

**IMPROVING PAYMENT PRACTICES IN THE CONSTRUCTION  
INDUSTRY –**

**CONSULTATION ON PROPOSALS TO AMEND  
PART II OF THE HOUSING GRANTS CONSTRUCTION AND  
REGENERATION ACT 1996 AND  
THE SCHEME FOR CONSTRUCTION CONTRACTS (SCOTLAND)  
REGULATIONS 1998**

**ANALYSIS OF CONSULTATION RESPONSES**

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**Acknowledgements**

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## EXECUTIVE SUMMARY

This is the analysis of responses received to the Scottish Executive's (now the Scottish Government) consultation from 29 August 2007 to 24 October 2007 which sought industry views on the proposals that were developed to amend the Housing Grants, Construction and Regeneration Act 1996 (the Construction Act).

### Background

In January 2003 the Scottish Government issued a Consultation Document '*Improving Adjudication in the Construction Industry*' and published the Consultation and Proposals Report<sup>1</sup> in May 2004.

However, this was overtaken by the subsequent effects of the Chancellor's Budget announcement in March 2004 of a Review of the Construction Act<sup>2</sup>. This Review, led by Sir Michael Latham, reported in September 2004 that although the Construction Act was generally working well some improvements would be helpful.

Since March 2005 the Department of Trade and Industry (DTI now Department of Business, Enterprise and Regulatory Reform (BERR)) and the Welsh Assembly Government (WAG) have conducted two consultation exercises to develop the necessary amendments required.

Responsibility for the Construction Act is devolved to the Scottish Parliament therefore in an effort to minimise any divergence for the construction industry across the United Kingdom the Scottish Government undertook a similar consultation exercise to BERR from 29 August to 24 October 2007. Although the Scottish Government's consultation was conducted independently the proposals contained within it replicated the proposals contained in BERR's consultation issued on 20 June 2007.

### Consultation Proposals

The 2007 consultation paper "Improving Payment Practices in the Construction Industry" put forward the following proposals:

#### Introduction of a 'slip rule' to enable the correction of errors

- Provision to allow the adjudicator to correct errors and omissions in their decisions.

#### Adjudication

- Removing the requirement for contracts to be 'in writing for the Construction Act to apply';
- Prohibiting agreements that interim or stage payment decisions will be conclusive;
- Introducing a statutory framework for the costs of adjudication.

1 <http://www.scotland.gov.uk/Publications/2004/05/19360/37122>

2 <http://www.berr.gov.uk/sectors/construction/constructionact/page13956.html>

## **Payment Framework**

- Preventing the unnecessary duplication of payment notices;
- Clarifying when a payment notice should be served;
- Clarifying the content of payment and withholding notices;
- Clarifying what constitutes the sum due;
- Prohibiting pay-when-certified clauses.

## **Suspension**

- Improving the right of suspension.

## **Other Issues**

- Clarification of the implication of the House of Lords judgement on Melville Dundas vs George Wimpey.

## **Consultation Responses**

There was broad support for the proposed amendments set out in the consultation.

### **Minimising Divergence**

Respondents unanimously agreed that we should continue to work to minimise divergence across the United Kingdom, subject to legal difference between Scottish and English law.

### **Introduction of a 'slip rule' to enable the correction of errors**

There was undivided support for the introduction of a provision allowing the adjudicator to correct errors and omissions in their decisions and 7 days was generally agreed as an acceptable period to review the adjudicator's decision.

### **Adjudication**

The responses for the proposed amendments on adjudication were exceptionally robust.

- Almost all of the respondents supported our proposal to remove the requirement that contracts should be in writing for the provisions of the Construction Act to apply.
- Our proposal on conclusive decisions was welcomed – although some felt it might be better to deal with this issue with a different legislative solution.
- Our proposal in relation to the introduction of a statutory framework for the costs of adjudication was broadly welcomed.

### **Payment**

There was understandably a range of diverse views in relation to the proposed amendments to the payment framework. However on balance, it was generally felt that our proposals would improve the operation of the existing statutory framework.

- The removal of the requirement to issue a payment notice for contracts subject to a third party certification process received mixed responses with some questioning the extent to which it was an issue.
- Respondents broadly welcomed the increased clarity and transparency our proposals were seeking to introduce to the existing statutory framework, although some felt that the issues concerning payment would be best dealt with through guidance.

- The proposal to abolish “pay-when-certified” clauses was broadly welcomed although this support was subject to the detailed mechanisms being made sufficiently robust.

## **Suspension**

Our proposal to improve the right of suspension received unanimous support.

