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Consumer Remedies for Faulty Goods
A Summary of Responses to Consultation

This document summarises the responses to the Law Commissions' Consultation Paper: Consumer Remedies for Faulty Goods

13 May 2009

THE LAW COMMISSION

THE SCOTTISH LAW COMMISSION

CONSUMER REMEDIES FOR FAULTY GOODS: A SUMMARY OF RESPONSES

CONTENTS

PART 1
INTRODUCTION

AIM OF THIS PAPER

1.1 In November 2008, the Law Commission and the Scottish Law Commission published a joint Consultation Paper on consumer remedies for faulty goods.[1] It made provisional proposals and asked questions in relation to the legal remedies available to consumers where goods do not conform to contract.

1.2 This document summarises our proposals and the responses we received to that paper. The Law Commissions have not yet formulated their final recommendations on this subject, and this paper should not be considered as a policy statement by the Commissioners.

OVERVIEW

1.3 Goods do not conform to contract where the retailer sells or supplies goods in breach of an express or implied contractual term.[2] In particular, goods do not conform if they do not correspond with the description by which they are sold, if they are not of satisfactory quality or fit for their purpose, or if they do not correspond with the sample by which they are sold.[3] Furthermore, goods may be delivered late, contrary to an express term of the contract, or the wrong quantity may be delivered, so that the delivery does not correspond with what has been agreed.

1.4 In our Consultation Paper, we used the term "faulty goods", for ease of reference, to refer to non-conforming goods generally. Most of the examples we gave were about goods that break (and are, therefore, not of satisfactory quality) which are the most common problems in practice.

1.5 Whilst there is general awareness that goods must conform to contract, there is less understanding about the remedies available to consumers if goods do not meet these standards. There are effectively two legal regimes: the traditional UK remedies have been overlain by the scheme set out in the EU Consumer Sales Directive (CSD). This makes the law difficult for consumers and retailers to understand, and can lead to unnecessary disputes.

[1] Law Commission Consultation Paper No 188; Scottish Law Commission Discussion Paper No 139.

[2] The Sale of Goods Act 1979 (SoGA), s 48F states that "goods do not conform to a contract of sale if there is, in relation to the goods, a breach of an express term of the contract or a term implied by section 13, 14 or 15". For other supply of goods contracts similar terms are found in the Supply of Goods and Services Act 1982, and the Supply of Goods (Implied Terms) Act 1973. See also paragraph 2.7 and footnotes of the Consultation Paper for more details.

[3] SoGA, ss 13, 14 and 15.

1.6 Our review is being conducted against the backdrop of the European Commission's review of the consumer directives. On 8 October 2008, the European Commission published a proposal for a new directive on consumer rights.[4] Among other things, this recommends changes to the law on consumer remedies for goods which do not conform to contract. The Department for Business Enterprise and Regulatory Reform (BERR) conducted a consultation on the European Commission's proposal.[5]

1.7 Our Consultation Paper was not a direct response to what the European Commission has proposed. Instead, we looked in more depth at the principles behind an appropriate scheme of consumer remedies, for example considering the circumstances in which consumers should be entitled to a full refund, rather than a repair or a replacement. However, we hope that the paper and the responses to it will continue to inform the debate on this subject, at both a European and national level.

1.8 Given that problems with faulty goods occur regularly in everyday life, and that consumers seldom obtain legal advice, it is particularly important that the law in this area is simple and easy to use. Our aim is to simplify the remedies available to consumers, bring the law into line with accepted good practice, and provide appropriate remedies which allow consumers to participate with confidence in the market place.

THE NEED FOR REFORM

1.9 The domestic law relating to the sale of goods is set out in the Sale of Goods Act 1979 (SoGA). Essentially, it allows the consumer to reject faulty goods and claim a full refund (the "right to reject"). However, the right is lost once the consumer is deemed to have accepted them, which may happen "after the lapse of a reasonable time".[6] Thereafter, the consumer has the right to damages only.

1.10 In 2002, the UK implemented the CSD, which sets out a separate regime of remedies. Implementation was effected by means of amendments to SoGA and the Supply of Goods and Services Act 1982.[7] Under that regime, consumers may initially ask for a repair or replacement. If this is impossible or disproportionate, or if a repair or replacement cannot be provided without unreasonable delay or significant inconvenience, the consumer may move to second tier remedies. These are rescission or reduction in price.

[4] COM (2008) 614/3.

[5] BERR's consultation paper on the proposed directive is available at www.berr.gov.uk.

[6] SoGA, s 35(4).

[7] The Sale and Supply of Goods to Consumer Regulations 2002 (SI 2002 No 3045) amend the SoGA and Supply of Goods and Services Act 1982. They implement Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, Official Journal L171 of 07.07.1999 p 12.

1.11 The domestic law has been criticised for its uncertainty: in particular, for its conflicting case law over what constitutes "a reasonable time" to reject goods.[8] In addition, the EU remedies have their own uncertainties, for example, over what amounts to "significant inconvenience". These problems are compounded by the fact that the two separate regimes co-exist, using different language and concepts and imposing different burdens of proof. As a result, SoGA has been described as "a disjointed, often incoherent, amalgam".[9]

1.12 In November 2006, the Davidson Review recommended that the Department of Trade and Industry (DTI) should ask the two Law Commissions to produce a joint report "on the reform and simplification of remedies available to consumers relating to the sale and supply of goods".

1.13 The Davidson Review found that following the implementation of the CSD, the remedies available to consumers when they buy faulty goods were too complicated, making it unclear how the choice should be made between the various remedies available. This followed representations by some retailers about difficulties in training sales staff to know when consumers could return faulty goods. It was argued that this led to a lack of shared understanding between consumers and retailers, and increased amounts of litigation. Disputes usually arose in relation to expensive and technical products where faults might not surface until later on and there was more money at stake for both parties.[10]

1.14 In the Consultation Paper, we concluded that although most stakeholders now accept and understand the basic structure of the existing law, there are significant and often unnecessary complexities. These are not just theoretical but affect standard day-to-day examples of faulty goods. As a result, consumers may be put at a disadvantage in asserting their rights. On the other hand, consumers may over-estimate their rights, causing unnecessary disputes with businesses.

1.15 This area of law covers a wide variety of different goods, from a sandwich to a new car. It is not always possible to make the law simple and clear cut if it is to cover the full range of possible cases. However, we identified the following areas where simplification or clarification would be desirable:

(1) The length of the reasonable time to reject goods in the context of the right to reject.

(2) Burdens of proof which differ depending on whether a consumer is asking for a refund or a repair or replacement.

(3) The difference between the right to reject and rescission.

(4) Different remedies apply to supply of goods contracts, as opposed to pure sale of goods contracts.

[8] See *Bernstein v Pamson Motors* [1987] 2 All ER 220 and *Clegg v Olle Andersson* [2003] 1 All ER (Comm) 721.

[9] L Miller, "The Common Frame of Reference and the feasibility of a common contract law in Europe" [2007] *Journal of Business Law* 378.

[10] Davidson Review, *Final Report* (November 2006) para 3.20.

(5) How to progress from a first tier to a second tier remedy in the CSD regime.

Support for reform

1.16 We have been encouraged by the universal support for reform from stakeholders. We have received consistent feedback that those involved in this area of law welcome this review, and feel that there is a need for clarification and simplification, for the benefit of retailers and consumers alike.

1.17 The British Retail Consortium summarised the views expressed by many in saying:

> Simplification would benefit consumers, businesses, shop staff, enforcers, consumer advisers and the courts. It should reduce the room for disputes when goods are faulty; assist consumers' awareness of their legal rights; and help to ensure retail staff among whom there is a high turnover from year to year, are better trained to ensure consumers receive the rights to which they are entitled.

1.18 Reflecting the views of the majority, Sainsbury's wrote:

> In our response we would like to emphasise our support for the view that the law governing consumer remedies should be simplified. The current complexity can lead to customers feeling that their rights have been ignored when in reality the rights they are trying to enforce do not exist in law. It is in everyone's interest to ensure that genuine complaints are given swift and appropriate redress but sometimes the lack of clarity in the law and the confusion surrounding what constitutes "reasonable time" can prolong the resolution process.

1.19 Consumer Focus also confirmed their support for reform:

> Consumer Focus welcomes the opportunity to comment on this important Consultation Paper. It deals with an area of law of everyday importance to consumers. As the statistical information in the paper demonstrates, millions of transactions are potentially affected by it. We agree that there is an urgent need to reform the law in this area for the reasons so clearly articulated in Part 7 of the Consultation Paper.

RETAINING THE RIGHT TO REJECT

1.20 In the Consultation Paper, we mentioned that the European Commission's proposal for a directive is a maximum harmonisation measure, which would mean that member states would not be able to provide greater or lesser rights in any field falling within its scope. On the face of it, this appears to mean that the UK right to reject would be lost.

1.21 As discussed in Part 2 of this paper, there is widespread support for retaining the right to reject in the UK. We, therefore, commissioned FDS International Ltd (FDS) to carry out market research into consumers' views. The first phase was qualitative research undertaken in February 2008. This research indicated that most were aware that they had a right to a refund for faulty goods, and valued it highly.[11]

1.22 As a follow up to that work, in February 2009, we commissioned FDS to carry out a quantitative phase of market research in order to obtain more detailed figures about the strength of support for the right to reject amongst consumers. Consumers were questioned from February to March 2009, and the results can be found at Part 9 of this paper. The results show that consumers are generally aware of their right to a refund. They value it and wish to retain it. 79% of consumers were aware that they have the right; 94% said the right was important to them; and 89% thought the right should be retained, even though other remedies (repair and replacement) are available.

1.23 Negotiations are continuing in Europe on the proposed new directive, and recently during those discussions, the European Commission has indicated that it does not intend that the UK's right to reject should be abolished.[12] However, this is still an issue that needs further clarification during the negotiations.

1.24 The majority of consultees who expressed a view on the scope of the proposed directive opposed maximum harmonisation of the provisions relating to consumer remedies, for shop sales at least.

CONSULTEES' RESPONSES

1.25 Since the Consultation Paper was published we have received 53 written responses from consultees, and we met with a range of consumer representatives, retailers, manufacturers, academics and lawyers.

1.26 The table below shows the categories of those who submitted the 53 responses we received. Twenty-eight of these consultees were not individuals, but rather organisations each representing a large number of stakeholders. For example, the Confederation of British Industry which represents 240,000 businesses; the City of London Law Society which represents 13,000 city lawyers; and the Local Authority Coordinators of Regulatory Services which represents local authority trading standards services across the UK.

[11] FDS's report of April 2008 is attached to the Consultation Paper at Appendix A.

[12] Commissioner Kuneva at the IMCO Committee Hearing on the Consumer Rights Directive on 2 March 2009 and at the 10th Anniversary European Consumer Day on 13 March 2009.

Table 1: Respondents to the Consultation Paper, by category

Type of respondent	*Number*
Retailers, manufacturers and business groups	13
Lawyers, legal associations and the judiciary	9
Consumers, consumer groups and consumer representatives	18
Academics	12
Other	1
Total	53

CONTENTS OF THIS PAPER

1.27 This paper is divided into a further 8 Parts. They follow the order set out in the Consultation Paper.

(1) Part 2 looks at the right to reject in sales contracts. It follows the issues and questions discussed in Part 8 of the Consultation Paper, from paragraphs 8.9 to 8.91.

(2) Part 3 considers issues relating to other supply of goods contracts, for example whether identical remedies should apply to these contracts. It follows the arguments and questions discussed in paragraphs 8.92 to 8.112 of the Consultation Paper.

(3) Part 4 concerns the reform of the Consumer Sales Directive. The issues and questions are listed in paragraphs 8.113 to 8.171 of the Consultation Paper. Our provisional proposals were put forward as part of the current debate within the European Union about how the CSD should be reformed, and aimed at improving the remedies set out in the CSD. As well as forming part of the European debate, it may be possible to implement some reforms in the UK only, provided that any replacement to the CSD continues to be a measure requiring only minimum harmonisation.

(4) Part 5 deals with wrong quantity, late delivery and damages, considered in paragraphs 8.172 to 8.187 of the Consultation Paper.

(5) Part 6 looks at how CSD remedies can be better integrated with the right to reject, discussed at paragraphs 8.188 to 8.202 of the Consultation Paper.

(6) Part 7 considers the urgent need to improve consumer education in this area, considered in paragraphs 8.203 to 8.218 of the Consultation Paper.

(7) Part 8 relates to assessing the social and economic impact of reform, which is discussed at Part 9 of the Consultation Paper.

(8) Finally, Part 9 presents the results of the FDS quantitative research that was undertaken in February and March 2009.

APPROACH

1.28 For each proposal or question, we start with a brief explanation for it. A fuller explanation of our proposals is available in our Consultation Paper (which we refer to below as "CP").

