

## **Contract Law – Review of Retention**

### **Summary and Analysis of Consultation Responses**

#### **Background**

1. The Scottish Government [consulted](#) on the [Scottish Law Commission \(SLC\) Report on Review of Contract Law](#) in July 2024. The aim of that consultation was to establish whether the landscape around this area of the law has changed since the Report was published in March 2018 and if so whether the changes are material to the recommendations contained in that Report. It also sought to confirm that the view of consultees received by the SLC are still broadly held.
2. One of the issues tested in the consultation was the need for reforms around the principle of mutuality and, particularly, retention. While retention is the legal term by which the remedy is known, it is the temporary withholding or suspending of performance of contractual obligations that are due to be performed.
3. In short, some of the responses indicated that in the light of case law subsequent to the SLC's Report, the law in relation to retention of performance is now *less* clear than when the SLC published its Report and that the law would benefit from clarification. The Scottish Government then [consulted](#) to seek views on what any reform should look like and this is a summary and analysis of the responses received.

#### **Summary**

4. The Scottish Government's consultation opened on 11 March 2025 and ran for 12 weeks. A total of 12 responses were received - 8 from individuals and 4 from organisations - and a list of respondents can be found at the Annex of this document.
5. This paper summarises the key points raised by respondents.
6. To protect the reputation of Scottish Ministers, named individuals, organisations and companies, responses were screened for potentially defamatory statements before they were made available to the public. The Scottish Government has published the responses of those who gave consent.
7. The questions were framed to elicit a broad range of responses and because of the wide range of open comments submitted we have opted to provide an analysis of each question, as set out below.

### **Scottish Government response**

8. This analysis demonstrates both that there is support for reforming the law of retention and that there is consensus on the scheme consulted upon. As one respondent put it, “[t]his reform may seem technical but actually could have significant impact: it provides a mechanism which helps lay people to resolve disputes without court intervention and upholds fundamental ideas of contract law.”

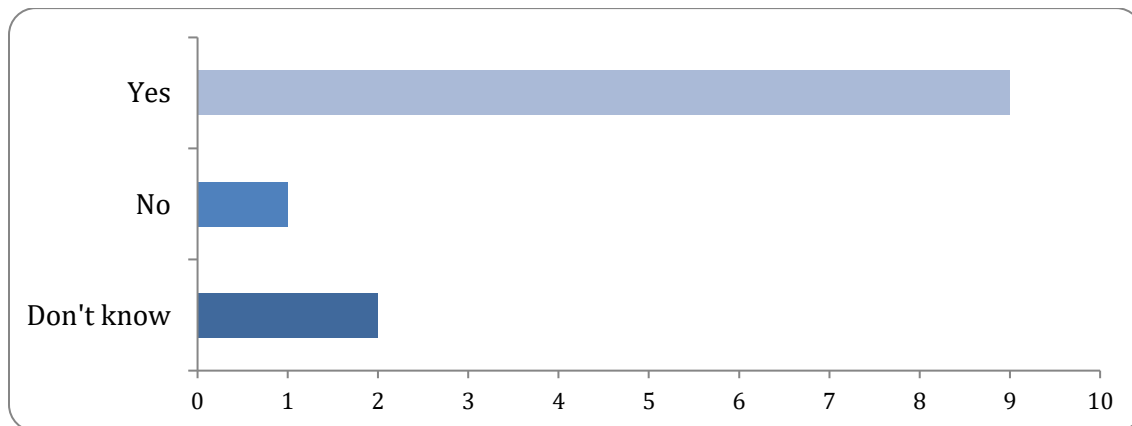
### **Next steps**

9. The Scottish Government intends to bring forward, by way of amendment to the Contract (Formation and Remedies) (Scotland) Bill, which was Introduced to the Scottish Parliament on 2 October 2025, provisions that will reform the Scots law of contractual retention (otherwise known as mutuality retention).
10. A draft of these provisions along with an Explanatory Note and a Policy Note can be accessed via the [consultation homepage](#).

