave rise to that right.
- (2) Paragraph (1) applies only if at the end date –
  - (a) no civil claim has been made in relation to the obligation; and
  - (b) the obligation has not been acknowledged.
- (3) An obligation is acknowledged if either –
  - (a) there has been such performance by or on behalf of the debtor towards discharging the obligation as clearly indicates that the obligation still subsists; or
  - (b) there has been made by or on behalf of the debtor to the creditor or the creditor's agent an unequivocal written admission clearly acknowledging that the obligation still exists.
- (4) In computing the period of 15 years under this Article, no account is to be taken of any period or periods during which the plaintiff is prevented by a legal impediment (*empêchement de droit*) within the meaning of Article 5 from exercising his or her right to commence or to continue legal proceedings.

## Explanatory Note

Article 6 implements the recommendations on the introduction of a 15 year ultimate prescription period, also known as a “long-stop”. It also provides for the suspension of the long-stop prescription period when the plaintiff is prevented by a legal impediment (*empêchement de droit*) from exercising his or her right to commence or to continue legal proceedings. This 15 year “long stop” is subject to the narrow discretion to extend provided for in Article 7 of the draft Law, below.

### 7 Judicial discretion in exceptional cases

- (1) The court may extend or disapply a prescriptive period of 15 years under Article 6 if, but only if, the court is satisfied that because of exceptional circumstances it would be unjust not to give such a direction having regard to—

- (a) any hardship which would be caused to the defendant if the direction were given;
  - (b) any hardship which would be caused to the plaintiff if the direction were not given; and
  - (c) the overall lapse of time between the date of the act or omission giving rise to the cause of action, and bringing of proceedings, and the impact which this lapse of time may have upon the rights of both the plaintiff and the defendant.
- (2) In considering whether or not to exercise its discretion under paragraph (1), the court shall have regard to all of the circumstances of the case and in particular to the following (each of which is to be treated as of equal significance)—
- (a) the length of, and reasons for, the delay on the part of the plaintiff;
  - (b) the effect of the passage of time on the ability of the defendant to defend the claim;
  - (c) the effect of the passage of time on the cogency of any evidence which might be called by the claimant or the defendant;
  - (d) the conduct of the defendant after the cause of action arose, including the extent (if any) to which the defendant responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claim;
  - (e) the extent to which the plaintiff acted promptly and reasonably once the plaintiff knew that the facts gave rise to a claim;
  - (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice the plaintiff may have received;
  - (g) any alternative remedy or compensation available to the plaintiff;
  - (h) the strength of the plaintiff's case;
  - (i) any conduct of the defendant that induced the plaintiff to delay bringing the action; and
  - (j) the nature and extent of the plaintiff's injury (including whether it was latent).

### **Explanatory Note**

**Paragraph (1) implements the recommendations in Chapter 4 on the introduction of a narrow judicial discretion to extend or otherwise disapply the ultimate prescription period (the long stop) in exceptional circumstances. Paragraph (2) implements the recommendations in Chapter 4 on the factors to be taken into account in exercising the narrow judicial discretion. The 15 year long stop in Article 6 of the draft Law will deal with most unusual cases, such as latent personal injury or latent property damage or other loss. The limited judicial discretion in Article 7 is intended to deal with other highly exceptional cases where this may not always be the case and the limited discretion allows for an extension if the criteria in Article 7 are met.**

### **8 Jurisdiction of court to dismiss claims**

Nothing in this Part affects any power of a court –

- (a) to dismiss a claim on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal;
- (b) to dismiss a claim where this arises from—
  - (i) such inordinate, inexcusable and prejudicial delay that a hearing of the claim would not be consistent with the administration of justice or fair procedures, or

- (ii) abuse of process or the frivolous or vexatious nature of the claim.