1.29 We then summarise the written responses we received, indicating the spread of opinion on a particular point. We outline the main arguments raised for and against our proposals. We have provided some quotations from the responses that we have received in order to illustrate the arguments raised. However, we have needed to be selective in order to keep this paper at a reasonable length. Many other points were made that we have not quoted in the paper, but which will be taken into account in formulating our views.

1.30 Where possible, we highlight any emerging consensus over the way forward. However, there is not always a consensus, for example in the area of other supply of goods contracts.

NEXT STEPS

1.31 This paper will be followed by a final report with recommendations. The timetable for this has not yet been fixed, and will depend in part on the progress of the European Commission's proposed consumer rights directive.

THANKS

1.32 We have received a high level of interest and a good number of responses to our Consultation Paper. We would like to thank all those who have devoted considerable time and resources in submitting written responses and meeting us to discuss their views.

1.33 Whilst we are not inviting comments at this stage if, having read this paper, anyone does wish to put additional points to the Commissions, we would be pleased to receive them.

1.34 Please contact us at commercialandcommon@lawcommission.gsi.gov.uk or by post to Donna Birthwright, Law Commission, Steel House, Tothill Street, London, SW1H 9LJ. Tel: 020 3334 0284, Fax: 020 3334 0201.

PART 2
THE RIGHT TO REJECT IN SALES CONTRACTS

RETAINING THE RIGHT TO REJECT

2.1 In the Consultation Paper, the first question we considered was whether the UK should retain the initial right to return goods and obtain a refund.

2.2 We provisionally proposed that the right to reject should be retained as a short-term remedy of first instance for consumers (CP paragraph 8.31) for several reasons, including the following:

(1) It is fairly easy for consumers and retailers to understand. Consumers know that if the goods they bought were not as promised, they can return the goods and get their money back, provided that they act quickly.

(2) It provides consumers with an effective remedy when they have lost confidence in a product or retailer, for example if they think that the product is dangerous, or that the fault will recur. The research we commissioned indicated that consumers often (in about 20% of cases) take the view that a refund is the most appropriate initial remedy for faulty goods.[13]

(3) It is a useful bargaining tool that prevents consumers being trapped in a cycle of failed repairs.

(4) The right to reject drives up standards, both by encouraging retailers to check products before they are sold and to increase standards in the repair process.

(5) The right to reject inspires consumer confidence, making them more prepared to try unknown brands or new retailers.

Support for retention

2.3 The great majority of consultees agreed with us. There was a widespread consensus in favour of retaining the right to reject. Consultees thought that it was important for the reasons we have listed above in paragraph 2.2.

[13] Appendix A of Law Commission Consultation Paper No 188; Scottish Law Commission Discussion Paper No 139.

The right to reject bolsters consumer confidence

2.4 The responses show that consumer confidence is considered key, particularly in difficult economic times. The right to reject is seen as an important part of consumer confidence. Several respondents pointed out that it may be the only satisfactory remedy in circumstances where a repair or replacement would not be appropriate, for example where a consumer has lost trust in the goods because the fault has involved the possibility of personal injury.

2.5 In other cases, a consumer may lose confidence in a product which reveals a serious early fault. Similarly, if goods are not fit for purpose, the right to reject is seen as the only satisfactory remedy, because a repair or replacement will not remedy the non-conformity.

2.6 Willett, Morgan-Taylor and Naidoo summarised the views expressed by many when they said:

> Losing the short-term right to reject could have an adverse impact on the competitiveness of SMEs and new entrants into the market. This is because the absence of the right to reject means that consumers are locked into longer relationships with traders following the sale of faulty goods. It means that there is an incentive for consumers to favour who they perceive as being capable of repairing the product effectively. This may well impose a competitive disadvantage on SMEs, new entrants and new traders from outside of the UK.

2.7 On the same topic, the Office of Fair Trading wrote:

> When considering the issue of rights and responsibilities for remedies it should always be borne in mind that it is the trader who is in breach of the contract. Consumers are entitled to expect fault-free purchases, and easily exercisable remedies where this is not the case.
>
> It is important that the right to reject is retained. In our view consumer confidence would be significantly impaired by its removal. While we appreciate the findings that both consumers and traders have difficulty understanding the extent of their remedies it is generally the one remedy that consumers are fairly confident about, at least in the immediate period following purchases. If this remedy were removed, consumers may be less adventurous in their purchasing and tend to favour known brands and suppliers making cross-border trade less likely.

The right to reject underpins the UK regime

2.8 A large proportion of consultees argued that the right to reject is an essential part, and a vital backstop, of our system, the removal of which would represent a significant reduction in consumer rights.

2.9 It was pointed out that the removal of the right to reject would create inconsistency between modes of purchase. In distance sales, consumers have a "cooling off period" which entitles them to return goods for any reason. Abolition of the right to reject might cause consumers to shop by distance means, rather than visiting the high street, because they will perceive that they are in a stronger position. Some suggested that this might have a negative effect on the competitiveness of face to face shop sales.

2.10 The cooling off period in distance sales is provided because the consumer can not see and touch the goods at point of sale. In many instances, this is also the case for the consumer who purchases an item from a shop. The goods may be presented to the consumer in a sealed package, and the consumer is not expected to unpack the goods until they arrive home. In other cases, the goods are paid for in store and delivered to the consumer at a later date. In these very common scenarios, consumers' lack of opportunity to see the goods they are buying is very similar to the distance sale scenario. Several consultees considered that it was anomalous that the purchaser of goods from a shop in those circumstances would not have a legal right to return goods for a refund if they were faulty.

2.11 The Bar Council were not alone in pointing out that removal of the right to reject in consumer sales would be anomalous with its continuance in business sales.[14] It would be odd if consumers had fewer rights than businesses. Others suggested that this might encourage consumers to pose as business purchasers in order to obtain the benefit of the right to reject.

2.12 The National Consumer Federation were among those who made the point that a repaired product may not be as good as one which has never shown a fault. Which? explained that in many cases, a repair will result in a reduction of market value, and this loss will be borne by the consumer.[15]

The right to reject drives up standards

2.13 Numerous consultees made the point that the right to reject encourages higher standards in the quality of goods sold and repairs. For example, Willett, Morgan-Taylor and Naidoo submitted:

> Having the right to reject may provide an incentive to traders to ensure effective and speedy repairs. The absence of the right to reject leaves the consumer vulnerable to accept whatever CSD remedies the trader wishes to use.

[14] The Bar Council added that this potential anomaly should not be relied upon to remove the right in business sales.

[15] Which? provided a case study of a faulty car which we summarised at paras 8.19 to 8.21 of the Consultation Paper.

> Maintaining the right to reject creates an incentive for sellers to ensure that goods are in conformity at the time of the sale. Where there is a short term right to reject, the seller stands to lose the bargain following the discovery of any faults and so there is an incentive to ensure that the goods are free from such defects when they are sold. Indeed in the absence of the right to reject, sellers may reduce the depth of pre-sales quality checks.

2.14 Consumer Focus said that the right to reject is central to ensuring that consumers have adequate protection. It is easy to understand and helps to redress the imbalance between the bargaining position of buyers and sellers, empowering consumers to enforce the implied terms of quality. In addition, they went on to say that:

> The buyer's right to reject thus acts as an essential check on product quality which: inspires confidence among consumers; drives up industry standards; acts as a cost effective way of resolving disputes quickly; prevents consumers getting trapped in a cycle of repairs; and mitigates against unreasonable seller behaviour which undermines the trust between the parties.
>
> The possibility of rejection is a spur to the production of goods of high quality, which are less likely to prove to be faulty and have to be scrapped.

2.15 Only four consultees argued against retention of the right to reject. They felt that it should not be a possible first option for consumers on the grounds, for example, that it undermines the goal of maximum harmonisation, and that the CSD remedies are sufficient. The Association of Manufacturers of Domestic Appliances responded:

> We believe the right to reject should not be the first option and should only be used for clear cases of faulty goods or perhaps as a second-tier remedy. Manufacturers must be given the opportunity to resolve issues with the consumer such as repairs.

SHOULD THE RIGHT TO REJECT BE EXTENDED TO COVER LATENT DEFECTS?

2.16 In the Consultation Paper, the second question we considered was whether the right should be extended so that, for example, consumers could return goods when latent defects became apparent several months (or possibly years) after purchase.

2.17 The law currently favours finality in terms of the right to reject, as it is a relatively short-term remedy. In the Consultation Paper, we concluded that this remains the correct approach, and that a long-term right to reject would be problematic.

2.18 Currently, consumers who exercise the right to reject may recover the full purchase price without a deduction for use. We were persuaded that the main problem presented by a long-term right to reject would be the difficulty in accounting for interim use. Giving credit for use and enjoyment would take away much of the force of the consumer's bargaining position.

2.19 It would raise difficult questions of calculation, which would detract from the benefits of the remedy of the right to reject. It is likely that the consumer would become involved in an argument or negotiation. From the consumer's point of view, the absolute nature of the right to reject is an important factor in the ability to bargain from a position of relative weakness.

2.20 There are other problems associated with a long-term right to reject. Retailers might suspect that the reasons for return were not genuine, for example that consumers had had the use they wanted out of the goods.

2.21 We provisionally concluded that the right to reject should not be extended to cover latent defects which appear only after a prolonged period of use (CP paragraph 8.41). More than two-thirds of respondents agreed with our conclusion.

Arguments in favour of the proposal not to extend the right to reject

2.22 Many consultees could see some attractions in extending the right to reject, but agreed that consumers who had enjoyed the benefit of goods for some time should give credit for that use. This was felt to undermine the efficacy of the right to reject, which is a powerful tool for consumers because it is a "short and sharp" remedy.

2.23 Professor CJ Miller was among the many who, after examination of the arguments for and against, concluded:

> The main argument in favour of a long-term right to reject in consumer sales is that it is unfair that the remedy should be lost when the buyer could not have known of the circumstances which gave rise to its existence. Although there is merit in this argument, an extended right to reject is not practicable. This is particularly true where the problem lies in the failure of the goods to last as long as might reasonably have been expected (lack of durability). In such cases an extended right to reject could be unfair to the seller unless it is accompanied by a need to give "credit" for what might have been a substantial period of trouble free use. This would lead to disputes as to the amount of credit required.

2.24 Several agreed with the view expressed by the Judges of the Court of Session:

> The arguments advanced for an extension of the law to create a long term right require, in our view, to be balanced by consideration of the possible abuse of such rights by consumers who have made such use as they wish from goods.

Arguments against the proposal

2.25 Less than a third of respondents thought that the right to reject should extend to latent defects. The two main arguments in favour of extension are that it would provide an appropriate remedy for latent defects, for example where goods prove not to be durable; and secondly that it would achieve uniformity between sale and supply of goods contracts.

2.26 For supply of goods contracts, such as work and materials contracts, hire and hire purchase contracts, the right to reject continues until the contract has been affirmed. The contract can only be affirmed once the consumer is aware of the breach.[16] This means that consumers may exercise the right to reject for latent defects.

2.27 Similarly, in Ireland, the buyer is deemed only to accept goods "when without good and sufficient reason, he retains the goods without intimating to the seller that he has rejected them."[17] In this respect, the Irish position would seem to be analogous to affirmation, as not knowing that the goods were defective would appear to be a good and sufficient reason for not rejecting them. It is not apparent that this provision has caused any significant problems since it was introduced in Ireland in 1980.

2.28 It was argued that if the doctrine of affirmation applied to sale of goods contracts as well, it would bring sale of goods contracts into line with supply of goods contracts. That would be a useful simplification of the law, and would remove the difficult distinctions between sale and work and materials contracts.

2.29 Some consultees contended that an extension of the right to reject would provide an appropriate remedy for goods that prove not to be durable. For example, expensive white goods or cars are expected to last several years, yet if they break down after six months, it is likely that the right to reject would have been lost. If the doctrine of affirmation applied instead, the consumer could obtain a refund.

2.30 Which? argued strongly that the right to reject should be exercisable throughout the full limitation period,[18] which would simplify the law, bring the rules on sale of goods into line with supply of goods contracts, and would be a more satisfactory result for consumers.

2.31 The National Consumer Federation submitted:

> Whilst we can understand that retailers and manufacturers need prompt notice of defects, so they can claim against their insurers, we do not see why a consumer should be put at a disadvantage where a product has a latent defect. Consumers buy products in good faith and in the expectation that they will work for a reasonable length of time, depending on the type of product and the price. Manufacturers are in a position to test their products; consumers are not.

[16] In Scotland, an equivalent result is achieved through the operation of personal bar. Personal bar cannot operate until the consumer knows of the defect.

[17] Sale of Goods Act 1893, s 35(c), as amended by the (Irish) Sale of Goods and Supply of Services Act 1980.