## Summary of responses to each question in the consultation paper

11. What follows is an analysis of the open comments provided for each question in the consultation.

### Question 1: Would the statutory scheme set out in the consultation paper address the concerns about the law of retention?



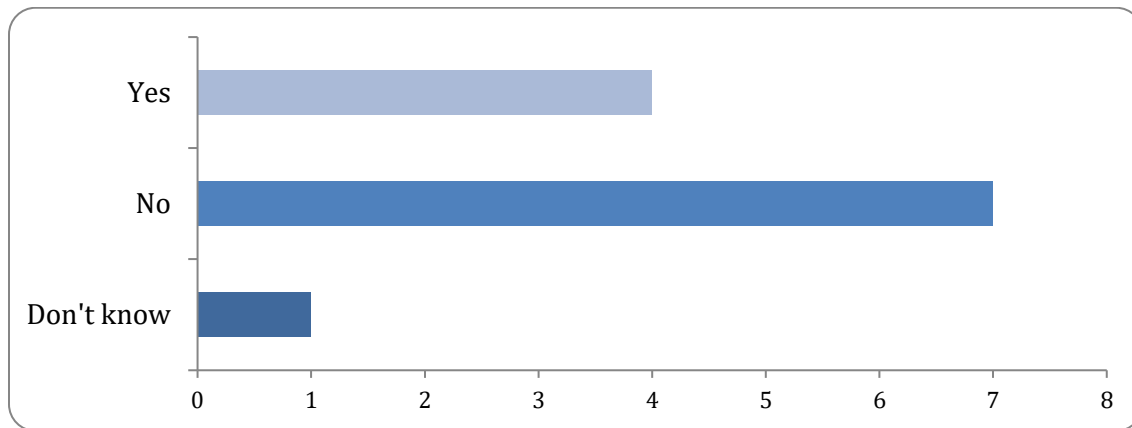
Option	Total	Percent
Yes	9	75.00%
No	1	8.33%
Don't know	2	16.67%
Not Answered	0	0.00%

12. A majority of respondents agreed that the statutory scheme would address the concerns about the law of retention.

13. While saying that the overall scheme is logical and clear, David Christie emphasized that consideration should be given to simplification while SNIPEF, a trade association for plumbing and heating businesses based in Scotland and Northern Ireland, said that the scheme “[...] is a positive step toward clearing up an area of law that has become confusing and inconsistent.”

14. Of those who answered no, Dr Ainslie did so “[...] because there are aspects of the proposed scheme that I would not support [...]” while there are other aspects of the scheme that would be strongly supported.

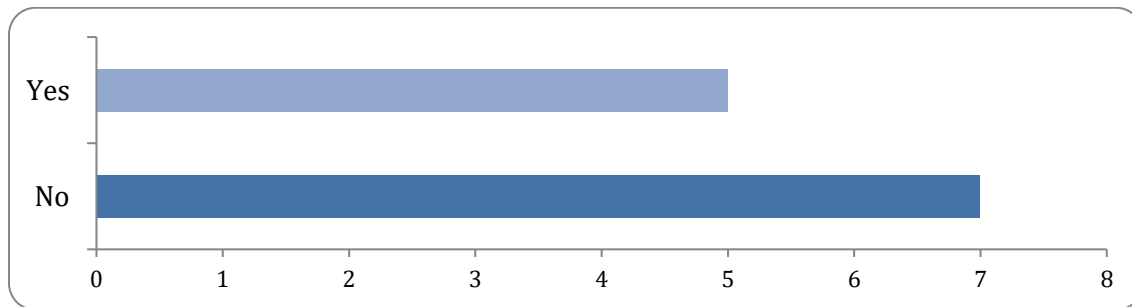
**Question 2: Do you think there are any components missing from the scheme?**



Option	Total	Percent
Yes	4	33.33%
No	7	58.33%
Don't know	1	8.33%
Not Answered	0	0.00%

15. A majority of respondents did not think that the scheme set out in the consultation paper was missing some component.
16. Of those who disagreed, Respondent A suggested that there is a question as to whether the scheme adequately covers the variety of language used to cover things that look like (and may in law be) retention.
17. Respondent C wrote that the scheme could describe how the 'non-trivial' threshold should be assessed in practice, while David Bartos said that provision 15(g) and (i) are missing some specific components.
18. SNIPEF suggested that the scheme could be strengthened by adding clearer protections for small businesses, such as how long money can be retained after performance, whether tools like Project Bank Accounts can be used to keep retention money safe and monitoring the use of retention in public contracts.

