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Consumer Rights Bill: Progress of the Bill

Bill No 161 of 2013-14

RESEARCH PAPER 14/27 8 May 2014

This is a report on the House of Commons Committee Stage of the *Consumer Rights Bill*. It complements Research Paper 14/5 prepared for Commons Second Reading.

The Bill would set out a framework that would consolidate in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts. The Bill would also introduce easier routes for consumers and small and medium enterprises (SMEs) to challenge anti-competitive behaviour through the Competition Appeal Tribunal ('CAT'). In addition, the Bill would consolidate and simplify enforcers' powers (as listed in Schedule 5) to investigate potential breaches of consumer law and would clarify that certain enforcers (Trading Standards) could operate across local authority boundaries. Finally, the Bill would give the civil courts and public enforcers greater flexibility to take the most appropriate action for consumers when dealing with breaches or potential breaches of consumer law.

The Committee divided on a number of occasions, but none of the amendments or new clauses moved by the Opposition were agreed. The Government moved a small number of minor technical amendments and new clauses, all of which were agreed.

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Research Paper 14/27

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Summary

The *Consumer Rights Bill* is designed to set out a framework that consolidates in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts. The Bill also introduces easier routes for consumers and small and medium enterprises ('SMEs') to challenge anti-competitive behaviour through the Competition Appeal Tribunal ('CAT'). In addition, the Bill would:

- consolidate and simplify enforcers' powers as listed in Schedule 5 to investigate potential breaches of consumer law;
- clarify that certain enforcers (Trading Standards) can operate across local authority boundaries; and
- give the civil courts and public enforcers greater flexibility to take the most appropriate action for consumers when dealing with breaches or potential breaches of consumer law

Currently, 12 separate pieces of legislation cover key consumer rights in the UK, and around 60 pieces of legislation set out the investigatory powers of consumer law enforcers. Whilst offering a high degree of consumer protection, the legislative regime has been criticised for being unnecessarily complex, fragmented and, in places, unclear, in particular where the law has not kept up with technological change.

A number of issues raised during the Commons Second Reading of the Bill, on 28 January 2014, were subject to more detailed scrutiny in Committee. The Committee divided on a number of occasions, but none of the amendments or new clauses moved by the Opposition were agreed. However, the Opposition reserved the right to return to a number of issues on Report as indicated in the table below. The Government moved a small number of minor technical amendments and new clauses, all of which were agreed, many without debate.

The Opposition reserved the right to return to the following matters on Report

Issue	Clause number in Bill as introduced	Discussed in this Paper at:
Contracts for the hire of goods	Clause 6	Page 7
Statutory rights under a goods contract	Clause 11	Page 7
Other pre-contract information included in contract	Clause 12	Page 8
Consumer's rights to enforce terms about goods	Clause 19	Pages 8-9
The right to reject a good	Clause 20	Pages 9-10
Right to single repair or replacement	Clause 23	Pages 10-11
Goods under guarantee	Clause 30	Pages 12-13
Right to repair or replacement of digital content	Clause 43	Page 14
Service contracts covered by Part 1 of the Bill	Clause 48	Pages 14-15
Service to be performed with reasonable care and skill	Clause 49	Pages 15-16
Right to a price reduction	Clause 56	Page 17
Ombudsman services	New clause 5	Page18
Annual report: consumer rights	New clause 8	Pages 18-19
Contract terms which may or must be regarded as unfair	New clause 63	Page 20
Terms which restrict access to information	Schedule 2 (Part 1)	Pages 21-22
Consumer rights and the provision of public services	New clause 9	Pages 23-24
Requirement for transparency – provision of public services	Clause 68	Page 26

Further background and information about the Bill is provided in Library Research Paper 14/5 (27 January 2014), which was prepared for Commons Second Reading.

1 Introduction

The *Consumer Rights Bill* was introduced into the House of Commons on 23 January 2014 as Bill 161 of 2013-14 and had its Second Reading debate on 28 January 2014. Following this debate, the House passed a carry-over motion which would enable scrutiny of the Bill to continue into the next session of Parliament.[1]

The Bill is in three parts and contains eight Schedules.

Part 1 sets out minimum quality rights and remedies for consumers in sale of goods and services contracts, and in a new category of digital content. The aim of Part 1 is to modernise and improve consumer law to offer appropriate consumer protections.