#### **Explanatory Note**

**This Article implements the recommendations in Chapter 4 that the law on prescription periods is without prejudice to the existing jurisdiction of the courts to dismiss a claim. This includes cases that are dismissed on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal. It also includes cases that are dismissed because of such inordinate, inexcusable and prejudicial delay that a hearing of the claim would not be consistent with the administration of justice or fair procedures. It also includes dismissing a claim for abuse of process or the frivolous or vexatious nature of the claim (such as where a litigant repeatedly returns to court with the same claim).**

#### **9 Saving**

Nothing in this Part revives any right of action which was barred by prescription before the appointed day.

#### **Explanatory Note**

**This article clarifies that there is to be no revival of any action already barred by prescription by the implementation of the new Law.**

## **PART 2**

### **PRESCRIPTIVE PERIODS IN RELATION TO IMMOVABLE PROPERTY**

#### **10 Acquisition of title to immovables**

- (1) If an immovable has been possessed by any person, or by any person and his or her successors, for a continuous period of [15 years], peaceably and without judicial interruption, then, as from the expiry of that period, the person shall have good and incontrovertible title to that immovable.
- (2) Accordingly, in the Code of Laws of 1771, under the heading A LA COUR DU SAMEDI for the words from “Les personnes qui ont possédé un immeuble” to “selon l’ancienne Coutume de l’Isle” there are substituted the words –

“Les personnes qui ont possédé un immeuble paisiblement, et sans interruption, [quinze ans], ou au-delà, ne pourront être inquiétés, ni molesté à l’égard de la propriété dans la chose possédée.”



## **11 Extinguishment of servitudes**

- (1) A servitude is extinguished by non-use for a continual period of [15 years].
- (2) Accordingly, in the Code of Laws of 1771, under the heading A LA COUR DU SAMEDI for the words “la servitude n’a point été exercée par quarante ans continuels” there are substituted the words “la servitude n’a point été exercée par [quinze ans] continuels”.

### **Explanatory Note**

**This article gives effect to the Recommendations in Appendix 1 to reduce the existing 40 year period of prescription to 15 years, both in relation to ownership of land by peaceful possession and in relation to the extinguishment of servitudes, and so align it with the 15 year period recommended above as the ‘long-stop’ (extinctive) prescription period in relation the bringing of civil claims.**

## **PART 3 MISCELLANEOUS AND CLOSING**

### **12 Prescriptive periods that commenced before the appointed day**

In the computation of a prescriptive period for purposes of any provision of this Law, time occurring before the appointed day shall be reckonable towards the prescriptive period in the same manner as time occurring after the appointed day, but subject to the restriction that any time reckoned under this Article must be less than the prescriptive period.

### **Explanatory Note**

**This article is a transitional provision to accommodate those claims that are already in train when the new Law comes into force. The article provides that time occurring before the commencement of the new Law should be reckonable towards the prescriptive period in the same manner as time occurring after commencement, but only if any time reckoned in this way was less than the prescriptive period (*i.e.* as long as this did not have the effect of bringing the prescriptive period to an end at the moment the new Law came into force).**

### **13 Repeal of certain prescriptive periods at customary law**

So much of the customary law is repealed as provides for a prescriptive period –

- (a) of 30 years for claims of *déception d’outré moitié du juste prix*;
- (b) of 10 years for claims –
  - (i) in contract (and specifically *actions personnelles mobilières*);
  - (ii) for *restitution de meubles*;
  - (iii) in relation to *voisinage*; and

(c) of a year and a day for claims –

- (i) in *actions personnelles immobilières*; and
- (ii) in *actions possessoires*.

#### **Explanatory Note**

**This article repeals the various customary law prescriptive periods currently in force.**

#### **14 Consequential amendment**

Article 2 of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960 ([jerseylaw.je](http://jerseylaw.je)) is repealed.

#### **Explanatory Note**

**This article repeals said Article.**

#### **15 Citation and commencement**

This Law may be cited as the Prescription (Jersey) Law 202- and comes into force on such day as the Chief Minister may by Order appoint.

#### **Explanatory Note**

**This article requires the law to come into force through an Appointed Day Order to provide proper notice to the legal community and a disciplined run-up to implementation of the new regime.**