## **The judgement of the House of Lords in Melville Dundas -vs-George Wimpey**

It was clear the recent House of Lords decision in Melville Dundas vs George Wimpey had given rise to some confusion and just over half of the respondents were keen to see some clarification in statute to make it clear that other than in cases of a subsequent insolvency, the requirement for the payer to issue a section 111 withholding notice should apply.

## **Way Forward**

The Construction Act applies in Scotland and the legislation is devolved to the Scottish Parliament. To support consistency of content and timing for the construction industry across the UK, the Scottish Government has continued to work with BERR and the other devolved administrations.

The responses and subsequent analysis of the consultations issued in 2007 by BERR and the Scottish Government have informed the development of draft Bill Clauses which BERR have published for technical scrutiny.

The Cabinet Office’s current consultation on the UK Government’s draft legislative programme for 2008/09 – *Preparing Britain for the Future* – indicates the UK Government’s intention to introduce the provisions to amend the Construction Act as part of the Community, Empowerment, Housing and Economic Regeneration Bill.

Scottish Ministers have confirmed their agreement in principle, to the extension of the Construction Act amendments to Scotland. In accordance with the Sewel Convention the Scottish Ministers will seek the consent of the Scottish Parliament by means of a Legislative Consent Motion to extend to Scotland the Construction Act provisions to be included in the Community, Empowerment, Housing and Economic Regeneration Bill.

BERR have published the draft Bill Clauses and an Explanatory Note which can be found at <http://www.berr.gov.uk/sectors/construction/constructionact/page13956.html>

In anticipation of the consent of the Scottish Parliament to a Legislative Consent Motion the draft Bill Clauses also extend to Scotland and include a Scottish only provision for a slip rule to enable the correction of errors in an adjudicator’s decision.

## INTRODUCTION

In January 2003 the Scottish Executive (now the Scottish Government) issued a Consultation Document on '*Improving Adjudication in the Construction Industry*' and published the Consultation and Proposals Report<sup>1</sup> in May 2004. This was however overtaken by the subsequent effects of the Chancellor's Budget announcement in March 2004 of a wider Review of the Construction Act<sup>2</sup>.

The Scottish Government decided to await the outcome of the Review to decide if other changes identified would have relevance for Scotland, to ensure that, where possible, arrangements north and south of the border remained consistent for the industry.

Following the Budget announcement, Nigel Griffiths, then Parliamentary Under Secretary of State at Department of Trade and Industry (DTI now Business Enterprise and Regulatory Reform (BERR)) asked Sir Michael Latham to review the operation of the Construction Act. Sir Michael's findings were published in September 2004. His report concluded that the Construction Act is generally working well but some improvements would be helpful if means could be found to deliver them without adverse impacts on other parties or other elements of payment processes.

Following the Latham report, BERR issued in March 2005, jointly with the Welsh Assembly Government (WAG), a first consultation document, *Improving Payment Practices in the Construction Industry*. This looked at a number of issues where amendments to the existing Act may be needed and covered both the payment framework and adjudication.

On 20 June 2007 BERR and WAG published a second joint consultation paper considering amendments to the Construction Act, which would be taken through UK Parliament by the UK Government and would affect both England and Wales. This consultation ended on 17 September 2007 with a total of 71 responses being submitted and BERR have produced an analysis of responses received<sup>2</sup>.

In an effort to minimise any divergence for the construction industry across the United Kingdom a similar consultation exercise was undertaken in Scotland from 29 August to 24 October 2007. Although Scotland's consultation was conducted independently the proposals within it replicated the proposals in BERR's consultation. A total of 13 responses<sup>3</sup> were received with 9 of those responding to the questions within our questionnaire and 3 others providing standard letters endorsing the views of the Scottish Confederation of Associations of Specialist Engineering Contractors/Specialist Engineering Contractors Group of whom they are constituent members. A further response was received after our deadline and has not been included in this analysis.

While this document provides an analysis of those responses it should be borne in mind that due to the relatively low number of responses received there is a limit to the value of this analysis which can only provide an indication of the measure of support for our proposals.

1 <http://www.scotland.gov.uk/Publications/2004/05/19360/37122>

2 <http://www.berr.gov.uk/sectors/construction/constructionact/page13956.html>

3 <http://www.scotland.gov.uk/Publications/2007/11/16132331/0>

In considering the responses we have kept in mind:

- The need for improvement in payment practices under the legislation for all concerned;
- The need to respect the principle of freedom of contract, though at times it may be essential to intervene;
- The continuing development of case-law in adjudication and payment provisions in relation to the Construction Act.

