I am grateful for the opportunity to assist the Committee and apologise for missing the deadline for submission.

Having reflected on the Bill, the comments made on it in evidence before the committee so far, as well as the Scottish Law Commission’s report, I think there are a couple of issues where I can helpfully provide some further detail principally around completion of construction projects and the point at which prescription can start to run (which is a narrow and relatively technical point) and the potential interaction of alternative dispute resolution procedures with the proposed “standstill” agreements.

These hopefully supplement the other evidence given by construction industry stakeholders.

Before going on it is worth briefly introducing the backdrop for consideration in the construction law context.

Construction Law

The need for the law to balance certainty in the terms of its rules alongside flexibility to cope with changing circumstances is particularly important in construction law given the complexity, the number of interlocking arrangements in a project and the likelihood of change to the scope of the project being delivered.

However, the balance in terms of the law around prescription is however somewhat different since the relationships which are involved will have most likely ended – at least in the sense of the particular contract or the most productive elements of it being complete (in short: the work will have been done) – at some point before prescription issue come into play. To that extent there is less need for flexibility and a greater need for certainty in the law.

Starting point for 5 prescriptive periods (sections 5)

In terms of the starting point, the options identified by the SLC at para 3.4 of the Report, represent a clear sliding scale from one to four in terms of the level and timespan of engagement from a party who may have a claim. The higher up that scale, the less is required from the party suffering a loss before the prescriptive period starts. The placing of the law at one point on this scale is a policy choice balancing the onus on getting issues resolved with the pressure it puts on those who have potentially suffered losses to resolve the various issues arising from those losses.

On construction specific points, the discussion on specific exclusions for construction contracts at paras 4.42 - 4.47 of the SLC report is noted. I agree with the view expressed that there is no case for a distinction to be made between the various contracts. As noted above clarity and certainty is the key principle here. That is assisted by as uniform a set of rules as possible.

Starting point for 20 year prescriptive period (section 8)

In terms of 20 year prescription, there is a construction law dimension relates to the timing of the "act or omission" which triggers the obligation – as covered in clause 8 of the Bill. As the RIAS set out

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1 Scottish Law Commission, Report on Prescription No. 247, July 2017
2 Clause 8 of the Bill
in their evidence, a start date needs to be clearly identified, as much as anything so that an end date for the purposes of insurance can be decided upon.\textsuperscript{3} That is, of course, correct.

The RIAS and Fenella Mason have identified the issue where a defect in design can take a long time to manifest itself as an issue. No particular view is expressed on that point in terms of starting point – but the introduction of standstill agreements, discussed below, may assist.

There is another issue, however, in terms of the start of the period and which has been of relative controversy that it is worth noting the position on. That issue is the identification of the date of loss caused by defective performance in the construction works themselves\textsuperscript{4}.

In construction projects there has been some discussion which would be relevant here and some of this is captured in paras 4.44 and 4.45 of the SLC report.

The issue arises about identifying when work “becomes” defective. That is when the “act, neglect, or default” in the current wording or “act or omission” from the Bill arises. If the requirement is an “act or omission” there needs to be (in the words of Mr Howie QC for the Faculty of Advocates) an identifiable time when “the omission stops”\textsuperscript{5} without that, there is no point against which an end date for prescription can be plotted. The discussion in paragraph 4.13 of the SLC report captures the position well and can be illustrated, in construction terms, in the following way.

In a standard construction project, this can be illustrated by reference to the various points for when the prescription “clock” would start. These are as follows

1. The time when the actual work is carried out defectively. So, simplistically and ignoring the way in which it might cause a loss: if the wrong brick is laid in place (for whatever reason). In terms of the drafting in the Bill this would correspond most clearly with the "act" referred to in the phrase "act or omission".

2. At practical completion. That is, the point at which work is substantially complete.\textsuperscript{6} At that point, the contractor essentially is presenting the (broadly) finished work – at least for the phase or section which has been undertaken. Up until that point, there is technically the opportunity to correct the defective work – change the brick to a correct one. (This may put the contractor to significant practical expense, and have consequences in terms of its other contractual obligations but in terms of the particular issue of defective performance – that would sound at this point).

   Although there is no further defective act here, there is an omission to correct the error when there is an opportunity to do so.