[18] Or, in Scotland, prescriptive period.

CLARIFYING THE RIGHT TO REJECT – THE 30-DAY NORMAL PERIOD

2.32 The main reported problem with the right to reject is uncertainty over how long it lasts. This adds complexity to what is intended to be a simple and certain tool. Most consultees felt strongly that the right to reject should be retained, but would benefit from clarification as to how long it lasts.

2.33 Some consumer advisers, including Consumer Direct, told us that it is difficult to advise consumers how long they have to exercise the right; consumers often expect to be told how long they have in terms of a number of days, weeks, or months. Retailers told us that it is difficult to train their staff about what the law requires.

2.34 In order to overcome the considerable problem of uncertainty, we carefully considered whether there should be a fixed time limit, after which the right to reject is automatically lost.

2.35 In the Consultation Paper, we concluded that there should not be an absolute fixed time limit. However, we thought there would be numerous benefits in setting a period of 30 days in which consumers should normally exercise the right to reject. We also felt there should be a limited amount of flexibility to reflect the principle behind the right to reject, that the consumer should have an opportunity to inspect the goods. In most cases, 30 days would give the consumer a reasonable opportunity to inspect the goods.

2.36 We provisionally proposed that the legislation should set out a normal 30-day period during which consumers should exercise their right to reject. The 30-day period should run from the date of purchase, delivery or completion of contract, whichever is later (CP paragraph 8.75). We asked whether consultees agree that 30 days is an appropriate period in which the right to reject should normally be exercised (CP paragraph 8.76). The majority of respondents agreed in principle with our proposal for a normal 30-day period. However, there was more uncertainty about the factors which should extend or reduce the period.

Support for the proposal of a 30-day normal period

2.37 The central argument in favour was that the advantages of clarity provided by a set period outweigh the potential disadvantages. The main benefit of the right to reject is that it is a “short and sharp” remedy that should be exercised relatively quickly. Generally respondents agreed that the 30-day normal period would provide sufficient time for most purchases to be tested in use, and it would encourage consumers to test goods promptly after purchase.

2.38 When we discussed our proposal of a 30-day normal period with Consumer Direct, they indicated that they supported the proposal on the ground that consumers would benefit from clarification of the law; consumers would find it easier to enforce their right to reject if they knew exactly how long it lasted. They believed that after around two weeks consumers lack confidence in pursuing the argument that the time period is “reasonable”, and would be extremely reluctant to take the matter to court.

2.39 Consumer Direct explained that, when seeking legal advice, consumers often expect to be told how long they have based upon the simplicity of a set period. They do not find it helpful to be told that the answer depends on a series of factors which must be applied on a case by case basis. In the face of this, and an intransigent retailer, they are unlikely to pursue their demand for a refund. In response to the Consultation Paper, the Office of Fair Trading (including Consumer Direct) wrote in support of the proposal:

> We agree that the idea of a finite time in which the right to reject is available would be a sensible reform, provided that the period is long enough. Although we appreciate that even specification is likely to reduce the period of time in which the right may currently be exercised in some circumstances, the advantages of simplicity outweigh the potential disadvantages in our opinion. Further we believe that many possible disadvantages could be avoided by a good consumer/trader awareness programme. If both consumers and traders knew there was a specific period in which this right could be exercised we think it may give consumers added confidence in their dealings with traders and vice versa.
>
> Many traders and consumers already appear to believe that consumers have 30 days in which to return goods (probably as a result of voluntary systems offered by some traders) so we think that this period is probably appropriate and gives the consumer sufficient time to test the goods and enables the trader to have some certainty.

2.40 Similarly, the Judges of the Court of Session took the view that the 30-day normal period:

> … appears to reflect the desires and expectations of both consumers and suppliers. As such, whilst there are no doubt arguments to be made for other periods 30 days appears a sensible compromise. We would wish to reiterate that in our view the principal advantage of any stipulated period is that it brings certainty. We regard that factor as a highly persuasive argument for having a stipulated period.
>
> In our view the period is long enough to be likely to satisfy consumer expectation in this area. Equally it is sufficiently short to avoid major inconvenience and consequent unfairness to suppliers. A stated period enshrined in statute would also provide the benefit of certainty, a period known to both consumers and suppliers.

2.41 On the subject of the right to reject, the Direct Marketing Association wrote:

> This right has been enshrined in UK law for over 100 years and is the consumer right most people are aware of. Its difficulty is its uncertainty, in that there is not an agreed period of rejection or agreed scope of the right. However, the Law Commission's Consultation Paper does argue for the right to reject to remain within UK law and proposes setting a time during which a consumer can reject a purchase because it is faulty. If the right to reject was lost, there would have to be a major effective consumer education programme and even then it will take years for consumers to become comfortable with their new rights.
>
> The DMA would support the Law Commission's proposal to retain the right to reject and to set a time frame for this right of 30 days.

2.42 Our opinion poll, described in Part 9, provides some support for a 30 day period. When consumers were asked how long the right to a refund should last, they gave a variety of answers, from less than two weeks to over a year. However, the most common reply, given by 30% of consumers, was that the right should last for about a month.

Arguments against the proposal

2.43 However, some consultees were not in favour of the proposal because they felt strongly that the 30-day period would lead to a reduction in consumer protection. For example, Professor John Adams feared that the period would be interpreted as an absolute cut-off by retailers. Some favoured a longer term right to reject, and/or that the normal period should be longer than 30 days.

2.44 In particular, there was a concern that whilst 30 days was sufficient to test simple goods, it was not long enough to test complex goods, such as washing machines and cars. Several consultees, such as Consumer Focus and the University of Strathclyde Law Clinic, suggested that a longer period was necessary for complex goods.

2.45 The University of Strathclyde Law Clinic were also among those who expressed a concern that the application of a 30-day period might have negative implications for vulnerable consumers, as they often take a long time to obtain legal advice.

2.46 Others mentioned that 30 days is not long enough where goods are not used sufficiently frequently within that period for the defect to be manifest.

2.47 Only two respondents said that the normal period for rejection should be shorter than 30 days.

Other approaches

2.48 Some consultees, such as the Bar Council, proposed that, rather than fixing a period, the law should be clarified by setting out a limited number of factors for determining the reasonable period in a clear and concise way. Factors could include the nature of the goods (such as whether they are perishable or complex); whether an express agreement has been made; and whether it was in the contemplation of both parties at the point of sale that the goods would not be tested straight away.

2.49 Others who agreed with this proposal to clarify the definition of a reasonable period added that the 30-day normal period should be expressed as a minimum period.

THE 30-DAY NORMAL PERIOD: REASONS FOR A SHORTER OR LONGER PERIOD

2.50 Whilst the majority of respondents agreed with our proposal for a normal 30-day period, there was less consensus about the circumstances in which that period should be shortened or lengthened.

2.51 Some consultees felt that too many exceptions to the period would undermine certainty and defeat the purpose of clarifying the law. Conversely, others were concerned that a greater degree of flexibility was necessary to ensure fairness. The law currently allows a great deal of flexibility to enable various objective and personal circumstances to be taken into account, but this leads to a large degree of uncertainty which most consultees have complained is undesirable. During the course of this project, we have attempted to strike an acceptable balance between flexibility and certainty.

2.52 On balance, most consultees seem to agree that the 30-day normal period should apply with a limited number of exceptions, including perishable goods, express agreement, and objective circumstances. Professor Roy Goode represented the views of the majority in concluding that objective but not personal circumstances should be taken into account:

> Finality is important in sales law. I agree that the right to reject should be retained as a short-term remedy but should not be extended to allow for latent defects. There should be a presumption that the period for rejection should be 30 days, capable of being displaced where the circumstances otherwise require, as in the case of perishables or foreseeabilty of a longer period. The personal circumstances of the consumer seem to me to be irrelevant except, perhaps, where these were known to the seller at the time of contract.

2.53 The British Retail Consortium pointed out the benefits of limiting the number of exceptions to the 30-day normal period:

> The objective should be to create a simple, easily understood, easily exercised right to obtain a refund for goods that are faulty, unfit for purpose or not as described at the time of purchase where the lack of conformity is clear virtually straight away. The fewer caveats, uncertainties and opt outs there are, the less will be the room for misunderstandings.
>
> For that reason, we welcome the proposal for a time limit to be placed on the right. That will remove disputes over what constitutes a reasonable time and different interpretations in different courts. Given the highest courts in the land seem to have a difficulty in determining the meaning of “reasonable time” it is essential to define it in legislation.

Perishable goods

2.54 In the Consultation Paper, when considering the possible reasons for a shorter or longer period, we began by asking whether it should be open to the retailer to argue for a shorter period where the goods are perishable, that is where they are by their nature expected to perish within 30 days (CP paragraph 8.77 (1)(a)). In these cases, we thought that a 30-day normal period would be incompatible with the nature of the goods.

2.55 On the question of perishable goods, the vast majority of respondents said that it should be possible for the retailer to argue for a shorter period. Only three respondents said that it should not be open to the retailer to argue for a shorter period where goods are perishable because, for example: in their view exceptions would defeat the aim of simplifying the law; or it was an irrelevant consideration where goods sold were unfit for purpose.

Inconsistent acts

2.56 We then asked whether it should be open to the retailer to argue for a shorter period where the consumer should have discovered the fault before carrying out an act inconsistent with returning the goods (CP paragraph 8.77 (1)(b)).

2.57 The principle behind this is that it in many cases it is reasonable to expect consumers to check goods before they alter them. For example, a consumer should check the colour of paint or tiles before applying them to a wall. If a product is altered or mingled with something else it will often be difficult for the retailer to examine the goods to see whether they are faulty (especially if the act means that the goods cannot be returned), or to resell the goods if appropriate.

2.58 Respondents' views were split on this question, with a very slim majority in favour of retailers being able to argue for a shorter period. Those who disagreed did so mainly on the grounds that exceptions defeat the aim of simplifying the law; this would be an unnecessary complication, and might encourage disputes.

Objective circumstances

2.59 The next question we asked was whether it should be open to the consumer to argue for a longer period where it was reasonably foreseeable at the time of sale that a period longer than 30 days would be needed. (CP paragraph 8.77 (2)(a)).

2.60 In the Consultation Paper, we presented the examples of skis bought at an end of season sale, and a lawnmower purchased in November. In both cases it would be within the contemplation of both parties at the point of sale that the items would not be used for a period exceeding 30 days.

2.61 Two-thirds of respondents agreed that it should be open to the consumer to argue for a longer period in these circumstances. Several respondents used Christmas presents purchased in autumn as an example.

2.62 Those who disagreed generally did so on the basis that exceptions undermine the certainty and the benefits of a set period.

Personal factors

2.63 We asked whether it should be open to the consumer to argue for a longer period where the consumer's personal circumstances made it impossible to examine the goods within the 30-day period (CP paragraph 8.77 (2)(c)).

2.64 Views were split on this question, with the very slight majority against a consumer being able to argue for a longer period in these circumstances; this was generally on the ground that it would be undesirable to introduce subjectivity and uncertainty which would rob the 30-day period of its simplicity. Some were also concerned about the potential for abuse.

2.65 Comments made by the Judges of the Court of Session were representative of many consultees:

> It appears to us that the advantage of certainty which a stipulated period would bring might be in danger of being seriously eroded if the degree of subjectivity in this proposal were introduced. Moreover, extensions of the time period which would be very likely to concern circumstances outwith the knowledge of the supplier could give rise to unfairness.

2.66 Those in favour of a consumer being able to argue for a longer period due to their personal circumstances did so on the following grounds. Some argued that it would be unduly harsh to discount personal circumstances, and would amount to a diminution of consumer rights as the law currently allows some personal circumstances to be taken into account. Others said that personal circumstances should be taken into account where they could be proven, for example proof of illness.

Express agreement

2.67 We also asked consultees whether it should be open to the consumer to argue for a longer period where the parties agreed to an extended period (CP paragraph 8.77 (2)(b)). The vast majority of those who responded to this question agreed that this should be possible. A number of those added, however, that it should not be possible to *reduce* the period by express agreement.

2.68 Only three felt that it should not be possible to agree an extended period, because they thought there should be no exceptions to the 30-day normal period.

Fundamental defects

2.69 We considered whether it should be open to the consumer to argue for a longer period where there were fundamental defects which took time to be discovered (CP paragraph 8.77 (2)(d)).

2.70 Once again views were split, with approximately half against allowing the consumer to argue for a longer period, generally on the basis that the right to reject should not be extended and/or there are other available remedies. The other half thought that the consumer should be able to argue for a longer period for fundamental defects. The arguments for and against were similar to those made in response to our question about whether the right to reject should cover latent defects (see above paragraphs 2.16-2.31 above).