# ANALYSIS OF CONSULTATION RESPONSES

## Chapter 1 – Outstanding Issues From The Scottish Government Report On The Consultation ‘Improving Adjudication In The Construction Industry’ In 2003

### Consultation Proposals

- Minimising Divergence.
- Introduction of a ‘slip rule’ to enable the correction of errors.

#### **1. Minimising Divergence**

The support for cross border uniformity to minimise any divergence across the United Kingdom wherever possible, subject to legal differences between Scottish and English law, was unanimous by all respondents who completed the questionnaire and was also endorsed by those who provided a narrative response.

#### **2. Introduction of a ‘slip rule’ to enable the correction of errors**

There was undivided support for the introduction of a provision to allow the adjudicator to correct errors and omissions in their decision and 7 days was generally agreed as an acceptable period to review the adjudicator’s decision.

## Chapter 2 – Adjudication Framework

### Consultation proposals

- Removing the requirement that the Construction Act should only apply to contracts in writing;
- Prohibiting agreements that interim or stage payment decisions will be conclusive;
- Introduction of a statutory framework for the costs of adjudication.

#### **1. Removing the requirement that the Construction Act should only apply to contracts in writing**

There was a high level of support for this proposal. It was felt that widening the scope of the Construction Act to include oral as well as written agreements was a vital step to the improving the effectiveness and reducing costs of adjudication.

The following comments were made by respondents:

*“We welcome the new proposal which will reduce the costs of adjudication and thereby improve accessibility.”*

*“We are delighted to see this proposal. This is a vital issue and so long as it is unresolved there is a danger of the whole policy of adjudication being undermined.”*

Our proposal suggested that certain important contractual provisions – specifically any provisions relating to a contractual adjudication scheme – will need to continue to be in writing. This was supported by 89% of respondents who completed the questionnaire and was also endorsed by those who provided a narrative response.

There were concerns that increasing access to adjudication with the removal of the requirement to agree a contract in writing would result in an increase of oral contracts in the construction industry. 62.5% of respondents who completed the questionnaire supported the view that this change is unlikely to encourage more oral or partly oral contracts in as much as the wider business benefits of contracting on a clearly recorded basis are understood. This was also endorsed by those who provided a narrative response.

## **2. Prohibiting agreements that interim or stage payment decisions will be conclusive**

All respondents who completed the questionnaire supported an amendment to the Construction Act to prohibit agreements that decisions as to the amounts of payments whether by instalment, stage or other periodic payments are conclusive.

*“The Construction Act never envisaged those types of provisions and we believe the isolated example of those practices ought to be curtailed.”*

This was a typical example of the statements which provided confirmation that the proposal would be welcomed by the industry.

However, supporting narrative from some respondents indicated varying views on how this amendment should be achieved.

*“The proper solution is the deletion of paragraph 20a of the Scheme and (except for settlement agreement) making ineffective any provision that seeks to make a decision final and conclusive.”*

Some respondents identified the importance of there being a period of time, (a minimum of 28 days was proposed) during which decisions could be challenged.

It was also suggested that the reference in the consultation to the term “agreements” should be taken to mean “contract terms”.

## **3. Introduction of a statutory framework for the costs of adjudication**

There was majority support for an amendment to the Construction Act to prohibit agreements as to the allocation of the costs of the adjudication until after the adjudicator was appointed.

44% of respondents who completed the questionnaire agreed with the proposal that the adjudicator should have no jurisdiction as to cost unless the parties made an agreement to that effect after the appointment of the adjudicator. However 33% did not consider that an agreement could be entered into after the appointment of the adjudicator.

There was majority support for the adjudicator being legally entitled to claim for their fees and expenses, with 89% of respondents who completed the questionnaire agreeing. There was however a more mixed response regarding the parties being jointly and severally liable for the adjudicator's fees and expenses, with some saying that they felt that the adjudicator should have no right to deal with party costs at all.

## **Chapter 3 – Payment Framework**

### **Consultation proposals**

- Prevention of unnecessary duplication of payment notices;
- Clarification of the requirement that a section 110(2) payment notice should be served;
- Clarity of the content of payment and withholding notices;
- Clarity of the “sum due”;
- Prohibiting the use of pay-when-certified clauses.

#### **1. Prevention of unnecessary duplication of payment notices**

There were mixed responses for the proposal to allow a notice or certificate from a third party to act as a section 110(2) payment notice with 44% of respondents who completed the questionnaire and one narrative response agreeing with the amendments. A further 56% of respondents who completed the questionnaire disagreed with this proposal for various reasons offering views that the industry would benefit from the issue of guidance and education, that this amendment would add an unnecessary complication when it has never been identified as an issue and would only affect a minority of contracts while incurring substantial costs.

