Thank you for consulting the RIAS on the Prescription (Scotland) Bill 2018.

With over 5000 members the Royal Incorporation of Architects in Scotland (RIAS) is the professional body for all of Scotland’s chartered architects. Our members work in over 1000 architectural practices of all sizes, as well as in areas of industry from housebuilding to local and central government. The RIAS has charitable status and offers wide range of services and products for architects, students of architecture, construction industry professionals and all those with an interest in the built environment and the design process.

The Scottish law commission made proposals for the reform of particular aspects of the law on prescription as a consequence of the Supreme Court decision in D T Morrison & Co Ltd v ICL Plastics Ltd [2014] UKSC 48 in a discussion paper which included a response form which the RIAS completed and submitted to the SLC. The draft bill attached to the SLC discussion paper, subject to one small alteration, was introduced on 8 February 2018 in the Scottish Parliament as the Prescription (Scotland) Bill (the ‘Bill’). The Bill amends the Prescription and Limitations (Scotland) Act 1973 (the ‘73 Act’). The committee handling the Bill (the Delegated Powers and Law Reform Committee) has requested interested parties to submit responses to a number of questions posed by the committee by 4 April 2018. The questions are set out below in bold with some explanation relative to the Bill after each question, where appropriate, and my initial response.

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

The main issues addressed by this Bill are:
- Obligations covered by 5-year prescription extended and simplified
- New test for start of 5-year prescription for clarity (see new section 11(3A))
- However, 5-year period can be extended by up to a year by agreement after claim made (to allow time to negotiate settlement without having to start proceedings)
- The 20-year long stop to be truly a long stop (to start when the act or omission occurred not when the damage caused occurred and there to be no interruption but a claim made before the long stop end can be pursued to a conclusion)

We have no concerns regarding the overall approach taken in this Bill, given the restricted scope of this particular reform of the law.
2. Do you think that negative prescription produces harsh results in individual cases? (You could illustrate by way of examples if you think that would be helpful to the committee). If so, is this acceptable in policy terms?

The present 20-year long stop does produce harsh results for RIAS Members as it needs both an act, neglect or default and the loss, injury or damage caused by that act or omission to start the period running. This is particularly harsh in construction cases, as interpreted by the courts, where the loss, injury or damage is interpreted as physical damage. Physical damage in a building may not occur for many years, whatever the cause, and it is only when there is actual damage, provided the damage can be attributed to an act, neglect or default, that the 20-year long stop starts to run. Thus, where an office floor was under designed but was still useable, although a little bouncy, it was only 30 years later when the client wished to make alterations and had an engineer check the floor that it was found to be under designed and needed to be strengthened and even at this stage there was still no physical damage. In another case tanking was omitted in part of a building erected in 1981 but the water ingress only occurred in 2015 when the water table was particularly high. By that time both the Architect and the Builder were dead, and their businesses wound up. Having title to sue 30 years or more after the defective work was executed may be of little value as by that time there may be no one to sue. However, the fact that the 20-year long stop period has such an indeterminate start point does mean that RIAS members have to maintain Professional Indemnity Insurance (“PII”) cover for many years after they retire and presents problems to insurers who have to defend stale claims, and this can be reflected in insurance premiums.

The present 5-year short period, post Morrison v ICL Plastics, presents a different problem in that a party with a defective building may need to sue everyone involved before they have been able to identify the most likely culprits just to avoid their title to sue prescribing. This can lead to unnecessary legal actions and costs to all concerned, including RIAS Members, who may be innocent parties but, because of the need to stop the prescriptive period running, are included in any proceedings just in case, again leading to time and money expended defending unnecessary actions and to increased PII premiums.

As indicated above, the present prescriptive long stop, with, in construction cases, its indeterminate starting point, can lead to exposure to stale claims without giving any real remedies to those suffering the loss as, even if they can find someone to sue, they may find it difficult to produce the necessary evidence to show liability. Whilst the present position in relation to the short prescriptive period may force those with defective buildings to sue before they know who is responsible, in order to avoid their claim prescribing. In such circumstances all those involved in the design and construction of such a building, including RIAS Members, may be subject to legal action involving both the pursuers and the defenders in unnecessary legal expense. Some of that expense could be avoided if the injured parties were given time to identify the delinquent party before the short prescriptive period starts to run.
3. Do you agree to the proposed extension in section 3 to the scope of the 5-year negative prescription, so it would apply to all statutory obligations to make payment (unless there are policy reasons to except them)?