Part 2 (and Schedules 2, 3 and 4) consolidates in one place the legislation governing unfair contract terms in consumer contracts, which currently is found in two separate pieces of legislation. Part 2 also seeks to clarify which terms may or may not be challenged in court for fairness. In particular, it would make contract terms specifying the main subject matter or price of the contract exempt from the 'fairness test' only if they are 'transparent' and 'prominent'.

Part 3 (and Schedules 5, 6, 7 and 8) contains important miscellaneous and general provisions. In particular, it would consolidate and simplify the powers of consumer law enforcers (such as Trading Standards) to investigate breaches of consumer law, which are currently contained in over 60 pieces of legislation. It would enable Trading Standards officers to operate over local authority boundaries. It would also enable public bodies responsible for consumer law enforcement to ask the civil courts to require traders to compensate consumers where they have breached consumer law (described as 'enhanced consumer measures'). Finally, Part 3 provisions on private actions in competition law and collective proceedings would reform access to redress for victims of competition law breaches through the Competition Appeal Tribunal ('CAT').

Parts 1 to 3 of the Bill (i.e. the majority of the provisions) extend to the whole of the UK. Some of Part 3 does not apply to Scotland or Northern Ireland because of the differences in the law. For example, the provision relating to the CAT issuing injunctions in private actions does not extend to Scotland, and some of the legislation which Part 3 proposes to amend does not extend to Scotland or Northern Ireland, for example, the *Sunday Trading Act 1994*.

The Bill page on the Parliament website provides information on the Bill's progress in Committee as well as links to the printings of the Bill and the Explanatory Notes published to accompany it. Written evidence was submitted to the Committee from a number of individuals and organisations. Oral evidence was also heard during the Committee's first and second sittings on 11 February 2014. Both are available on the Parliament website.

2 Second Reading debate

The Secretary of State for Business, Innovation and Skills (BIS), Vince Cable, introduced the Bill by explaining that a draft Bill had been published in June 2013 for pre-legislative scrutiny, with the BIS Select Committee publishing a report setting out its recommendations. The Minister confirmed that many of the Committee's recommendations were reflected in the Bill now before the House.[2]

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1 HC Deb 28 January 2014 c834
2 HC Deb 28 January 2014 c769

The Minister said that the Bill would set out in one place key consumer rights in respect of the sale of goods, services and, for the first time, digital content. The Bill would also reform unfair contract terms – essentially the small print problem – to remove the legal ambiguity that had arisen from recent landmark court cases.[3] The Minister described the Bill as being both pro-consumers and businesses.[4] He argued that it would make it easier for consumers and business to understand what should happen when a problem arises; stop disputes escalating, with all the associated costs; and help to create a level playing field for business.[5]

Vince Cable set out the purpose of Part 3 of the Bill dealing with private actions in competition law, in the context of the earlier reforms made to the UK's competition regime: principally, the establishment of a new single competition authority, the Competition & Markets Authority (CMA), from the merger of the Office of Fair Trading and the Competition Commission:

> A competition regime is essential to encourage efficient and innovative businesses, allowing the best to grow and enter new markets, driving investment in new and better products, and pushing prices down and quality up. That is good for growth and good for consumers. That is why earlier in the Session we introduced reforms of competition policy and the new Competition and Markets Authority, which will come into effect in April with strong new powers to take robust decisions more quickly. Changes we have made to the criminal cartel offence will enable the CMA to address the pernicious influence of cartels.[6]

The Minister went on to say that the Government's aim was to facilitate private actions as an effective way for aggrieved parties to seek resolution, without fostering an "American-style system of prodigious and constant litigation":

> Despite the strong competition framework that the Government are putting in place, the Office of Fair Trading has shown that businesses believe that the current regime for private actions is too slow and costly. As a result, businesses and consumers rarely get redress when they have been harmed by anti-competitive behaviour. In 10 years, there has been only one collective action case in this country, and only one 10th of 1% of the consumers who were eligible signed up to it.
>
> We have tried to strike a careful balance. We do not want an American-style system of prodigious and constant litigation, which would be costly and benefit only lawyers. None the less, we believe that there is some imbalance in the current system that needs to be redressed. We will try to discourage parties from engaging in costly court cases by encouraging alternative dispute resolution. We propose reforming the Competition Appeal Tribunal by introducing a fast-track regime so that small and medium-sized companies can get quicker and cheaper access.
>
> For example, let us take a car garage that relies on spare parts from a large supplier that has started withholding supplies to drive up prices, showing cartel-type behaviour. Previously, the garage would have had to take costly legal action in the High Court, possibly bankrupting itself in the process—it is a small company up against a big one. Under the Bill, the garage could take the case to the Competition Appeal Tribunal, which could swiftly issue an injunction resulting in the supplier having to restart its supply.