3. At some other contractually stipulated date. Most construction contracts – especially for significant projects – provide for a period after practical completion when the contractor has the opportunity to rectify any defects which are identified in that period (rather than it

\textsuperscript{3} RIAS written evidence to the Delegated Legislation and Law Reform Committee at http://www.parliament.scot/Prescription%20(Scotland)%20Bill/SPBill26S052018.pdf at point 6.

\textsuperscript{4} See e.g. para. 4.7 of the SLC Report

\textsuperscript{5} Official Report, Delegated Powers and Law Reform Committee, 27 March 2018 (“Official Report”) at col.11

\textsuperscript{6} “See Keating on Construction Contracts, (10th ed, 2017) at para. 4.019: “In determining whether there has been substantial or practical completion one test, in the absence of a contractual definition, is whether the work was “finished” or “done” in the ordinary sense, even though part of it is defective”
resulting in an immediate claim for breach of contract and damages). There is a school of thought that the omission did not end until that point had been reached.

The principal tension in construction law has been between points 2 and 3. As picked up in clause 4.44 of the SLC report, there is case law to suggest that the period only begins on the issuing of the final certificate. As noted in the case law, below, there is a difference where the defect is identified in this period and where it is not. In the former situation, the breach of obligation is the breach of the obligation to make good the defect in the relevant period, rather than the original failure to carry out the work properly.

4. It could possibly be said that any omission to correct a defect continues past the point. This is the risk which Mr Howie identified in giving evidence on behalf of the Faculty of Advocates.

The case of Huntaven Properties Limited v Hunter Construction (Aberdeen) Limited and others [2017] CSOH 57 provides support for point 2. It distinguishes the position between defects which were latent at practical completion and which remained latent with those which were patent or became patent in the defects liability period. It leaves open the possibility of point 1 on the basis that in the facts of that case it could be said that the loss had been suffered “by practical completion” (So it was open to potentially argue that the loss was suffered beforehand – and that ought not to be discounted in appropriate circumstances). Point 3 is engaged where defects arise and are not rectified in the contractually agreed period. The case law referred to at para 4.44 of the SLC report was distinguished – and did not bind the court in Huntaven.

In the subsequent case of McClure Naismith v Harley Haddow Partnership [2017] CSOH 125, counsel for both sides appeared to accept the reasoning in Huntaven on this point.

This all fits in my view with the SLC’s recommendation on the start date of the 20 year prescriptive period. In the framework in Huntaven type cases there ought to be a means to identify when the relevant “act or omission” could have occurred with sufficient certainty – even pursuing an appropriately cautious approach – to allow for forward planning for a time after which no claims might be made.

**Interruption of 20 year period**

The point was made by the RIAS in their written evidence and by Fenella Mason of Burness Paull in her evidence about the difficulties where the 20 year period was to run following an issue with the design arising in a large project on the basis that the design could have been completed some time ago. On the assumption that that sort of issue would most likely arise in large projects (smaller projects taking proportionately less time to complete) that would support an argument that a standstill agreement could be put in place to allow investigation.

Other than that, to be clear and as is proposed, the long prescriptive period ought to encompass the completion of proceedings – so if a relevant claim is made in year 19, then it ought to run to conclusion.

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7 Although this judgement was issued before the Report was produced and is referred to in the report on different points from the one under discussion, consultees are unlikely to have had the benefit of it in responding to the Discussion Paper.
8 See discussion in [2017] CSOH 57 paras. 51 - 59
9 [2017] CSOH 125 at para. 15
10 Echoed by RIAS in their written evidence to the Committee
11 Official Report, 27 March 2017 at cols. 24 - 25
The judge ought to be empowered to take steps to ensure that relevant information is captured in that sort of situation relatively early.

**Restriction on contracting out. (s.13)**

The allowance of “standstill agreements” prevents court actions having to be raised merely to meet a prescriptive deadline is beneficial as, even if the action is being raised transparently for reason of avoiding a prescriptive deadline, it still consumes some additional effort beyond a standstill agreement (the action needs to be sufficiently detailed to meet the requirements of fair notice of the claim) and could raise the stakes in any wider discussion around resolution of the dispute, unnecessarily. It is therefore to be welcomed.

Moreover, there is a safeguard in the Bill in the sense that (at least as far as one party might be concerned) the agreement has to occur after the event giving rise to a claim has arisen – rather than being added, pro-forma, into the original contract. That ought to avoid the issue of extended prescriptive periods being imposed by parties with stronger commercial bargaining positions – which is one of the concerns of the Faculty of Advocates.