Where the proposal was accepted it was suggested that there was a need to make it absolutely clear in the draft wording that:

- The third party actually has the right under the contract to issue a certificate;
- That the certificate from the third party is issued or copied directly to the payee – not an intermediary.

#### **2. Clarification of the requirement that a section 110(2) payment notice should be served**

Of the respondents who completed the questionnaire only 33% disagreed with this proposal with 22% stating they had received no complaints of any mass failing of the service of payment notices under section 110(2).

56% of respondents who completed the questionnaire agreed that the process of issuing a section 110(2) payment notice should be improved. However, where comments were provided the view was that any drafting should, if possible, be without reference to “set-off” or “abatement” as the purpose of the payment notice should be that it responds to an application for payment and should simply constitute what is to be paid and the grounds for paying that sum. This was supported in other responses where it was agreed that a payment notice should be issued whenever the payer intends to pay an amount other than that which was applied for and that the notice should include an explanation of the difference.

#### **3. Clarity of the content of payment and withholding notices**

There was clear support from 56% of respondents who completed the questionnaire to all the questions asked. However, comments provided to the proposal for combining the section 110(2) and section 111 notices were varied. A supporting comment stated:

*“A revision of the payment notice would simplify procedures and provide greater clarity as to the amount due.”*

It was however recognised that respondents did not agree with any of the proposed amendments to the payment framework with the following comment.

*“We firmly believe that the issues concerning payment would be best dealt with through guidance as opposed to amendment of the existing legislation.”*

#### **4. Clarity of the “sum due”**

The principle behind this proposal was broadly welcomed with only 2 respondents who completed the questionnaire rejecting it.

Some in the industry wanted to see the proposal clarified to include claims issued before the due date, (e.g. applications for payment) whether they were required or not.

#### **5. Prohibiting the use of pay-when-certified clauses**

This proposal was broadly welcomed with 67% of respondents who completed the questionnaire supporting it, although it was stated that the support was subject to the detailed mechanisms being made sufficiently robust.

The remaining 3 respondents who completed the questionnaire did not support the proposal and 2 of those raised concerns that if implemented, it would be excessive and would interfere with the parties’ freedom to contract and may well ‘stifle innovation in the future’.

### **Chapter 4 – Improving The Right To Suspend Performance**

Support was unanimous for amending section 112 of the Construction Act to include provisions allowing the suspending party to:

- claim a reasonable amount in respect of costs of remobilisation;
- claim an extension of time for meeting any contractual deadlines imposed by the party in default of payment for any delay to the completion of work caused by the exercise of the right to suspend; and
- clarify that they may suspend any or all of their contractual obligations to the party in default of payment.

### **Chapter 5 – The Judgement Of The House Of Lords In Melville Dundas - Vs- George Wimpey**

The consultation also considered what, if anything, might be done in response to the House of Lords decision in Melville Dundas v George Wimpey.

56% of respondents who completed the questionnaire agreed that the Construction Act should be amended to make it clear that other than in cases of a subsequent insolvency, the requirement for the payer to issue a section 111 withholding notice should apply.

## WAY FORWARD/NEXT STEPS

The Construction Act applies in Scotland and the legislation is devolved to the Scottish Parliament. To support consistency of content and timing for the construction industry across the UK, the Scottish Government has continued to work with BERR and the other devolved administrations.

The responses and subsequent analysis of the consultations issued in 2007 by BERR and the Scottish Government have informed the development of draft Bill Clauses which BERR have published for technical scrutiny.

The Cabinet Office's current consultation on the UK Government's draft legislative programme for 2008/09 – *Preparing Britain for the Future* – indicates the UK Government's intention to introduce the provisions to amend the Construction Act as part of the Community, Empowerment, Housing and Economic Regeneration Bill.

Scottish Ministers have confirmed their agreement in principle, to the extension of the Construction Act amendments to Scotland. In accordance with the Sewel Convention the Scottish Ministers will seek the consent of the Scottish Parliament by means of a Legislative Consent Motion to extend to Scotland the Construction Act provisions to be included in the Community, Empowerment, Housing and Economic Regeneration Bill.

BERR have published the draft Bill Clauses and an Explanatory Note which can be found at <http://www.berr.gov.uk/sectors/construction/constructionact/page13956.html>

In anticipation of the consent of the Scottish Parliament to a Legislative Consent Motion the draft Bill Clauses also extend to Scotland and include a Scottish only provision for a slip rule to enable the correction of errors in an adjudicator's decision.