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3 HC Deb 28 January 2014 cc770-1
4 HC Deb 28 January 2014 c769
5 HC Deb 28 January 2014 c770
6 HC Deb 28 January 2014 c768. Provision to make this changes were made under the *Enterprise & Regulatory Reform Act 2013*. More detail on this reform is given in the Library paper published when this legislation was first presented to the House (Library Research paper 12/33, 7 June 2012 – see pp 12-63).

> We will also introduce an opt-out collective action regime for consumers and businesses that have been harmed by anti-competitive practice, with safeguards to ensure that cases are appropriate and merit that approach.[7]

In Committee, these provisions were the subject of a short debate.[8]

Stella Creasy, Shadow Minister (Business, Innovation and Skills), said that whilst the Opposition welcomed the Bill, it didn't go far enough – it was a missed opportunity.[9] The Bill made the Government a consolidator, not a champion of consumer rights.[10] She said that in working to improve the Bill in Committee, the Opposition would focus on four issues. First, the role of competition within markets to produce real consumer choice and value for money. She raised concern that in some markets, consumers were paying over the odds for essential goods and services because entry barriers into those markets had created dominance for a small number of providers or because there was outdated regulation. By way of example, she highlighted the retail market for energy,[11] the pensions market,[12] and the payday lending market. She argued that greater competition across retail sectors would greatly benefit consumers, yet there was no provision for this in the Bill.

The second issue was concerned with the importance of 'information flows'. The Shadow Minister argued that the Bill should be revised to compel businesses to release data and information so to empower consumers to shop around for better deals.[13] She said the Bill was missing provisions to help consumers protect their data and to deal with nuisance calls.[14]

The third issue related to the transparency of contract terms and unfair contract terms. In particular, the lack of clarity about prices or hidden charges in many consumer contracts, which cause consumers to purchase products that are not suitable.[15]

The fourth issue was concerned with whether there was a clear enough framework in place for consumers when things go wrong. The Shadow Minister argued that consumers should be given a stronger voice in the regulation of goods and services.[16] In particular, she highlighted the Opposition's disappointment that the Bill did not deal with the European Directive on Alternative Dispute Resolution (see section 6.4 below).

A wide ranging debate followed during which Members raised a number of consumer issues, including the cost of financial services and utilities, nuisance phone calls, copycat websites and ticket touting. Some Members said they were disappointed that these issues did not directly fall within the remit of the Bill. The provision and funding of local trading standards services, and their ability to tackle rogue traders, was also raised by several Members, as was the possibility of establishing a consumer ombudsman. In winding up the debate, Jenny Willott, Parliamentary Under-Secretary (Business, Innovation and Skills) said that the Bill would provide a substantial improvement to consumers' rights, remedies and protections.[17] A number of issues raised during Second Reading resurfaced in committee.

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7 HC Deb 28 January 2014 cc775-6. Other Members who spoke during the second reading debate did not mention this issue.
8 PBC Deb 11 March 2014 cc578-91
9 HC Deb 28 January 2014 cc779-780
10 HC Deb 28 January 2014 c777
11 HC Deb 28 January 2014 c781
12 HC Deb 28 January 2014 c782
13 HC Deb 28 January 2014 c782
14 HC Deb 28 January 2014 c783
15 HC Deb 28 January 2014 c784
16 HC Deb 28 January 2014 c789
17 HC Deb 28 January 2014 c828

3 Public Bill Committee Stage

The Public Bill Committee met 15 times over 8 days from 11 February to 13 March 2014. A further session agreed for 13 March 2014 in the programme motion was not used.

The Committee considered many amendments and several new clauses moved by the Opposition. A number were pressed to a vote, all of which were defeated. The Opposition reserved the right to return to a number of these issues on Report. A number of minor technical amendments and new clauses were moved by the Government. These were agreed and added to the Bill without a vote

The Committee received 29 written memoranda.[18] During its first and second sitting on 11 February 2014, the Committee also took oral evidence from eleven witnesses representing consumer and business interest groups, enforcement bodies, the Law Commission, the Scottish Law Commission and including the Minister for Employment Relations and Consumer Affairs, Jenny Willott MP.

4 Part 1 of the Bill

This section of the Paper provides information on significant areas of debate in Committee on Part 1 of the Bill, but no Opposition amendments were agreed. It is not intended to be an account of all the issues raised in Committee on Part 1 or of all the contributions made to debates. For ease of reference, the headings used in this section correspond to those used in the Bill.