**Question 3: Do you think any of the components listed should not feature in the scheme?**



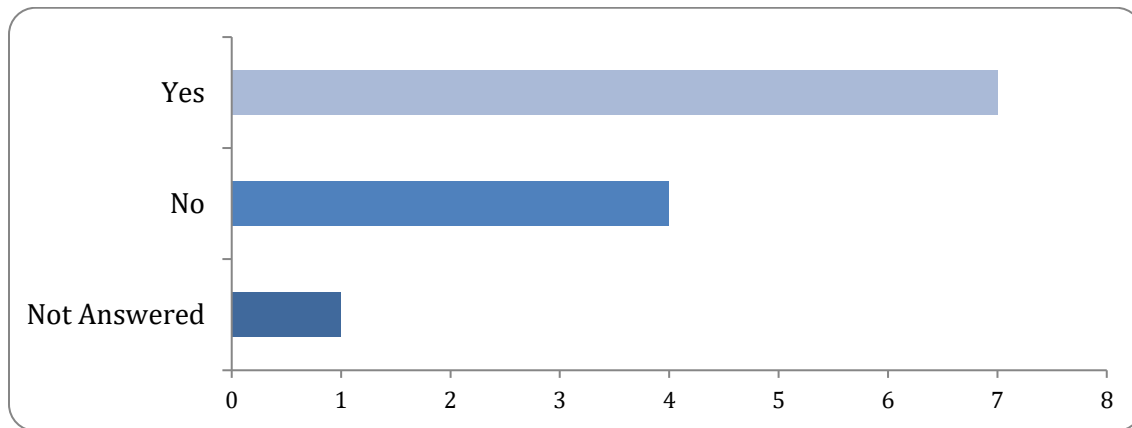
Option	Total	Percent
Yes	5	41.67%
No	7	58.33%
Don't know	0	0.00%
Not Answered	0	0.00%

19. A small majority of respondents thought that none of the scheme's components should not feature in legislation.

20. Of those who disagreed, it was said that the following aspects should not feature:

- 15(e) Despite being in different contracts, obligations may be counterparts where they form part of one transaction.
- 15(i) Retention can be, but is not limited to, securing future performance and can be used even if the contract has come to an end in respect of obligations subsisting when it ends.
- 15(l) Should A have obligations to perform before B performs, but before A has performed her obligations B makes clear that he will not perform his obligations when the time comes to perform or will do so in such a manner that he will be in material breach of the contract, then A has the right to retain her performance notwithstanding that her obligations are due to be performed before B's obligations. With the exception of permitting retention of performance in response to an anticipatory refusal to perform, as set out in this rule, nothing in these rules affects the law in relation to anticipatory breach of contract.