### Enquiries

Enquiries about this consultation process or the contents of this report should be addressed to Audrey Macdonald, The Scottish Government, Construction Advice and Policy Division, 3-G(N) Victoria Quay, Edinburgh EH6 6QQ. Alternatively please phone 0131 244 2072 or e-mail

[audrey.macdonald@scotland.gsi.gov.uk](mailto:audrey.macdonald@scotland.gsi.gov.uk)

### Confidentiality

Responses to the consultation have all been made public by the Scottish Government unless respondents specifically asked that their response or identity remained confidential. The responses are available at:

<http://www.scotland.gov.uk/Publications/2007/11/16132331/0>

# **Annex 1 – List of consultation respondents**

## **Categories of respondents**

### **Professional Bodies**

- 13 Association for Consultancy and Engineering (ACE) response
- 11 Civil Engineering Contractors' Association (Scotland) (CECA) response
- 04 Electrical Contractors Association of Scotland (SELECT) response
- 08 Heating and Ventilation Contractors' Association (HVCA) response
- 06 National Specialist Contractors' Council (NSCC) response
- 12 Royal Institution of Chartered Surveyors (RICS) response
- 10 Scottish Building Federation (Confidential response)
- 03 Scottish CASEC and SEC Group response
- 05 Scottish and Northern Ireland Plumbing Employers' Federation (SNIPEF) response
- 07 The Chartered Institute of Building (CIOB) response

### **Individuals**

- 02 Professor Peter Hibberd response
- 09 Confidential response

### **Legal**

- 01 Burness LLP response
- 14 Faculty of Advocates response (received after deadline therefore not included in this analysis)

## ANNEX 2 – BREAKDOWN OF RESPONSES TO THE STATISTICAL QUESTIONS WITHIN THE CONSULTATION RESPONSE FORM

This Annex shows the breakdown of responses to the statistical questions contained in the Consultation Response Form. Due to the low number of responses received no analysis of these responses has been carried out therefore the detail in this Annex is purely for information.

### Chapter 2

#### 1. Removing the requirement that the Construction Act should only apply to contracts in writing.

Q1d: What proportion of contracts as a whole do you consider contain non-trivial terms which have been subject to oral agreement or variation?

Answers are illustrated in the table below.

<b>% of contracts</b>	<b>i) 0% - 10%</b>	<b>ii) 10% - 25%</b>	<b>iii) 25% - 50%</b>	<b>iv) 50% - 75%</b>	<b>v) 75% - 90%</b>	<b>vi) 90% - 100%</b>
<b>Responses (numbers)</b>	1*	3**	1	1	1	

\*One respondent noted it varied with responses received but noted it was between i) and ii).

\*\*One respondent noted it was between ii) and iii).

#### 3. Introduction of a statutory framework for the costs of adjudication

Q3e: What proportion of contracts do you think contain an agreement that the referring party (or a specified party) should pay all or part of the costs of the adjudication?

Answers are illustrated in the table below.

<b>% of contracts</b>	<b>i) 0% - 10%</b>	<b>ii) 10% - 25%</b>	<b>iii) 25% - 50%</b>	<b>iv) 50% - 75%</b>	<b>v) 75% - 90%</b>	<b>vi) 90% - 100%</b>
<b>Responses (numbers)</b>	1	1	1	1*	2	1

\*One respondent noted it varied with responses they received, any of iv), v), or vi)

Q3f – What proportion of adjudications do you think are conducted under contracts containing an agreement that the referring party (or a specified party) should pay all or part of the costs of the adjudication?

Answers are illustrated in the table below.

<b>% of contracts</b>	<b>i) Less than 0.1%</b>	<b>ii) 0.1% - 0.5%</b>	<b>iii) 0.5% - 1%</b>	<b>iv) 1% - 5%</b>	<b>v) 5% - 10%</b>	<b>vi) More than 10%</b>

<b>Responses (numbers)</b>	1	2	1	1*	2	
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\* one respondent noted it varied with responses they received, any of iv), v), or vi)

## Chapter 3

### 2. Clarification of the requirement that a section 110(2) notice should be served

Q2b: Responses to *Improving payment practices in the construction industry in 2005* suggested that a section 110(2) payment notice is only issued for 40% of payments. What proportion of payments where the notice is not issued do you think can be explained by the current deficiencies in the requirements in section 110(2) of the Act?

Answers are illustrated in the table below.