THE REVERSE BURDEN OF PROOF AND THE RIGHT TO REJECT

2.71 We provisionally proposed that a consumer who exercises a right to reject should be entitled to a reverse burden of proof that the fault was present when the goods were delivered (CP paragraph 8.81).

2.72 Under the Consumer Sales Directive (CSD), durable goods are presumed to be faulty at the time of the sale if the fault appears within six months of delivery. This means that if such a fault appears it is up to the retailer to show that the goods were not faulty at the time of delivery. The overwhelming majority of those who responded to the question agreed with this proposal because it would simplify the law and make it more consistent. Only two consultees disagreed.

MINOR DEFECTS

2.73 We provisionally proposed that legal protection for consumers who purchase goods with "minor" defects should not be reduced with regard to the right to reject and also the CSD (CP paragraph 8.91).

2.74 When considering this area of law, it is important to note that not all faults entitle the consumer to exercise the right to reject. The right will only arise where the fault is significant enough to amount to a breach of an implied term, for example if it renders the goods of unsatisfactory quality.

2.75 The Sale of Goods Act 1979 provides that the quality of goods includes their state and condition. Appearance and finish, and freedom from minor defects are among the factors which are, in appropriate cases, aspects of quality.[19] As Howells and Weatherill note:

> The 1994 amendments clarify that appearance and finish and freedom from minor defects are relevant factors, but note that the presence of such a defect will not necessarily render the goods unsatisfactory as they are only to be considered in appropriate cases as part of the overall assessment of the goods' quality. [20]

2.76 They go on to explain that, in some cases, the defect might be so minor that it is considered *de minimis.* That is, the defect may be too trivial to constitute a breach.

[19] SoGA, s 14(2B).

[20] Howells and Weatherill, *Consumer Sales Law* (2nd ed 2005) p 178.

2.77 With regard to the CSD, whilst Article 3(6) of the CSD states that a consumer is not entitled to have the contract rescinded if the lack of conformity is minor, the UK has not implemented that provision.

2.78 The large majority of respondents agreed with our proposal, and only two disagreed. There is a strong concern among consultees that reducing protection in this area would be a "major retrograde step". There is lack of clarity over what constitutes a minor defect. It is a subjective judgment, and retailers would be too likely to say that a defect was merely "minor". Consultees felt that disputes about what constitutes a minor defect would detract from the simplicity of the right to reject.

2.79 They pointed out that the appearance of goods is often as important as function to consumers. If a consumer purchases a new item, they are paying the price for something new, not second-hand or repaired. The consumer, if given the option, would often not have chosen to purchase the damaged item, even at a discount. Many consultees shared the view expressed by Westminster Trading Standards:

> Consumers place a great deal of emphasis on "new", ie free from defects, and the price reflects this. Current laws relating to consumer buyers should be retained. Consumers often like their items to look good and not just to perform a function.

2.80 The City of London Law Society observed:

> The UK took the decision not to follow the permitted exceptions from the right to rescind for "minor" defects. We would agree with the views expressed in the Law Commission's 1987 report that cosmetic issues, such as product finish, are of major importance to consumers. The current law does not require absolute perfection in goods sold by retailers and the 1994 reforms to the Sale of Goods Act 1979 recognise freedom from minor defects as an element of "satisfactory quality". We are not aware that this has caused major problems in practice. Removing the reject to reject for "minor" defects would create further uncertainty in the law and would lead to costly disputes.

2.81 The Office of Fair Trading added that retaining the level of protection in this area is necessary for simplicity and will avoid erosion in consumer protection; it also creates an incentive for traders to produce high quality goods.

2.82 The two consultees who disagreed with this proposal regarding minor defects felt that a repair or replacement should be attempted first for minor faults, as refunds might be disproportionate. In addition, the British Retail Consortium accepted our proposal but felt that the right to reject in the case of a minor defect should only be exercised where it is "reasonable and proportionate".

PART 3
THE RIGHT TO REJECT IN OTHER SUPPLY OF GOODS CONTRACTS

INTRODUCTION

3.1 In the Consultation Paper, we discussed how other supply of goods contracts should be treated, for example work and materials contracts, exchange, hire and hire purchase contracts. In these contracts, unlike sales contracts, the right to reject is not lost by acceptance. The law is more favourable to consumers. In England and Wales, the right to reject continues until the contract has been affirmed. Affirmation can only take place once the consumer is aware of the fault. Similarly, in Scotland, the right to reject is lost when the consumer, through words or conduct, waives the right to reject.

3.2 We considered whether the same rules should apply to sales and other supply of goods contracts. That is, should the proposed normal 30-day period for exercising the right to reject goods also apply to other contracts for the supply of goods? We thought that the arguments differed between contracts where property passes (such as work and materials contracts) and those where property does not pass (such as hire contracts).

CONTRACTS WHERE PROPERTY IS TRANSFERRED

3.3 The first question we asked is whether the normal 30-day period for exercising the right to reject should also apply to other contracts for the supply of goods in which property is transferred, or whether the current law should be retained (CP paragraph 8.104).

3.4 In the Consultation Paper, we reached no concluded view on this question. On the one hand, we thought that removing the distinction would simplify the law. However we had been told that affirmation is an important safeguard for consumers. In response to the Consultation Paper, respondents' views were split with half in favour and half against.

Arguments in favour of the normal 30-day period applying to other supply of goods contracts where property is transferred

3.5 The Office of Fair Trading (including Consumer Direct) were among those who thought that the benefits of simplicity of the 30-day period applying to these contracts was likely to be advantageous on balance. Whilst they acknowledged that application of the 30-day period might limit consumers' rights, they pointed out that consumers generally do not know about these rights and therefore there would be little practical detriment; consumers would benefit from the simplification of the law.

3.6 Others agreed that simpler law would benefit consumers, advisers and retailers. Some said it did not make sense to have different rights if a faulty cooker was bought as part of a fitted kitchen, as opposed to a free-standing model bought separately. Several consultees considered that it was difficult in practice to distinguish a sale contract from a contract to supply goods and services.

Arguments against the normal 30-day period applying to other supply of goods contracts where property is transferred

3.7 Many of those who argued against this did so on the basis that the current law should be retained, expressing the view that the arguments for uniformity do not outweigh the reduction of consumers' rights. Several said that they could see no justification for a change in the law, and there was no evidence of it causing unfair results in practice.

3.8 The point was made that consumers frequently seek advice on work and materials contracts. These are often relatively expensive contracts, involving consumers' homes (their most important asset).

3.9 In many of these contracts the consumer is much more reliant on the trader who has selected, obtained, examined and fitted the goods on the consumer's behalf. In these cases it is common for the consumer to rely on the trader's expertise, skill and advice in relation to the goods. Consultees argued that a 30-day period would operate harshly in these contracts.

3.10 The Local Authorities Coordinators of Regulatory Services argued strongly that the current law should be retained. They felt that the imposition of a 30-day period in the type of contracts involved (such as home improvements) would diminish consumers' rights more than in the case of straightforward sale of goods contracts.

3.11 The Council of Her Majesty's Circuit Judges concurred that the current law should be retained, and said that faults in these contracts often take longer to appear:

> Although we see benefit in simplifying the law to substitute the 30-day rejection period in supply contracts other than simple sale of goods contracts, we do not consider that the benefit of simplification should outweigh the views of consumer groups as to the advantages of the different regimes in contracts of work and materials and exchange, particularly as, in those contracts, it is more often than not that defects may take a substantial time to manifest themselves. We therefore consider that the current law should be retained.

Other approaches

3.12 Others, including Gordon Cameron, proposed that the current law should be maintained, but clarified:

> I am not convinced that the arguments for uniformity are sufficiently strong to justify a diminution in the consumer's rights. I suggest that the major argument in favour of uniformity would be best addressed by clarifying the law on affirmation and waiver.

3.13 Which? are of the view that a single remedies regime based upon affirmation should apply to sales contracts and supply contracts. They submit that this would increase clarity and provide more appropriate protection.

3.14 Deborah Parry proposed that if affirmation is to be retained, then it should be confined to work and materials contracts. Other transfer of goods contracts should be aligned with sales.

HIRE PURCHASE

3.15 We invited views on the issues raised by hire purchase contracts, and whether they cause any problems in practice. In particular should hire purchase be treated as a supply contract to transfer property in goods, or analogous to a hire contract (CP paragraph 8.112)?

3.16 Respondents' views were split with approximately half thinking that hire purchase should be treated as a supply contract to transfer property in goods. Conversely, the other half thought that hire purchase should be treated in a different way. Many of those thought that the current law should remain. Only two thought hire purchase contracts should be treated as analogous to hire contracts.

3.17 In the Consultation Paper, we began by explaining that we had received little evidence about hire purchase contracts during the course of the review. We had been informed that hire purchase was not as popular as it once was in consumer transactions. However we were aware that it is still used in certain sectors such as the motor industry and the purchase of household appliances and goods. We are grateful for the views we have subsequently received, in particular from the Finance and Leasing Association (FLA), Hertfordshire Trading Standards, and the Bar Council.

3.18 The FLA confirmed that hire purchase is still a very important method of financing car purchases for consumers. They advised:

> In 2007, 63% of the consumer motor finance agreements written (for the purchase of new and used cars) were hire purchase agreements. It remains, therefore, the most popular method of finance for purchasing vehicles.

3.19 The FLA went on to explain that, in their sector, an option to purchase fee on a hire purchase agreement is generally minimal (in the region of £50-100). It is, therefore, rare for a customer who has made all the payments owing under the agreement not to exercise the option to obtain title. In the vast majority of cases, it is envisaged by the consumer that the transaction will result in a transfer of property to the consumer, and in these cases it is not analogous to hire.

3.20 The FLA took the view that it would be sensible to treat hire purchase contracts as a contract to transfer property in goods and the remedies available to the consumer should be the same. Several consultees concurred with the views expressed by the FLA.

3.21 The position is less clear in other sectors. Although it appears that, more often than not, hire purchase transactions end in the transfer of ownership, in a proportion of cases they do not, and as a result the effect is similar to hire. As the Bar Council wrote:

> The popularity of agreements which carry a large "balloon" payment, rather than a typical small option to purchase fee, has complicated the picture. It is accordingly difficult to align hire purchase with either sale or hire, since traditional hire purchase is very similar to sale, but the "balloon" agreements perhaps have more in common with hire.

HIRE CONTRACTS

3.22 In the Consultation Paper, we provisionally proposed that in hire contracts the current law should be preserved (CP paragraph 8.108). The current law is that when goods develop a fault, the consumer is entitled to terminate the contract, paying for past hire but not future hire. The doctrine of affirmation applies to the exercise of the right to reject, and the method for valuing use is the rate of hire.

3.23 The vast majority of respondents agreed with this proposal, on the basis that the current law appears to be understood and operate well in practice. Only two disagreed with the proposal. The Judges of the Court of Session succinctly represented the views of the majority in saying:

> We consider that the law as it stands appears to be understood and operate well in practice. In these circumstances we consider that there is neither demand, nor justification, for innovation in the law.

PART 4
REFORMING THE CONSUMER SALES DIRECTIVE

INTRODUCTION

4.1 The UK implemented the Consumer Sales Directive (CSD) in 2002. In 2004, the European Commission launched a review of the eight consumer protection directives ("the consumer acquis"), including the CSD. The European Commission published a proposal for a new directive on consumer rights in October 2008. This is intended to reform four existing consumer protection directives including the CSD.

4.2 The provisional proposals in our Consultation Paper were put forward as part of the current debate within the EU about how the CSD should be reformed, and aimed at improving the remedies in the CSD. As well as forming part of the European debate, it may be possible to implement some reforms in the UK only, provided that any replacement to the CSD continues to be a measure requiring only minimum harmonisation.

4.3 During the course of our review, stakeholders repeatedly told us that clarification of how the CSD operates is required. In particular, there was confusion about how a consumer can move from first tier to second tier remedies. What amounts to "unreasonable delay" and "significant inconvenience"? In practice, these terms allow considerable scope for dispute.

CLARIFYING WHEN CONSUMERS MAY MOVE TO A SECOND TIER REMEDY: "REASONABLE TIME" AND "SIGNIFICANT INCONVENIENCE"

4.4 In the Consultation Paper we made several proposals regarding the CSD. Firstly, we provisionally proposed that the directive which replaces the CSD should state that after two failed repairs, or one failed replacement, the consumer is entitled to proceed to a second tier remedy (CP paragraph 8.135).

4.5 All respondents who expressed a view appeared to agree that the law requires clarification in this area. Most pointed out that the benefit of our proposal would be that it would introduce a much needed measure of certainty.

4.6 One-third of respondents agreed with our proposal. The remaining two-thirds suggested alternatives. The most common suggestion (made by just over a third of respondents) was that a consumer should be able to proceed to a second tier remedy after one failed replacement or one failed repair.