**Question 4: Do you have any general comments on the proposed scheme?**



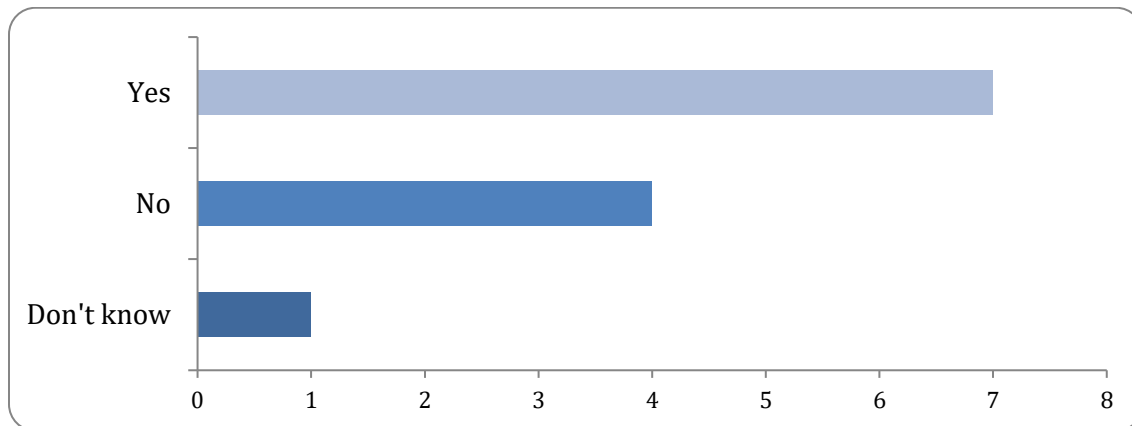
Option	Total	Percent
Yes	7	58.33%
No	4	33.33%
Not Answered	1	8.33%

21. A number of respondents made some general comments about the scheme.

22. It was said, for instance, that the scheme should be “checked against” various practical scenarios, or that clear guidance should be published about how the scheme would work in practice.

23. SNIPEF said that the scheme is a positive development, particularly for the construction sector, where confusion and abuse of retentions often results in delays, disputes and unnecessary litigation.

**Question 5: In relation to provision (f) do you consider that the non-trivial adverse effect requirement is necessary?**



Option	Total	Percent
Yes	7	58.33%
No	4	33.33%
Don't know	1	8.33%
Not Answered	0	0.00%

24. The scheme consulted upon included a provision that for party A to have the right to retain, there should be no need/requirement for party B's breach of contract to be material. The breach must have an adverse effect or effects for A which are not trivial.

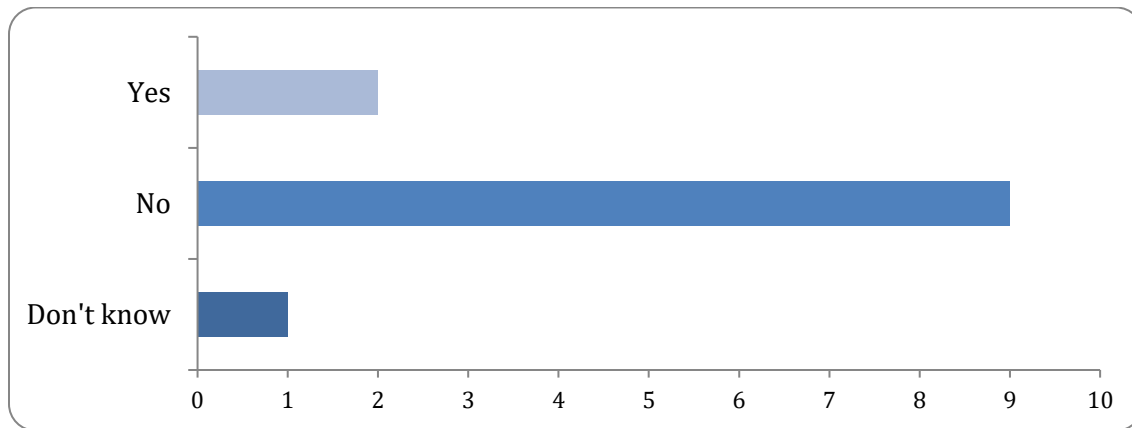
25. A majority of respondents considered that the non-trivial adverse effect requirement is necessary. The Scottish Law Agents' Society thought that this is sensible so as to prevent a minor breach in performance by party A being treated by party B as sufficient to justify the exercise of the right of retention. SNIPEF said that it sets a fair limit preventing people from abusing retention.

26. Of those who thought otherwise, David Christie suggested that it may simply add an unnecessary step as a breach must already be 'clearly disproportionate'. Dr Ainslie said that the requirement of materiality was inappropriately read across from the remedy of rescission in the 19<sup>th</sup> century case law and that, therefore, non-triviality or some other kind of de minimis rule is the only threshold needed.