<b>% of contracts</b>	<b>Response (numbers)</b>
<b>i) Less than 10% of cases where the notice is not issued ( less than 6% of payments as a whole)</b>	3*
<b>ii) Between 10% and 33 % of cases where the notice is not issued (between 6% and 20% of payments as a whole)</b>	
<b>iii) Between 33% and 66% of cases where the notice is not issued (between 20% and 40% of payments as a whole)</b>	2
<b>iv) Between 66% and 90 % of cases where the notice is not issued (between 40% and 54% of payments as a whole)</b>	
<b>v) More than 90% of cases where the notice is not issued (more than 54% of payments as a whole)</b>	2

\* One respondent noted that it varied with organisation but it was less than 66% of all cases

### 3. Clarity of the content of payment and withholding notices

Q3c: Responses to *Improving payment practices in the construction industry in 2005* suggested that a section 110(2) payment notice is only issued for 40% of payments. In what proportion of cases where the notice is issued do you believe it is later supplemented by a separate section 111 withholding notice because the payer is unclear about how the section 110(2) notice should act as a section 111 withholding notice?

Answers are illustrated in the table below.

<b>% of contracts</b>	<b>Responses (numbers)</b>
<b>i) Less than 10% of cases where the notice is issued ( less than 4% of payments as a whole)</b>	4*
<b>ii) Between 10% and 33 % of cases where the notice is issued (between 4% and 12% of payments as a whole)</b>	
<b>iii) Between 33% and 70% of cases where the notice is issued (between 12% and 28% of payments as a whole)</b>	1
<b>iv) Between 70% and 90 % of cases where the notice is issued (between 28% and 36% of payments as a whole)</b>	

<b>v) More than 90% of cases where the notice is issued (more than 36% of payments as a whole)</b>	1
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\* One organisation noted that their responses varied, selecting i), iii), and iv), but felt it was more than 30% of cases

#### 4. Clarity of sum due

Q4c: For the purposes of this consultation, we have assumed that on average across the industry, one in 30 payments that are (or should have been) notified under section 100(2) are later abated. Do you consider that this proportion:

Answers are illustrated in the table below.

<b>% of contracts</b>	<b>Responses (numbers)</b>
<b>i) Is about right</b>	2
<b>ii) Should be less than half this (i.e. less than one in 60 payments)</b>	2
<b>iii) Should be more than twice this (i.e. more than one in 15 payments)</b>	

\* One organisation commented that the question was not clear.

Q4e: Notwithstanding your answer to question (d) what percentage of the amount of each payment finally due under a construction contract do you consider is lost on account of the cost and delay involved in obtaining proper payment?

Answers are illustrated in the table below.

<b>% of Contracts</b>	<b>Responses (numbers)</b>
<b>i) Less than 1% of each payment</b>	2
<b>ii) Between 1% and 5% of each payment</b>	
<b>iii) Between 5% and 10% of each payment</b>	1*
<b>iv) Between 10% and 15 % of each payment</b>	
<b>v) Between 15% and 25 % of each payment</b>	
<b>vi) More than 25% of each payment</b>	1

\* One organisation noted it varied between iii) and iv)

Q4f: If changes to the payment framework were introduced as proposed in this chapter, what percentage of the amount of each payment finally due under a construction contract do you consider would be lost on account of the cost and delay involved in obtaining proper payment?

Answers are illustrated in the table below.

<b>% of Contracts</b>	<b>Responses (numbers)</b>
<b>i) Less than 1% of each payment</b>	1
<b>ii) Between 1% and 5% of each payment</b>	1
<b>iii) Between 5% and 10% of each payment</b>	
<b>iv) Between 10% and 15 % of each payment</b>	
<b>v) Between 15% and 25 % of each payment</b>	
<b>vi) More than 25% of each payment</b>	1

Q4g: If, as proposed, the sum due under a construction contract were to be viewed in law as the amount paid or proposed to be paid as specified in a Section 110(2) payment notice, (with the amount in a claim for payment becoming due if no notice were issued), what effect do you think this would have on the cost of resolving payment disputes at adjudication?

Answers are illustrated in the graph below.

<b>% of Contracts</b>	<b>Responses (numbers)</b>
<b>i) The cost would not be subject to a significant reduction (i.e. less than 5%)</b>	1
<b>ii) The cost would be reduced by 5% to 15%</b>	1
<b>iii) The cost would be reduced by 15% to 35%</b>	
<b>iv) The cost would be reduced by 35% to 65%</b>	1
<b>v) The cost would be reduced by more than 65%</b>	
<b>vi) The cost would be increased.</b>	1

#### **Chapter 4 Improving the right to suspension**

Q4d: What would you estimate to be the reasonable one-off costs of suspending performance on a typical construction project?

Answers are illustrated in the table below.