4.7 This means that a combined total of just over two-thirds of respondents felt that consumers should be able to proceed to a second tier remedy after a set number of failed replacements or repairs; that is after one failed replacement, and either one or two failed repairs.

4.8 Our second provisional proposal was that further guidance should be provided stating that the consumer should be entitled to rescind the contract: after one failed repair where the product is in daily use; or immediately where the product is essential; unless the retailer has reduced the inconvenience to the consumer by, for example, offering a temporary replacement (CP paragraph 8.136).

4.9 Many consultees had previously indicated their support for the proposal that the consumer should be entitled to rescind the contract after one failed repair when responding to the previous question. As a result the response rate for this question was relatively low. Of those who did respond, about half agreed with the proposals. The remainder made other suggestions such as that the consumer should be able to rescind immediately where the product is in daily use as well as where the product is essential.

BEST PRACTICE GUIDANCE

4.10 Thirdly, we provisionally proposed that there should be best practice guidance on the repair and replacement process under the CSD (or any replacement) (CP paragraph 8.141). We also asked consultees what form best practice guidance should take. In particular, whether it should be issued at EU or national level (CP paragraph 8.142).

4.11 Most of those who responded to this question agreed with our proposals, citing the benefits of clarification. Only three disagreed. The arguments against our proposal were that guidance would not be helpful, and would create an additional administrative burden. The main argument in favour of the proposal was summarised by Professor CJ Miller who said that clarification would reduce the annoyance, frustration and the potential for loss of earnings occasioned by the inefficiencies highlighted in the Consultation Paper.

4.12 On the question of whether guidance should be at EU or national level, views were divided with approximately half saying that guidance should be at EU level and half national; many said that guidance should be issued at both levels.

OTHER REASONS TO PROCEED TO SECOND TIER REMEDIES: DANGEROUS GOODS AND UNREASONABLE BEHAVIOUR

4.13 Our fourth proposal regarding the CSD was that it should be reformed to allow a consumer to proceed to a second tier remedy when a product has proved to be dangerous or where the retailer has behaved so unreasonably as to undermine trust between the parties (CP paragraph 8.146).

4.14 The overwhelming majority of respondents supported this proposal. All but two respondents agreed in principle that consumers should be able to proceed to a second tier remedy where a product has proved to be dangerous, or where the retailer has behaved so unreasonably as to undermine trust.

4.15 Some respondents, including the Local Authorities Coordinators of Regulatory Services and the Office of Fair Trading, suggested that care should be taken with the terminology and definitions of “dangerous” and "unreasonable behaviour", in order to avoid disputes and prevent ambiguity in practice.

4.16 The British Retail Consortium objected to this proposal saying that the tests would be too subjective:

> In the context of a faulty product, whether or not it is dangerous is likely to be a highly subjective judgment for the consumer. While that consumer may believe or "feel" it is dangerous, the retailer might objectively believe that it was not the product that was dangerous but its improper use – or indeed that it was defective but not dangerous. The proposal is, therefore, likely to give rise to excessive disputes and to undermine the simplification process. In classifying a product as dangerous it is vital that objective criteria be set and objective assessments be made. The same is true of the assessment of whether the retailer has behaved unreasonably. The consumer who has been denied something is likely to believe that the retailer has acted unreasonably.

RESCISSION AND THE DEDUCTION FOR USE

4.17 If a consumer progresses to the second tier remedy of rescission, they are entitled to a refund. However, the retailer is permitted to deduct an amount to reflect the consumer's use of the faulty goods.

4.18 This deduction for use is an option in the CSD[21] which the UK chose to implement, but many member states did not. Under the European Commission's proposals for a new directive, this option would be removed. Recital 41 of the proposed directive states that "the consumer should not compensate the trader for the use of the defective goods".

4.19 In the Consultation Paper, we concluded that the European Commission is right to propose the removal of the deduction for use. We arrived at this conclusion for several reasons. In meetings, stakeholders told us that the deduction for use is seldom used, and uncertain. Currently, there is no indication as to how it should be calculated which leads to disputes.

4.20 The deduction for use is an inflammatory topic with consumers. Consumers said that if they had been unfortunate enough to buy a faulty product, and repairs and/or replacements had been unsuccessful, they would feel aggrieved if they were then charged for use of the product. Further, they felt that if the refund was going to be reduced in this way, the consumer should be entitled to compensation for time off work, other associated costs such as telephone calls, and also for general inconvenience.

4.21 In the Consultation Paper, we asked whether consultees agreed that the "deduction for use" in the event of rescission should be abolished (CP paragraph 8.157). Two-thirds of those who responded to this question were in favour of this proposal for consumer sales, mainly for reasons of simplicity, and to reduce uncertainty and the potential for disputes.

[21] Recital 15.

4.22 The Citizens Advice Bureau said that the damages the consumer suffers will often offset usage. Most agreed with that view. Similarly the Council of Her Majesty's Circuit Judges commented:

> The calculation of the appropriate reduction is fraught with difficulties and in most cases the rough and ready set off between the use the consumer has had of the goods and the likely inconvenience he or she has experienced in obtaining repairs or replacements seems to strike an equitable balance.

4.23 The third of respondents who objected to the abolition of the deduction for use generally did so on the ground that the consumer may have had a substantial period of trouble-free use, and it was appropriate that the consumer should pay a reasonable amount for this. Several agreed with the method of calculation discussed in paragraph 8.150 of the Consultation Paper, that is by reference to the expected life-span of the goods.

4.24 The City of London Law Society expressed the view that the deduction for use should be retained to prevent the exceptional case where a consumer attempts to abuse the law. For example, where a consumer obtains the use they want from goods, and then seeks to reject them, this amounts to "free hire" of goods. This view was also expressed by a handful of other stakeholders in our meetings with them, who said that a deduction for use could be used to deter abuse. The City of London Law Society said:

> It is clear, in practice, that the vast majority of retailers will not attempt to make a deduction for use in all but the very few cases where the consumer is attempting to abuse the law.
>
> The Law Commission notes that the consumer may have suffered additional expense because of the fault in the product and we agree that where this is the case, the retailer should be required to set off this amount against the amount deducted for use.

4.25 The Radio, Electrical and Television Retailers' Association (Retra) suggested a different approach in terms of calculating the deduction for use:

> Retra believes that a fair approach could be to have no reduction in the refund amount during the first six months from the date of purchase/delivery. Following on from this time there should be a reduction of some 10-15% per year or part thereof.

THE SIX-MONTH REVERSE BURDEN OF PROOF

4.26 Under the CSD regime, goods which do not conform to contract at any time within six months of "delivery" will be considered not to have conformed at that date.[22] Normally, the relevant delivery is the point at which goods are first delivered to the consumer. However, we raised the question of whether the redelivery of repaired goods, or delivery of replacement goods, qualify as relevant deliveries.

4.27 Our view was that the same logic that provides a six-month reverse burden of proof for the original delivery should also apply where there is redelivery following cure, or delivery of a replacement. Therefore, we provisionally proposed that the six-month reverse burden of proof should recommence after goods are redelivered following repair or replacement (CP paragraph 8.163).

4.28 The large majority of those who responded to this question agreed with the proposal, for the reasons put forward in the Consultation Paper. Only a handful disagreed. For example, the British Retail Consortium argued:

> The six-month reversal relates to the original purchase and is provided because a fault that appears in that time is presumed to have been present at the time of delivery. It does not relate to a repair but the good itself. Should the repair be unsuccessful the consumer has alternative routes … He does not need a new six-month period to be protected.

4.29 A few respondents suggested that the six-month reverse burden should begin again in the case of replacement but not repair. Two others suggested that there was some merit in the argument that the reverse burden should be suspended whilst repairs took place and resumed after the repair is complete.

THE TIME LIMIT FOR BRINGING A CLAIM

4.30 The CSD currently states that member states must allow consumers at least two years to bring a claim before the courts.[23] The UK exceeds this minimum, as the limits which apply are those set in general contract law. In England there is a limitation period of six years, and in Scotland a period of prescription of five years.

4.31 Under the European Commission's proposed directive consumers would not be able to pursue a retailer for any fault which becomes apparent more than two years after delivery.[24] Our concern was that this provision may not be suitable for some goods which are intended to be long-lasting and where defects may take time to come to light.

[22] SoGA, s 48A(3).

[23] Art 5(1).

[24] Art 28(1).

4.32 We provisionally proposed that the time limits for bringing a claim should continue to be those applying to general contractual claims within England, Wales and Scotland (CP paragraph 8.170). More than three-quarters of respondents supported our proposal.

Arguments in favour of the proposal

4.33 Many consultees were concerned that the time limits for bringing claims are already complicated enough for consumers without introducing new ones. The Faculty of Advocates added that consumers might well be misled into thinking they had the usual period to bring a claim, only to discover, after the expiry of two years, their claim has become barred.

4.34 The City of London Law Society concurred:

> Multiple limitation periods for claims of this nature would add yet another complexity to the law that would confuse consumers further. We view it as extremely unlikely that a consumer would be able to make a successful case beyond the period of two years. It is for this reason that we do not feel it is necessary to add the extra limitation period into the law, when we feel that the position as it currently stands is adequate to cover instances of consumer abuse.

4.35 Gillian Black and others agreed with our proposal and added:

> We do not understand why a consumer should be deprived of remedies where defects (as opposed to wear and tear or consumer-inflicted damage) arise after two years.
>
> In particular, many high value consumer goods are intended to last for more than two years (cars, televisions/sound equipment) and it is not clear why consumers should bear the risk of any latent fault which is revealed after two years.
>
> Further, imposing a cap on the period in which a consumer has a remedy potentially disadvantages the consumer in comparison with a non-consumer buyer, who does not suffer from this time bar.

4.36 The Local Authorities Coordinators of Regulatory Services pointed out that the proposed two-year cut-off might cause conflict or confusion where traders already offer guarantees or warranties that exceed this period.

4.37 Consumer Focus said:

> In practice, it is not likely that consumers will pursue such claims as, in most cases, faults will have appeared much earlier. However, there will be cases with more complex products such as cars and consumer durables with long life spans where faults will not manifest themselves for some time. To prevent consumers asserting their rights after two years would be most unfair. It would diminish the importance of the durability aspect of the satisfactory quality standard and would provide no incentive to manufacturers to improve the quality of their products.

4.38 Which? were concerned that the proposed two-year cut-off would raise serious environmental questions. They argued that if consumers could not expect goods to last longer than two years then manufacturers were more likely to produce poor quality products with reduced life spans, which would encourage waste. Which? added that the two-year cut-off also appears to conflict with Article 24 of the proposed directive (conformity with the contract). One of the factors used to determine whether goods are in conformity is whether they show "the quality and performance which are normal in goods of the same type". Such an analysis necessarily involves durability and must take into account that some products are expected to last longer than two years.

Arguments against the proposal

4.39 Retra were among the very few respondents who objected to the proposal. They did so on the following basis:

> To have an entitlement to claim in a court of law that there was an inherent fault in a product for up to six years is unreasonable and the present statute of limitation of six years is too long and should be reduced to two years.
>
> Most faults with products appear within the first six to eighteen months of use and certainly most inherent faults would be obvious within this time span. Reducing the statutory limit to two years would still provide adequate assurances for consumers.

4.40 Similarly, the Association of Manufacturers of Domestic Appliances (Amdea) said that in the case of domestic appliances it is difficult to imagine any original faults that would manifest themselves after two years.

PART 5
WRONG QUANTITY, LATE DELIVERY AND DAMAGES

WRONG QUANTITY

5.1 Section 30 of the Sale of Goods Act 1979 (SoGA) sets out remedies for consumers where a retailer delivers the wrong quantity of goods. It provides consumers with a choice between exercising the right to reject or asking for a cure.

5.2 In the Consultation Paper, we invited views on whether there are reasons to retain section 30 of SoGA for consumer sales, or whether cases of wrong quantity can be dealt with through the application of general principles applying to non-conforming goods, that is the application of the duty to provide goods which correspond to their description.[25]

5.3 Half of respondents thought that section 30 of SoGA should be retained. They tended to see section 30 as a reasonable, sensible and logical set of rules to deal with the wrong quantity of goods being delivered.

5.4 Professor CJ Miller made the point that wrong quantity does not necessarily fall within section 13 of SoGA which relates to description. Professor Roy Goode shared that view, and commented:

> I do not agree that delivery of the wrong quantity goes to description, since this is concerned with the identity of the subject matter of the contract.

5.5 The other half of respondents either made alternative comments or thought that the matter could be dealt with through the application of general principles. For example Dr Christian Twigg-Flesner wrote:

> The assumption that quantity is a part of description might not be correct, particularly in the European context. There is a lot of debate in the literature as to whether quantity is covered by the current CSD at all, although the dominant view is that it is – as an implicit aspect of conformity – but not of description. So there is probably room for using general remedies, leaving section 30 for non-consumer contracts only.