- The Scottish Government agrees with the argument put forward by those who suggested this was unnecessary given that in order to retain performance it must not be clearly disproportionate to the effects of the other party's breach. Therefore, in order to retain performance, the breach must not be clearly

disproportionate (instead of requiring the breach to have a non-trivial adverse effect on Party A). That is a sufficient and clear test for the parties to apply.

**Question 6: Do you have any concerns about a statutory statement of the law of retention given the general approach of the SLC not to recommend a general statutory statement of the law of remedies for breach of contract?**

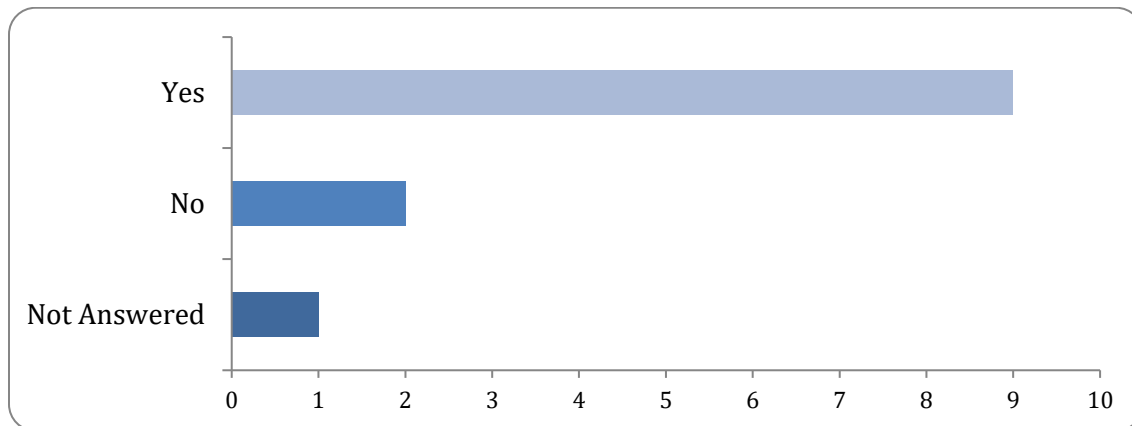


Option	Total	Percent
Yes	2	16.67%
No	9	75.00%
Don't know	1	8.33%
Not Answered	0	0.00%

27.2 respondents had concerns about a statutory statement of the law of retention given the general approach of the SLC not to recommend a general statutory statement of the law of remedies for breach of contract.

28. Respondent A said that the scheme, if proceeded with, would be a piecemeal codification of contract law and that this does not move Scots law onwards in a material fashion, while another said that care needs to be taken ensure retention fits into the general law of remedies for breach of contract.

**Question 7: Do you have any views on whether retention should be available in response to an anticipatory refusal to perform?**



Option	Total	Percent
Yes	9	75.00%
No	2	16.67%
Not Answered	1	8.33%

29. The majority of respondents agreed that retention should be available in response to an anticipatory refusal to perform.

30. Of those who disagreed, Dr Ainslie said that a repudiation, if it is accepted by the innocent party, should result, logically, in rescission.

31. David Bartos, while saying that he is not persuaded of its utility, suggested that if anticipatory retention was permitted then Party A should be obliged to notify Party B of the anticipatory retention. The Scottish Government sees the force in this argument and proposes to make this change to the scheme by way of amendment to the Contract (Formation and Remedies) (Scotland) Bill.

**Question 8: Do you have any views on whether these provisions should be made in primary or secondary legislation?**

32. All the respondents who answered this question said that any change to the law should be done by way of primary legislation.

## **Annex - List of respondents to the consultation**

33. Responses to the consultation were received from:

- Respondent A;
- The Scottish Law Agents' Society;
- Respondent B;
- David Christie;
- Respondent C;
- Angus Council;
- David Bartos;
- Panagiota Koutsoukou;
- Laura Macgregor, Hector MacQueen, Lorna Richardson, & Martin Hogg;
- Dr Jonathan Ainslie;
- Scottish and Northern Ireland Plumbing Employers Federation (SNIPEF);  
and,
- James Drummond Young.