<b>% of average monthly interim payment</b>	<b>Responses (numbers)</b>
<b>i) Less than 5% of an average monthly interim payment</b>	
<b>ii) 5% to 15% of an average monthly interim payment</b>	2

<b>iii) 15% to 50% of an average monthly interim payment</b>	2
<b>iv) 50% to 100% of an average monthly interim payment</b>	
<b>v) 100% to 200% of an average monthly interim payment</b>	
<b>vi) More than double an average monthly interim payment</b>	

\*Scottish CASEC and SEC Group stated it was not possible to quantify such costs. The NSCC said it varied considerably across the specialist trades they represented, but did not select any of i) to vi)

Q4e: What would you estimate to be the reasonable monthly ongoing costs while in suspension on a typical construction project?

Answers are illustrated in the table below.

<b>% of Average monthly interim payment</b>	<b>Responses (numbers)</b>
<b>i) Less than 5% of an average monthly interim payment</b>	
<b>ii) 5% to 25% of an average monthly interim payment</b>	3
<b>iii) 25% to 50% of an average monthly interim payment</b>	
<b>iv) 50% to 100% of an average monthly interim payment</b>	

\*Scottish CASEC and SEC Group stated it was impossible to estimate. The NSCC said it varied considerably across the specialist trades they represented, but did not select any of i) to iv)

Q4f: What would you estimate to be the reasonable costs of remobilising performance on a typical construction project?

Answers are illustrated in the table below.

<b>% of Average monthly interim payment</b>	<b>Responses (numbers)</b>
<b>i) Less than 5% of an average monthly interim payment</b>	
<b>ii) 5% to 25% of an average monthly interim payment</b>	2
<b>iii) 25% to 50% of an average monthly interim payment</b>	
<b>iv) 50% to 100% of an average monthly interim payment</b>	1
<b>v) 100% to 200% of an average monthly interim payment</b>	
<b>vi) More than double an average monthly interim payment</b>	

\*Scottish CASEC and SEC Group stated it was impossible to estimate. The NSCC said it varied considerably across the specialist trades they represented, but did not select any of i) to vi)

Respondents were asked to reconsider their answers to question 3d, 3e and 3f if the suspending party was not required to be ready to remobilise immediately, as at present, when the defaulted payment was eventually made, but was allowed an additional extension of time for any delay caused by the exercise of the right of suspension.

Q4g: In the light of the Scottish Governments’s proposed amendment, what would you estimate to be the reasonable one-off costs of suspending performance on a typical construction project?

Answers are illustrated in the table below:

<b>% of average monthly interim payment</b>	<b>Responses (numbers)</b>
<b>i) Less than 5% of an average monthly interim payment</b>	
<b>ii) 5% to 15% of an average monthly interim payment</b>	1
<b>iii) 15% to 50% of an average monthly interim payment</b>	1
<b>iv) 50% to 100% of an average monthly interim payment</b>	
<b>v) 100% to 200% of an average monthly interim payment</b>	
<b>vi) More than double an average monthly interim payment</b>	

\*Scottish CASEC and SEC Group stated it was impossible to estimate.

The NSCC said it varied considerably across the specialist trades they represented, but did not select any of i) to vi)

Q4h: In the light of the Scottish Government’s proposed amendment, what would you estimate to be the reasonable monthly ongoing costs while in suspension on a typical construction project?

Answers are illustrated in the table below.

<b>% of Average monthly interim payment</b>	<b>Responses (numbers)</b>
<b>i) Less than 5% of an average monthly interim payment</b>	1
<b>ii) 5% to 25% of an average monthly interim payment</b>	1
<b>iii) 25% to 50% of an average monthly interim payment</b>	
<b>iv) 50% to 100% of an average monthly interim payment</b>	

\*Scottish CASEC and SEC Group stated it was impossible to estimate.

The NSCC said it varied considerably across the specialist trades they represented, but did not select any of i) to iv)

Q4i: In the light of the Scottish Government’s proposed amendment, what would you estimate to be the reasonable costs of remobilising performance on a typical construction project?

Answers are illustrated in the table below.

<b>% of Average monthly interim payment</b>	<b>Responses (numbers)</b>
<b>i) Less than 5% of an average monthly interim payment</b>	1
<b>ii) 5% to 25% of an average monthly interim payment</b>	
<b>iii) 25% to 50% of an average monthly interim payment</b>	
<b>iv) 50% to 100% of an average monthly interim payment</b>	1
<b>v) 100% to 200% of an average monthly interim payment</b>	
<b>vi) More than double an average monthly interim payment</b>	

\*Scottish CASEC and SEC Group stated it was impossible to estimate.