LATE DELIVERY

5.6 The current law allows the consumer a refund of the purchase price only where the delivery date is of the essence of the contract.

[25] SoGA, s 13.

5.7 The European Commission's proposal for a new directive would result in increased protection for consumers in this area. It states that goods must be delivered within 30 days unless the parties have agreed otherwise.[26] The consumer is entitled to a refund within seven days where the trader fails to fulfil his obligation to deliver.

5.8 This proposal appears to increase consumers' rights where they agree a delivery date with the retailer. Currently, consumers would only be entitled to a full refund if they made it clear that the date was important to them.

5.9 In the Consultation Paper, we sought consultees' views on whether consumers should be entitled to a full refund whenever the trader fails to meet an agreed delivery date. The alternative would be to retain the current law.

5.10 Two-fifths of respondents thought that the current law should be retained. A further two-fifths suggested numerous alternative proposals. The remaining one-fifth thought that consumers should be entitled to a refund whenever a trader fails to meet an agreed delivery date.

DAMAGES

Retention of the domestic remedy of damages

5.11 Throughout this project, there has been consistent support for the retention of the domestic remedy of damages. Many noted that damages provide a vital remedy for consequential loss. That is, where consequences within the contemplation of the parties flow from the breach of contract. Others noted that damages require consumers to mitigate their loss which is beneficial to retailers. We proposed that the right to damages should be retained in UK law (CP paragraph 8.186).

5.12 The British Retail Consortium (BRC) was the only respondent that had reservations about our proposal. All other respondents agreed with the proposal; most of those were very strongly in favour. However, the BRC submitted:

> The BRC does not agree that in a unified, codified system the right to damages should be retained without restriction. The remedies provided and required under EU law are specific and there should be no need to retain a system of damages running alongside that. Any such right should be limited to specific circumstances and consequential financial damages and fully integrated into one unified approach. Anything else would seem to retain the dual system of remedies that it is the purpose of the review to remove.

[26] Art 22(1).

5.13 In contrast, the majority reiterated that damages are an essential element of our remedial system. For example, Westminster Trading Standards explained that damages are a useful alternative and "catch all", flexible enough to deal with a variety of situations, and sometimes providing the most appropriate remedy. By the time consumers go to court, often they are claiming for the cost of repair or replacement, having had no alternative but to arrange for repair or replacement themselves. They described damages as "a fundamental tool", bearing in mind that a consumer should be compensated by being put into the position in which he would have been had the goods conformed to the contract.

5.14 In order to illustrate their point, Westminster Trading Standards presented the facts of a case that they had recently dealt with:

> A real example where damages were the most suitable remedy involved an elderly lady who purchased some glasses with expensive gold frames (costing about £1000) from a high street optician. It was more than she had wanted to pay but she had been convinced by the sales person that they would last significantly longer than the standard frame glasses.
>
> The frames proved defective and broke after 11 months. The trader agreed to repair them, so the glasses were sent away for two months. When the lady received the glasses back they broke again after a week, at the point on the frames where the repair had been done. The trader refused to repair them again, claiming the frames were not designed to last forever; as she had had them for over a year they would not repair them again for free. She could not afford the repair cost quoted by the trader.
>
> A year later, by chance, she was put in touch with a specialist repair centre who repaired the glasses for £25 and provided a report detailing why the seller's repair was defective. She now had glasses in useable order but was £25 out of pocket. Relying on compensation by way of damages, she claimed not only the £25 but also £200 for loss of use (1 year) based upon a five-year life expectancy for the frames.

5.15 Which? expressed a similar view:

> The right to damages has an important role in faulty goods cases, for example, because it can encourage traders to remedy the faulty good more quickly and efficiently and incentivise them to cause minimal inconvenience to the consumer; there are some circumstances where the simple legal remedies may not be enough eg where the consumer is forced to remedy the problem at his own expense; it provides a straightforward and proportionate remedy in unusual cases that are otherwise difficult to legislate for.

Would guidance on damages be helpful?

5.16 A secondary issue that was brought to our attention is that in practice there is a considerable amount of uncertainty about the circumstances in which a consumer may claim damages with respect to faulty goods. Office of Fair Trading research has shown that it is not uncommon for consumers to experience financial loss due to faulty goods.[27] However, stakeholder feedback suggests that consumers do not routinely claim for relevant financial loss. There is even greater confusion about whether consumers can claim for non-financial loss, such as disappointment, distress and inconvenience.

5.17 Therefore, we sought views on whether the issue of damages should be left to the common law or whether guidance would be helpful on the circumstances in which damages should be payable to consumers. In particular, should damages be available for loss of earnings, distress, disappointment, loss of amenity and inconvenience. If so, for which types of goods, and in which circumstances (CP paragraph 8.187). The majority of those respondents who expressed a view on the question of guidance felt that it would be useful.

Arguments in favour of guidance on damages

5.18 Dr Christian Twigg-Flesner encapsulated the generally shared view when he commented "it may be helpful to provide guidance as to what the common law permits by way of recovery". In meetings with stakeholders several said that guidance should explain the circumstances in which a consumer cannot claim damages as well as when they can.

5.19 Similarly, the Bar Council saw the merit of guidance:

> Guidance as to what the common law states might be helpful. In particular for litigants in person or their advisers who frequently plead such claims unsuccessfully.

5.20 However, the Bar Council added that it would be problematic if such guidance were itself an attempt to rewrite the common law on damages.

5.21 Which? took the view that further guidance would be useful so that consumers are more fully aware of when damages might be available in addition to the standard legal remedies and how such damages are likely to be calculated.

5.22 The National Consumer Federation agreed that guidance providing clarification of the circumstances in which damages will be payable, and the type of damages, would be helpful for consumers.

5.23 The Office of Fair Trading wrote:

> We agree that the right to damages should be retained in UK law. The CRD remedies are not sufficient on their own.

[27] The Office of Fair Trading Report on Consumer Detriment, April 2008.

> Consumers should be able to claim damages for any reasonably foreseeable losses arising from the trader's breach of contract, particularly, in the case of damage to property and person that result.
>
> While we envisage that many consumers and traders may deal with compensation for lost days off work and expenses incurred in connection with non-conformity of goods in accordance with any guidance issued in this respect, consumers whose circumstances are such that their losses are greater for some reason should retain the option of pursuing damages.
>
> While compensation is often sufficient for the most straightforward cases, the level of compensation set is usually on the low side, not revised sufficiently often and suitable only for the most straightforward cases where the damages would be low in any event. We consider that guidance on circumstances for claiming damages would be helpful, but not on the amount to be claimed.

Arguments against guidance on damages

5.24 Very few respondents put forward an argument against guidance. The Judges of the Court of Session considered that the issue of damages is best left to the common law. They felt that guidance of the sort suggested would be relatively complicated, might be difficult to apply in practice, and doubted whether such guidance would confer any practical advantage to the consumer.

5.25 The Faculty of Advocates agreed with that view. They said that the issue of damages should be left to the general law of damages, adding that:

> The Faculty considers that attempts to clarify the law in this area may serve to unnecessarily elaborate an already extensive and complex area of law and result in more uncertainty and confusion for the consumer.

5.26 Unlike the other consumer groups, it appears that Consumer Focus did not favour guidance, preferring the matter to be left to the common law. They also suggested that it might be best dealt with as a matter of consumer education:

> We consider that the issue of damages is best left to UK law. The current law appears to deal adequately with the issues. This is, perhaps, truer of Scots law than English law. In the Court of Session decision in *Webster v Cramond Iron Co* it was held that damages may be awarded for trouble and inconvenience arising from the breach. This was a commercial case but the principle has also been applied to non-commercial contracts in *Mack v Glasgow City Council* and *Smith v Park*. Even in England the courts to seem to be willing to award damages to consumers on a somewhat similar basis.
>
> The difficulty is that even in Scotland, where the principle of damages for trouble and inconvenience is more clearly settled, it seems not to be one that is well-known to consumers and their advisers. This raises wider issues about informing consumers of their rights and is best dealt with in discussing that problem.

Other comments

DAMAGES FOR NON-FINANCIAL LOSS

5.27 Some consultees commented on the circumstances in which damages should be payable. In particular whether damages should be available for loss of earnings, distress, disappointment, loss of amenity, or inconvenience. Most considered that damages should be payable in appropriate cases, where quantifiable financial loss within the contemplation of the parties flows from the breach of contract. This would include loss of earnings and other costs. That was seen as a fairly non-contentious matter.

5.28 Non-financial loss, such as distress, disappointment, loss of amenity and inconvenience were more contentious topics. However, the majority of those who expressed a view on those potential heads of loss favoured the possibility of recovery in appropriate cases. For example, the Institute of Consumer Affairs wrote:

> Clear guidelines should be produced, this will be helpful for consumers, traders and consumer advisers. All types of goods should be covered and any monetary loss made good. It is obviously more difficult to adduce damages for more abstract features such as distress and loss of enjoyment but nevertheless we see no reason why, if sufficient justification is produced, these should not be included.

5.29 On the other hand, the Council of Her Majesty's Circuit Judges were among those who considered that non-financial loss should not generally be recoverable:

> We consider that the remedy of damages is an important right for the consumer of faulty goods and should certainly be retained. We favour retaining the current law, particularly in relation to continuing to disallow damages for loss of earnings, distress, disappointment, loss of amenity or inconvenience. That extension is likely to be very costly for retailers/manufacturers and to lead to excessive litigation.

LACK OF KNOWLEDGE OF THE LAW ON DAMAGES

5.30 In paragraph 5.26 we noted that Consumer Focus had expressed that the common law is adequate, and should be left as it is to deal with questions of when damages are payable. They highlighted that the real difficulty is that the rules are not well-known to consumers and their advisers, which raises issues about informing consumers of their rights.

5.31 Professor CJ Miller expressed a similar view, that the right to claim damages is not widely known which results in consumers not being compensated:

I think it is very important that the right to claim damages (subject to the standard tests that are applied) is retained. I would add two short points. Firstly, this has the advantage of imposing strict liability on a seller of goods which are not of satisfactory quality etc and cause personal injury or property damage to the buyer. In my experience of giving lectures or seminars, this is not widely known either by businesses or indeed by lawyers.

Secondly, I hope that the opportunity can be taken to widen or complement the *Farley v Skinner* principle and apply it to consumer sales. It seems entirely reasonable and within the contemplation of the parties that when goods break down loss of earnings may follow from time wasted on contacting sellers, that money will be wasted on laundering clothes, hiring cars etc, and that there will be more general hassle and stress.

Routine failure to provide compensation in such cases is bad for consumers, but is also bad for business in that it reduces the incentive to improve quality.

PART 6
INTEGRATION OF CSD REMEDIES WITH THE RIGHT TO REJECT

INTEGRATION OF CSD REMEDIES WITH THE RIGHT TO REJECT

Rejection with three possible options

6.1 In Part 2 of the Consultation Paper, we explained that the rejection of goods and the termination of the contract are two separate concepts. The rejection of goods (that is, the refusal to accept goods) is not necessarily followed by termination of the contract. For example, the consumer may reject goods and give the trader an opportunity to cure the fault. We use the short-hand term of "right to reject" to mean rejection and termination (including a refund) or, in Scots law, the consumer treating the contract as repudiated by the trader.[28]

6.2 We considered how the right to reject under the Sale of Goods Act 1979 (SoGA) might be better integrated with the Consumer Sales Directive (CSD) remedies in order to make the remedies regime simpler. This could be done by combining the right to reject with repair and replacement. These three first instance remedies could be joined under the umbrella of the concept of rejection.

6.3 Accordingly, we provisionally proposed that SoGA and the CSD remedies should be better integrated in a single instrument by use of the concept of rejection (paragraph 8.193). A new provision in the Sale of Goods Act could provide that the consumer buyer of faulty goods can *reject* them with three possible remedies of first instance: termination plus full refund; or alternatively the consumer can request repair or replacement.

6.4 There was a large degree of consensus on this proposal. The great majority of those who responded to this question agreed with the principle that the provisions should be simplified in this way.

6.5 Only three consultees indicated disagreement. However, two of those do not appear to disagree with the concept of integrating the right to reject with the CSD remedies. Rather, they expressed views about the length of the normal period for the right to reject, and queried whether the consumer should lose the right to reject if they opted for repair or replacement within the first 30 days.

6.6 The majority view was that the proposal to integrate remedies is a sensible approach. The Office of Fair Trading wrote:

> We agree that the CRD remedies and the right to reject should be integrated into one system for the sake of simplicity making the rights easier for consumers, traders and advisers to understand.

6.7 The Bar Council concurred:

[28] That is, rescinding the contract as a result of material breach.

> Assuming this can be done, then we agree that this is the ideal outcome. However, if this cannot be achieved at European level, then an independent right to reject should be retained.