This appears to be a general tidying up and does not appear to impact particularly upon Architects any more than any other citizens, taxpayers or businesses. As such we have no particular opinion on this subject.

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

We have no particular views on these exceptions.

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

This is a threefold test (i) damage has occurred (for buildings this is usually physical damage), (ii) caused by person’s or persons’ act or omission, and (iii) the person or persons are identified (with specific exclusion of the need to establish legal liability). We appreciate that one cannot make liability, and thereby the start of the prescriptive period, contingent upon awareness of legal remedies. However physical damage to buildings of which the owner is aware (the starting point for the short prescriptive period) is often difficult to attribute to any particular act or omission by a particular person without also investigating the legal liability of the persons involved.

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

In relation to the effect on construction works of the short prescriptive period (section 5), given the dangers noted before, that building defects can often take time to manifest themselves, it is reasonable to have a discoverability test and given the case law showing how differently awareness of such loss injury or damage is interpreted it is also reasonable to set out clearly the facts of which the creditor should be, or ought to be, aware to start the prescriptive period. The facts (occurrence of loss, injury or damage, caused by an identified person’s act or omission) appear ascertainable and, by requiring the potential delinquent or delinquents to be identified should focus any legal action on those most likely to be liable and to reduce legal actions which subsequently prove irrelevant.

The effect on construction works of the present long prescriptive period (section 8), given the dangers noted before, is that some acts or omissions relative to the design and/or construction of buildings may never give rise to physical defects (such defects being interpreted by the courts as the loss, injury or damage referred to in the `73 Act) or, if they do, those defects may not manifest themselves for many years (as much as 30 years or more). To avoid such uncertainty and the need for RIAS Members to maintain PII for many years into the future to cover stale claims, there needs to be an
ascertainable starting point and the proposed starting point of the date that the last such act or omission occurred or, where continuing, the date it ceased, appears reasonable.

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

Section 7 in the '73 Act is amended so that any obligations covered by that section are extinguished after 20 years from the start of the 20-year period without any interruption (previously allowed). We agree with this as it gives more clarity and certainty in relation to the long stop.

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

Section 6 allows for the 20-year period to be extended for claims made prior to the expiry of the 20-year period to allow for those claims to be finally disposed of or any proceedings relative to those claims to come to an end (there are similar provisions relative to the 20-year period in which to exercise property rights (section 7). This appears fair and reasonable as it allows any proceedings that have been commenced within the prescriptive period to be concluded or otherwise disposed of.

9. Do you have any concerns about those sections of the Bill (sections 4, 13 & 14) that seek to clarify the law on prescription?

We have no concerns regarding the amendments to section 6 of the '73 Act introduced by section 4 of the Bill. It appears sensible to reduce the matters to be proved especially such things as ‘inducement’ and ‘intention’. With regard to section 13 of the Bill allowing the parties to agree an extension, but only after the prescriptive period has commenced, to the short prescriptive period of up to one year this also appears reasonable and may encourage parties to negotiate settlements rather than starting legal proceedings merely to stop prescription running. Again, the clarification of the onus of proof in section 14 of the Bill appears reasonable and should assist in clarifying the law.

10. What are the financial implications of the Bill?

From the point of view of the RIAS the main financial implications will be in relation to PII. The greater clarity as to the start of the short prescriptive period and the associated test requiring the identity of the person whose act or omission has caused the loss, injury or damage to be ascertained before an action can be raised, should reduce the number of scattergun and premature actions reducing legal costs for both defenders and pursuers. Making the log stop period a true long stop with a more certain start, no interruption and an end only extendable where proceedings have already commenced should also lead to fewer stale claims and less need for long ‘run off’ cover and the worry that the estates of the deceased may be pursued.
11. The Scottish Government says that the Bill will increase clarity, certainty and fairness. (It also says it will promote a more efficient use of resources (in that people will be less likely to have to raise court proceedings to preserve rights) and will reduce costs for those involved in insurance and litigation. Do you agree with this assessment?

Yes.