The NSCC said it varied considerably across the specialist trades they represented, but did not select any of i) to vi)

As well as covering the regulatory impact of the proposals described in Chapter 3 on the costs of suspension, the following questions also covered the impacts of the proposal in Chapter 2 on the transparency of the sum due and its effect on right to suspend.

In reading the responses to questions (j) to (i) you should bear in mind the finding of *Improving payment practices in the construction industry* that the right to suspend performance is exercised in fewer than one in a 100 cases of defaulted payment at present.

Q4j: Following the introduction of both:

- our proposals to reduce the costs of suspending performance in cases of non-payment; and,
- our proposals to improve the transparency of the sum due....

...how frequently do you believe the right to suspend performance would be exercised?  
Answers are illustrated in the table below.

<b>Frequency in cases of defaulted payment</b>	<b>Responses (numbers)</b>
<b>i) In more than 1 in 5 cases</b>	
<b>ii) Between 1 in 5 and 1 in 20 cases</b>	2
<b>iii) Between 1 in 20 and 1 in 100 cases</b>	1
<b>iv) Fewer than 1 in 100 cases</b>	3

Q4k: Following the introduction of only our proposal to reduce the costs of suspending performance in cases of non-payment how frequently do you believe the right to suspend performance would be exercised?

Answers are illustrated in the table below.

<b>Frequency in cases of defaulted payment</b>	<b>Responses (numbers)</b>
<b>i) In more than 1 in 5 cases</b>	
<b>ii) Between 1 in 5 and 1 in 20 cases</b>	2
<b>iii) Between 1 in 20 and 1 in 100 cases</b>	2
<b>iv) Fewer than 1 in 100 cases</b>	2

Q4l: Following the introduction of only our proposal to improve the transparency of the sum due in respect of the right to suspend performance, how frequently do you believe the right would be exercised?

- i) In more than one in five cases of defaulted payment?
- ii) In between one in five and one in 20 cases of defaulted payment?
- iii) In between one in 20 and one in 100 cases of defaulted payment?
- iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change)

Answers are illustrated in the table below.

<b>Frequency in cases of defaulted payment</b>	<b>Response (numbers)</b>
<b>i) In more than 1 in 5 cases of defaulted payment</b>	
<b>ii) Between 1 in 5 and 1 in 20 cases of defaulted payment</b>	1
<b>iii) Between 1 in 20 and 1 in 100 cases of defaulted payment</b>	2
<b>iv) Fewer than 1 in 100 cases of defaulted payment</b>	2

Q4m: What do you consider is the incidence of non-payment of a sum due in the construction industry?

Answers are illustrated in the table below.

<b>% of Payments</b>	<b>Responses (numbers)</b>
<b>i) Fewer than 10% of each payment</b>	2
<b>ii) 10% to 30% of payments</b>	1
<b>iii) 30% to 50% of payments</b>	
<b>iv) 50% to 70% of payments</b>	2
<b>v) 70% to 90% of payments</b>	
<b>vi) More than 90% of payments</b>	

Q4n: What do you consider would be the incidence of non-payment following the introduction of both:

- our proposals to reduce the costs of suspending performance in cases of non-payment; and
- our proposals to improve the transparency of the sum due?

Answers are illustrated in the table below.

<b>% of Payments</b>	<b>Responses (numbers)</b>
<b>i) Fewer than 10% of each payment</b>	3
<b>ii) 10% to 30% of payments</b>	
<b>iii) 30% to 50% of payments</b>	2
<b>iv) 50% to 70% of payments</b>	
<b>v) 70% to 90% of payments</b>	
<b>vi) More than 90% of payments</b>	

Q4o: What do you consider would be the incidence of non-payment following the introduction of only our proposals to reduce the costs of suspending performance?

Answers are illustrated in the table below.

<b>% of Payments</b>	<b>Responses (numbers)</b>
<b>i) Fewer than 10% of each payment</b>	3
<b>ii) 10% to 30% of payments</b>	
<b>iii) 30% to 50% of payments</b>	1
<b>iv) 50% to 70% of payments</b>	
<b>v) 70% to 90% of payments</b>	1
<b>vi) More than 90% of payments</b>	

Q4p: What do you consider would be the incidence of non-payment following the introduction of only our proposals to improve the transparency of the sum due in respect of the right to suspend performance?

Answers are illustrated in the table below.

<b>% of Payments</b>	<b>Responses (numbers)</b>
<b>i) Fewer than 10% of each payment</b>	3
<b>ii) 10% to 30% of payments</b>	1
<b>iii) 30% to 50% of payments</b>	1
<b>iv) 50% to 70% of payments</b>	
<b>v) 70% to 90% of payments</b>	
<b>vi) More than 90% of payments</b>	