6.8 Also in agreement, the Faculty of Advocates wrote:

> The Faculty considers that clarity in consumer law is particularly important. The Faculty agrees with the proposal that the SoGA and CSD remedies be integrated into a single instrument through the broadening of the concept of *"rejection".*
>
> It is crucial in any single instrument that termination and refund are a first tier remedy (as is presently proposed) to avoid a consumer being required by a seller to accept mere repair or replacement.

Other points

6.9 In addition, the Office of Fair Trading felt strongly that, if the right to reject is integrated into one system with the remedies for non-conformity, the right to reject for breach of contractual conditions under UK law should be retained generally. They said:

> The way in which the CRD is drafted, and indeed the CSD, does not make the requirements that goods are of satisfactory quality, fit for purpose, and so on, conditions of the contract in the same way as the SoGA. Therefore, the remedies contained in the CRD are for non-conformity rather than breach of contract. Currently, the right to reject exists for breaches other than terms implied into the contract by the SoGA. We would be concerned if such rights were lost as a result of integration of the right into the CRD.

6.10 Which? recognised the merits of our proposal, but suggested that the proposal could have gone further:

> Which? believes that where a consumer has purchased a faulty good, he should have the right to choose between the three remedies of refund, repair or replacement, with the right to a full refund also underpinning any failed attempts to repair or replace.

A right to reject after repairs have failed

6.11 In the Consultation Paper, and under the head of integrating the right to reject with the CSD, we also proposed that once a consumer has accepted a repair their right to reject ceases. If the repair fails, the consumer should proceed to a second tier remedy along the lines we proposed in relation to the reform of the CSD (CP paragraph 8.202).

6.12 Under current law, if a consumer seeks to exercise the right to reject, but is persuaded by the retailer to allow one or more attempts at repair, then the right to reject is suspended. If the repair(s) fails, the consumer may exercise the right to reject.[29]

6.13 Two-fifths of respondents agreed with the proposal; two-fifths disagreed; and the remaining one-fifth made alternative suggestions and comments expressing concern about the proposal. Those who agreed did so on the grounds of simplicity.

Consumers should not be discouraged from attempts to cure

6.14 However, there was a general concern, amongst the majority, that the proposal would discourage consumers from agreeing to attempts to cure because in doing so they would lose the right to reject. It was felt that attempts at cure should be encouraged where acceptable to both parties, and the consumer should not be penalised for being cooperative.

6.15 When responding to this proposal, Deborah Parry said:

> This would be likely to lead to a reduction in repairs during the first 30 days as any sensible, informed consumer is likely to reject rather than risk extended problems, delays etc if a repair did not work out.

6.16 The British Retail Consortium said that they did not object in principle to the proposal but feared it would make it less likely that consumers would choose repair:

> We believe that if a consumer who waives his right to a refund in the first 30 days in favour of a repair or replacement loses this right to a refund if the repair or replacement fail, then consumers will learn simply to demand a refund in the first 30 days and start again. This would be detrimental where a simple repair would have been possible and should have been tried.

6.17 Westminster Trading Standards said that consumers would be advised to be cautious about accepting a repair or replacement so as not to lose the right to reject. This would have the undesirable result of more goods being returned.

6.18 The City of London Law Society disagreed with the proposal:

[29] SoGA, s 35(6)(a).

> We agree with the policy that consumers should be encouraged to attempt to cure a fault with goods, but that they should not be penalised for doing so. It is clear to us (given our view that the right to reject should be retained) that a consumer who accepts a repair (during the time period within which the consumer had the option of rejecting the goods), which subsequently fails, should not be forced to attempt a further repair, but should instead be in at least as strong a position as they would have been in had the retailer not attempted the cure in the first place, ie consumers should then have the right to reject.

6.19 Some said that the proposal would represent a reduction in consumer rights and it would only be acceptable if the consumer was able to proceed to the second-tier remedy of rescission after one failed repair or replacement. In effect, this would act as a revival of the right to reject. For example, the Office of Fair Trading responded:

> We would only think that this limitation of consumer rights would be appropriate if the consumer could proceed to the second tier remedy of rescission after one failed repair or replacement per item not per fault. Otherwise the loss of the right to reject following repair could result in the consumer being locked into a cycle of repairs which would significantly disadvantage the consumer. Further, consumers may refuse repairs and reject goods if they anticipated that by accepting a repair their ability to reject or rescind the contract may be much more difficult to exercise.

PART 7
CONSUMER EDUCATION

INTRODUCTION

7.1 When we began talking to stakeholders in the early stages of this project, we were struck by how many raised the urgent need for consumer and retailer education about the legal remedies available for faulty goods. Stakeholders told us that the lack of knowledge resulted in unnecessary disputes. It leads to consumers underestimating or overestimating their legal rights, and shop staff not knowing how to deal with consumers returning faulty goods.

7.2 As we mentioned in the Consultation Paper, whilst everyone agreed that education would be highly beneficial, there was no consensus on how it should be done. Responses to the Consultation Paper have mirrored our early discussions. Respondents feel strongly about the necessity for education, but have different ideas about the way to achieve it.

7.3 In the Consultation Paper, we first asked consultees to comment upon how the aim of increasing awareness of consumer legal rights for faulty goods might be achieved (CP paragraph 8.216).

In particular, we asked, should there be a summary of consumer legal rights for faulty goods available at point of sale? If so, which form should it take? (CP paragraph 8.217).

We then asked consultees whether they agree that notices displayed in shops should:

(1) Use the expression “This does not reduce your legal rights” rather than “This does not affect your statutory rights”.

(2) Say how a consumer could obtain further information about their legal rights (CP paragraph 8.218).

A SUMMARY OF LEGAL RIGHTS AT POINT OF SALE?

7.4 The majority of those who responded favoured a summary of consumer legal rights being available at point of sale, in notices or leaflets. Many emphasised that such a summary would only be beneficial if it was succinct and easy to understand; a summary should not overload consumers with information. The University of Strathclyde Law Clinic wrote:

> We would propose a leaflet which is available at points of sale, advice centres and public buildings etc. This would only have to take the form of a single, small, double-sided leaflet with details of the various rights that a consumer has upon purchasing goods. As a Law Clinic, we would welcome these.
>
> A centrally produced information pack/leaflet could help alleviate consumer misunderstandings on the rules of law which govern these contracts.

7.5 A few respondents were concerned about the burden that leaflets or notices might place upon retailers if they had to be displayed in shops. In addition, the City of London Law Society pointed out the risk of notices having the effect of "souring" the buying experience:

> We note the clear evidence that consumers (and indeed traders) generally have a lack of awareness as to the legal remedies in these cases, but we are also concerned that retailers are not required to place excessive legal notices too prominently in shops as psychologically this would raise questions as to the quality even of perfectly acceptable goods and sour the buying process.

7.6 The Confederation of British Industry had reservations about point of sale education:

> We agree with the Law Commissions' report that consumers may be unaware of their legal rights and that more could be done to provide consumer education. CBI regards consumer education as of fundamental importance; indeed in our response to the BERR Call for Evidence we stated that it was a "golden thread" running through the various elements covered in the Consumer Law Review. It is our view that good quality information targeted to the real needs of consumers and education at the front end of transactions would help to align consumer expectations with reality, highlighting responsibilities as well as rights, and would reduce the likelihood of problems further down the line.
>
> We are not convinced, however, that education at point of sale is the most appropriate time or place for such information. We believe that while there is a role for business in the whole area of consumer education this particular element should be dealt with by independent agencies rather than by retailers. It is anyway a complex area of law and not necessarily one where it would be possible without running the risk of being misleading, to put it in summary form.

Other suggestions

7.7 Others suggested that information on consumer legal rights should also be provided on-line, in local newspapers, in local authority newsletters, and in television and radio campaigns. Consumer Focus added:

> We are also attracted to the idea of a "shoppers rights card" – a credit card-sized summary of the main SoGA rights, which shoppers can keep in their purse or wallet, such as that produced by the General Consumer Council of Northern Ireland.

7.8 Several respondents thought that the key was an education programme in schools. For example, the British Retail Consortium said:

> Retailers do have a direct interest in consumer education programmes as part of the general school "civics" curriculum because accurate knowledge of rights leads to fewer disputes and reduces the need for staff training – a key factor when there is such a high turnover of staff and many temporary employees – because new employees will have some basic understanding of consumer rights from their education.

7.9 The Institute of Consumer Affairs responded:

> Consumers often fail to exercise their rights because of a lack of knowledge and similarly, traders fail to understand their obligations. Simplification of the law is one step towards better understanding. However, the UK will not achieve anything like an understanding population unless consumer education is made a subject in the school curriculum.

"THIS DOES NOT AFFECT YOUR STATUTORY RIGHTS"

7.10 Most respondents agreed that the phrase "This does not affect your statutory rights" was problematic, and required clarification. There were various suggestions as to how this might be done. Many stressed that any change in the wording would only be beneficial if such a change went hand in hand with a simplification of the law, and/or was accompanied by information about the consumer's rights or how they could obtain such information.

7.11 In response to our suggested alternative wording: "This does not reduce your legal rights", Consumer Focus wrote:

> The FDS research seems to show that the new formulation would be more effective, and it does seem to us that this phrase is likely to be more meaningful to consumers.

7.12 However, Consumer Focus suggested that there should be more detailed research to establish the best wording.

HOW TO OBTAIN FURTHER INFORMATION ABOUT LEGAL RIGHTS

7.13 The majority of respondents also felt that information about how consumers could find out about their rights should be available at point of sale, such as a reference to Consumer Direct or the Citizens Advice Bureau. For example, the City of London Law Society said:

> We agree with the approach suggested by the Law Commission at paragraph 8.128, that the wording of existing notices displayed in shops should be clarified, and consumers should be directed to sources of further information (for example, phone number of Consumer Direct could be advertised). We also agree that a standardised summary sheet setting out in only a few bullet points an accurate statement of consumer rights should be produced. Retailers should be obliged to keep copies of the sheet at the point of sale so that if the consumers request information, they can easily obtain advice.

7.14 The University of Strathclyde Law Clinic also agreed:

> The information available should be short; offering a website address and a telephone number, for example, to keep things as simple as possible. The website which they are lead to should also reflect this simplicity and direct people to online explanations of the disclaimer, and/or online pdf copies of the leaflets mentioned above. Providing both a telephone number and website would appeal to a broader range of consumers.

PART 8
ASSESSING THE IMPACT OF REFORM

INTRODUCTION

8.1 In Part 9 of the Consultation Paper, we discussed the social and economic impact of our provisional proposals. We set out the main costs and benefits for each option we considered.

8.2 We concluded that the main problem with the current law is that it is overly complex and uncertain. As a consequence, shop managers find it too difficult to understand or to communicate to sales staff. Similarly, consumer advisers often struggle with its intricacies, and feel uncertain about communicating it to consumers. This causes unnecessary disputes.

8.3 The policy objective of this project is to simplify the remedies available to consumers when they buy faulty goods. We wish to bring the law into line with accepted good practice and provide appropriate remedies which allow consumers to participate with confidence in the market place. The intended benefits are a simpler legal system, leading to reduced training costs, fewer disputes and increased consumer confidence.

8.4 In our view, the central issue is the question of when consumers should be entitled to return faulty goods and receive a refund, rather than being required to accept a repair or replacement. Under current law consumers have "a right to reject" goods and receive a refund, provided that they exercise it within "a reasonable time". It is very difficult to say what a reasonable time is.

8.5 We identified four possible policy options for the right to reject:

(1) *Do nothing*. This would leave the law as it is, with all its existing complexities.

(2) *Abolition*. UK law would no longer recognise a right to reject. Where goods developed a fault the consumer's primary remedy would be to ask for a repair or replacement.

(3) *Extension*. Under this option, consumers could return the goods and receive a refund even for latent defects which became apparent months (or possibly years) after purchase.

(4) *Retention with clarification*. The right to reject would be retained as a short-term remedy, but legislation would clarify how long it should last, together with related simplifications.

8.6 In the Consultation Paper, we provisionally concluded that the balance of costs and benefits favoured the fourth option, that is retaining the right to reject with appropriate clarification, in particular about how long it lasts (CP paragraph 9.25).

8.7 We invited comments and information about the costs and benefits of our proposals (CP paragraph 9.68).

8.8 Finally, (at CP paragraph 9.69) we asked whether consultees agreed that:

(1) "Doing nothing" would retain the administrative burden on retailers and would continue to produce unnecessary disputes.

(2) Abolishing the right to reject would damage consumer confidence.

(3) Extending the right to reject would increase costs to business and might lead to increased landfill.

(4) The greatest benefits stem from retaining the right to reject but providing appropriate clarification about how it operates.