In terms of the restriction to one extension for one year, this seems too limited. The call for evidence asks for views on the statement:

> “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?”

However, efficiency is not enhanced in my view by the restriction imposed on standstill agreements.

In particular, it might impede the ability of parties to use the full range of alternative dispute resolution processes available. These ADR processes could lead to a faster and more cost effective resolution than full blown court or arbitration proceedings.

Commonly, large construction projects will have “escalation” provisions within the agreement as to dispute resolution. That is, the parties will often agree to work through increasingly formal and adversarial processes to try and resolve a dispute. The steps below litigation or arbitration do not count as “relevant claims” for the purposes of stopping the prescription clock.

Specifically, the comments of the RIAS in terms of construction adjudication – as recorded and discussed at paras. 7.23 and 7.24 of the SLC report are noted. This is one example of dispute resolution processes that lie outside the scope of the definition of “relevant claims”. That adjudication takes a relatively short time and can run in parallel with litigation or arbitration means that its exclusion from “relevant claim” does not pose particular prescription issues in my view. However, it might be that allowing parties to agree a standstill to the prescription period to pursue their statutory right to

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12 The proposed amended Clause 13 (2) (a)
13 Noted from the evidence of Robert Howie QC, Official Report, Delegated Powers and Law Reform Committee, Col. 15
14 These are controlled by s. 9(1) of the 1973 Act, as potentially amended.
adjudicate would be a useful means of taking account of that point while not disrupting the overall, and generally well understood, scheme for prescription.

That would also apply to widening the definition of “relevant claims” further – and moreover, the flexibility and overlaps between the various forms may obscure the requirements, which would be undesirable and make the provisions less certain.

However, giving parties some freedom to pursue these mechanisms would be desirable and the concern is that the restrictions currently set out in the Bill are too tight. That concern is amplified by the following points.

1. If parties do not wish to live with that level of uncertainty for longer, they do not need to agree to an extension of the prescriptive period.

2. One of the key purposes of prescription is to ensure that parties are not exposed to stale claims and are able to plan for a “post-claim” period for their various obligations. Where parties are actively choosing to engage in a standstill agreement, then the justification of these protections which prescription rules provide is weakened: parties are aware of the potential for litigation and claims and ought to be taking steps to protect their position and preserve evidence.

3. While alternative forms of dispute resolution do not necessarily count as “relevant claims” the time to both prepare and execute them falls within the 5 year period – this puts pressure on those processes compared with the formal “relevant claims” for which the full five years is allowed. It is more likely that a resolution will be reached where parties have had the opportunity to develop their positions fully.

4. Even if an alternative dispute resolution procedure is not successful, it may well lead to a focussing of the issues that if a relevant claim is advanced, it can be dealt with more quickly. The ADR process should therefore be encouraged from that perspective.

5. The court process after a relevant claim is not dealt with in the Bill (correctly) but as a matter of practice the “relevant claim” can be a formality followed by a lengthy period when the action does not proceed on the basis that the parties have then agreed a “sist” or freezing of the action. While the practical impact is largely the same, in those cases, a pre-action agreement is preferable to avoid the added pressure of litigation which can alter the dynamic between the parties. Although relatively straightforward procedurally, that process does still engage the parties and court system in a process which could be avoided – and without having the potential of adding pressure to negotiations of having a pending court action.

6. If parties only get one ‘bite’ at an extension, it would seem that a one year extension becomes the obvious default – rather than one which might be shorter but tailored to a particular form of dispute resolution. That might actually lengthen the period to resolution.

7. In construction claims, in particular, the resolution of one claim can set out of a potential sequence of claims. Those claims might be contingent on the result of an "earlier" claim. While it might be that this sequence means that there would be no starting of a prescription clock in the latter cases before the earlier ones are resolved, it would make sense that parties can enter into standstill agreements which are tied to that proviso. That would aid dispute
resolution by requiring engagement with the issues and attempting to investigate (or at least giving the opportunity to do so) rather than leaving them to go stale.

While it is clearly to be hoped that parties can resolve disputes within the 5 years, there ought to be scope for them to agree to delay matters and for that agreement to be more open ended than currently proposed.

11 April 2018