DOING NOTHING

8.9 The great majority of respondents agreed that reform was necessary for the reasons we highlighted in Part 9 of the Consultation Paper. Only two respondents disagreed. Among the majority, Consumer Focus wrote:

> We agree that "doing nothing" is not a sensible idea. The lack of clarity in the remedies is in the interests of neither consumers nor traders. It makes it difficult for consumers to understand their rights and to obtain redress and may lead to unnecessary disputes.

8.10 The British Retail Consortium also agreed:

> The BRC is of the view that clarification of the blurred edges of the current regime would help reduce the number of disputes while simplification would assist consumers and retailers in understanding their rights and obligations.

CONSUMER CONFIDENCE

8.11 Once again, the great majority of respondents agreed that the loss of the right to reject would be likely to undermine consumer confidence; and many of those felt strongly about the issue. Consumer Focus represented the views of the majority in saying:

> To abolish the right to reject would undoubtedly damage consumer confidence. It would send entirely the wrong signals to business and consumers. Consumers would lose an important and easily understood remedy. They would also be more reluctant to try the products of less well known sellers whose remedial policies they were unfamiliar with.

8.12 Only the British Retail Consortium disagreed with our view that abolishing the right to reject would damage consumer confidence:

> We believe that given consumers do not know they have a right to reject, it is unlikely that consumer confidence would be undermined by its abolition though we are not seeking it. However, consumers do believe they have a right to a refund if goods are faulty. Whether the right is a legal right or not, they would expect it to be available.

COSTS TO BUSINESS AND LANDFILL

8.13 In the Consultation Paper, we considered the costs businesses face in receiving returned faulty goods and refunding the purchase price. We also considered the environmental effect of the consumer remedies scheme.

8.14 Only one respondent agreed that extending the right to reject would lead to increased costs to business and increased landfill. The remainder disagreed, arguing that if the right to reject were extended, traders would supply better quality goods; and that it is often possible for goods returned as faulty to be repaired and resold.

8.15 The Local Authorities Coordinators of Regulatory Services commented:

> If the business receives a number of faulty items back from consumers, they will hopefully ensure that future versions of that item have the latent defect removed. This could decrease landfill in the long term, by providing higher quality goods that don't break as quickly.

8.16 Regarding an extension of the right to reject, Westminster Trading Standards wrote:

> We don't think it would lead to an increased landfill. When goods are rejected they are not generally discarded. Shops are able to sell items at a reduced price obviously alerting the public to any specific defect.

8.17 Several pointed out that if goods are faulty there will inevitably be costs because of the fact that they are faulty – usually consumers will not continue to use faulty goods. It is likely that if the faulty goods are not repaired, they will be disposed of, either by the consumer or by the retailer. Both repair and disposal will involve costs, whether or not the consumer is given a refund. In some cases, the cost will be borne by the consumer; in other cases, it will be borne by the retailer and/or manufacturer. If consumers do not obtain a satisfactory remedy, they are likely to dispose of the product anyway.

RETAINING THE RIGHT TO REJECT WITH APPROPRIATE CLARIFICATION

8.18 The majority of respondents agreed with our provisional conclusion that the balance of costs and benefits favoured retaining the right to reject with appropriate clarification. There was a general consensus on this point. For example, the City of London Law Society responded:

> Creating simple, consistent law should be a crucial approach to law reform in this area. It is clear that already fragile consumer understanding will not be aided by further complications in the law. Clear regulation also reduces the administrative costs of compliance for retailers.

8.19 Similarly, the Institute of Consumer Affairs commented:

> Clarification and appropriate guidance are key to a better understanding by all parties.

PART 9
FDS MARKET RESEARCH

INTRODUCTION

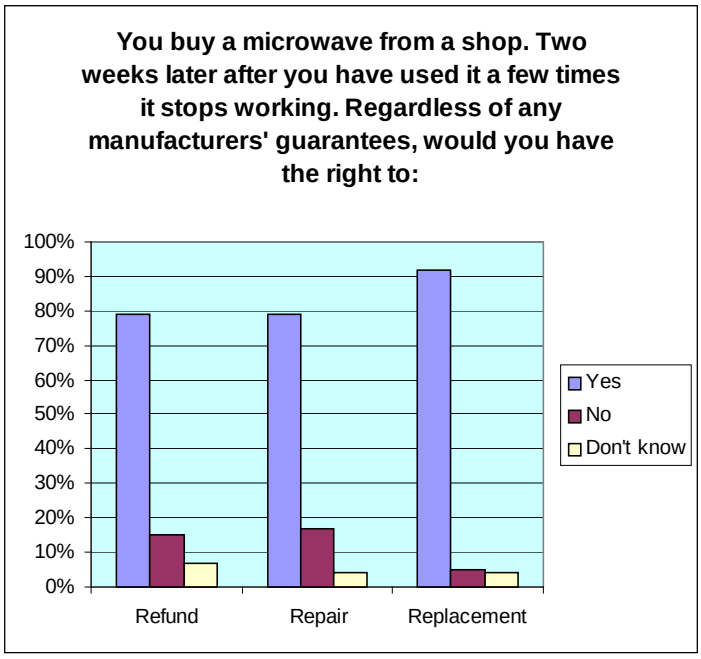
9.1 In February 2008, we commissioned FDS International Ltd (FDS) to carry out qualitative market research into consumers' views and understanding of legal remedies for faulty goods. FDS produced a report in April 2008, which was attached to the Consultation Paper at Appendix A.

9.2 In brief, the research showed that consumers were generally unaware of their legal rights, and had a flawed understanding of them. However, most were aware that they had a right to a refund for faulty goods, and valued it highly. When presented with the faulty kettle scenario, a significant group (20%) felt that a refund would be the appropriate remedy, and that a repair or replacement would not be acceptable. Loss of confidence in the product and/or retailer were important factors in their decision to ask for a refund.

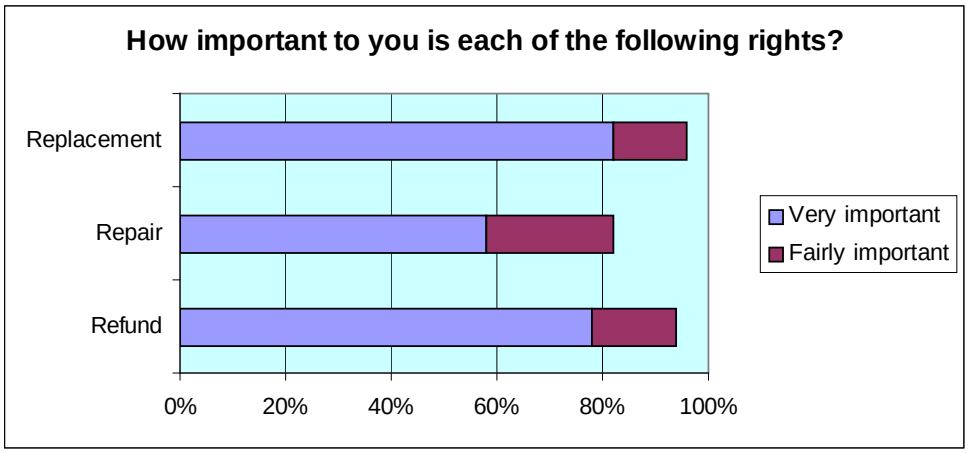
9.3 As a follow up to that work, in February 2009, we commissioned FDS to carry out a quantitative phase of market research in order to obtain more detailed figures about the strength of support for the right to reject among consumers. Just over 1,000 consumers in England, Wales and Scotland were interviewed between February and March 2009.

SUMMARY OF RESULTS OF THE QUANTITATIVE PHASE

9.4 The consumers were given the example of a microwave that stopped working two weeks after it was bought having been used a few times. They were asked what remedy they would have. 79% of those questioned thought that they would have the right to their money back. The same percentage thought they would have the right to get the microwave repaired. 92% of those questioned thought that they would be entitled to a replacement.



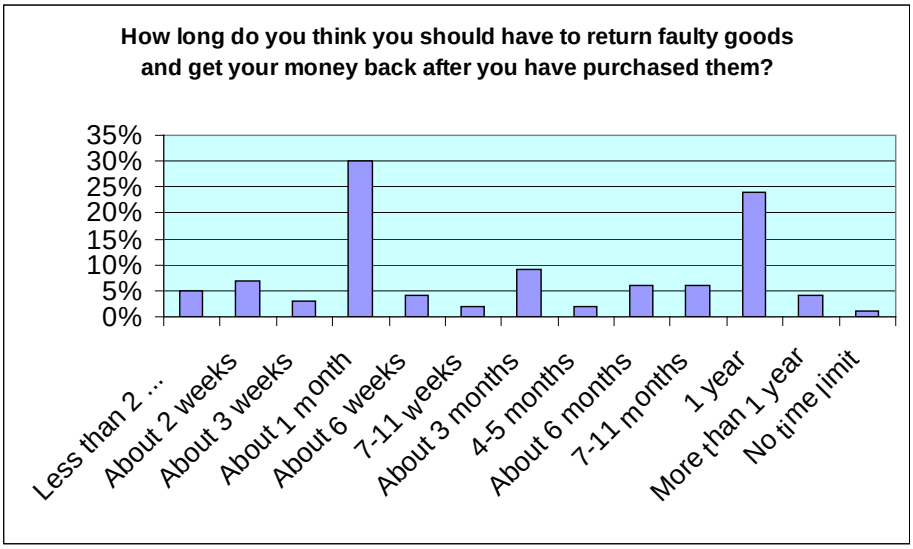
9.5 The consumers were then asked how important they considered each of the rights: money back, repair and replacement. With regard to the right to money back, overall, 94% considered it important. A total of 82% considered the right to repair important. Overall, 96% considered the right to replacement important.



9.6 Those consumers who did not initially consider the right to receive their money back to be important were asked under which circumstances it might be important to them to get their money back. 56% said it would be important if they had a faulty product repaired or replaced but it then broke down again. 55% said it would be important if they had grounds for thinking the product was dangerous. 46% said it would be important if the retailer behaved unreasonably.

9.7 Those who believed that the right to receive their money back was important were asked why it was important to them. 50% said that it was important so they could get their money back if the product was not fit for purpose. 42% considered it important so they could get their money back if the product turned out to be dangerous and 37% said it made them more confident about buying an unfamiliar brand. 37% considered it important so that they would not have to wait for a repair or replacement; 29% in order that they could get their money back if the product was badly designed; and 18% so that they could get their money back if the retailer behaved unreasonably.

9.8 When asked an open question about how long after purchase they thought they should be able to return faulty goods for a refund, a total of 45% gave periods of up to “about one month”; 24% indicated periods of “about six weeks” to “about six months”; and 24% said one year. The most common answer was “about a month”.



9.9 The consumers were told that they currently have the legal right to get their money back if they return faulty goods within a reasonable time. 89% considered that this right should be retained even though consumers can get repairs or replacements.

APPENDIX A
LIST OF RESPONDENTS

RETAILERS, MANUFACTURERS AND BUSINESS GROUPS

Association of Manufacturers of Domestic Appliances
British Retail Consortium
Cattles plc
The Committee of Scottish Clearing Bankers
The Confederation of British Industry
Direct Marketing Association
Finance and Leasing Association
G Haywood
Institute of Credit Management
The Radio, Electrical and Television Retailers' Association
Retail Motor Industry Federation
Sainsburys
S Waddell – Boori (UK) Ltd

LAWYERS, LEGAL ASSOCIATIONS AND THE JUDICIARY

Association of Her Majesty's District Judges
Bar Council
City of London Law Society
Council of Her Majesty's Circuit Judges
Faculty of Advocates
James E. Petts
Judges of the Court of Session
Law Society
McCartney Stewart

CONSUMERS, CONSUMER GROUPS AND CONSUMER REPRESENTATIVES

Grant Baisley
Birmingham City Council
Linda Cartwright
Citizens Advice
Consumer Focus
East of England Trading Standards
Robert Gilham
Vicky Gunther
Institute of Consumer Affairs
Local Authority Coordinators of Regulatory Services
Liz Miller
Mangala Murali
National Consumer Federation
Trading Standards Institute
University of Strathclyde Law Clinic
Ms K Waddilove
Westminster Trading Standards
Which?

ACADEMICS

Professor John Adams, Notre Dame
Gillian Black and others, The University of Edinburgh
Professor Bridge, London School of Economics
Gordon Cameron, The University of Dundee
Professor J Dewhurst and Dr C Montagna, The University of Dundee
Professor Roy Goode, St John's College, Oxford
Professor Macleod, University of Liverpool
Professor CJ Miller, University of Birmingham
Deborah Parry
Dr Christine Riefa, Brunel University
Dr Christian Twigg-Flesner, The University of Hull
Willett, Morgan Taylor and Naidoo, De Montfort University

OTHER

Office of Fair Trading