4.1 Sale of Goods

Clause 2 (Key definitions)

The Opposition sought to amend **clause 2** of the Bill to include micro-businesses – those with fewer than ten employees - within the definition of a 'consumer' when purchasing goods or services for use within their commercial activities.[19] The Shadow Minister, Stella Creasy, said that the presumption that all businesses (regardless of size) were able to interact with other businesses in the same way did not bear scrutiny. The intention behind the Opposition's amendment was to put micro-businesses on a level footing with consumers.

The Consumer Minister, Jenny Willott, explained that the issue had been consulted on in 2008 and again in 2012. Businesses had told the Government that it would be unreasonable for them to use the same rights and remedies as consumers, as their use of goods is significantly greater. The Minister said that the Bill was designed to relate to consumer-to-business relationships and that regulations implementing the *Consumer Rights Directive*, the *Consumer Protection from Unfair Trading Regulations 2008* and other consumer legislation all consistently define consumer in the same way as it is defined in the Bill. The amendment was pressed to a division, but was defeated.

The Opposition also sought to introduce **new clause 1**, which would have required the Government to produce a report, three months after the Bill is enacted, on how businesses with fewer than 250 employees could secure appropriate consumer protections when buying goods or services for business use.

On new clause 1, the Minister confirmed that the Government had already undertaken to respond to any recommendations made by the Federation of Small Businesses (FSB) in

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18 Memoranda available to view on the Parliament website (accessed 22 April 2014)

19 Amendment 1 to clause 2

respect of research currently being undertaken on smaller businesses as consumers.[20] New clause 1 was therefore withdrawn.

Clause 3 (Sale of goods contracts covered by the Bill)

Part 1 of the Bill aligns the rights and remedies for different types of contract under which goods are supplied to consumers. The Opposition sought to bring within the scope of **clause 3** those financial service contracts which contain a 'bill of sale agreement' regarding the ownership of goods', specifically logbook loans.[21] A logbook loan is a loan secured against a vehicle, where the logbook is given to the lender as an asset against which the loan is made. Stella Creasy argued that such loans were made at high rates of interest, causing consumer detriment and distress. Sheila Gilmour also referred to the small print in financial contracts and how difficult it is for consumers to understand exactly what they are signing up to.[22]

Jenny Willott acknowledged that logbook loans were an issue in communities and that people who access such loans are often among the most vulnerable in society.[23] She explained that responsibility for consumer credit transactions had transferred to the Financial Conduct Authority (FCA) and as high-risk activities, logbook lenders would be among the first to require full authorisation by the FCA.[24]

When challenged, the Minister confirmed that the unfair contract terms part of the Bill (Part 2) would apply to bill of sale agreements.[25] However, Stella Creasy said that there should be an explicit statement to that effect in this Part 1 of the Bill. The amendment was pressed to a vote, but was defeated.

New clause 3 (Right to supply unique goods)

New clause 3, tabled by the Opposition, sought to place an additional information requirement on sellers of unique goods. It would also have allowed the Secretary of State for Culture, Media and Sport (DCMS) to place restrictions on the resale of tickets for nationally significant events. The Opposition had in mind ticket touting and what could be done to reduce consumer detriment.

Stella Creasy explained that new clause 3 would require a good to have a unique identifier; a person would be buying a particular ticketed seat for an event. She argued that this would enable tickets to be cross-referenced in order to check that the ticket actually exists and was available for resale.[26] There was a long debate on this new clause with a number of members of the Committee making contributions.

The Minister argued that the protection that new clause 3 sought to provide was unnecessary. She said that the *Consumer Protection from Unfair Trading Regulations 2008* already prohibits traders from engaging in unfair commercial practices, such as selling a ticket that they do not have or know to be a fake.[27] In addition, under the new *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* (which come in to force in June 2014), a trader will be required to provide the consumer with certain information on the main characteristics of the good for all distance sales (which would include ticket sales). Under the Bill and under existing legislation, consumers already have the protection that goods must be fit for purpose and traders must have the right to sell those

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20 PBC Deb 13 February 2014 cc94-95
21 Amendment 2 to Clause 3
22 PBC 13 February 2014 c114
23 PBC Deb 13 February 2014 c115
24 PBC Deb 13 February 2014 c116
25 PBC Deb 13 February 2014 cc120-121
26 PBC Deb 25 February 2014 c168
27 PBC Deb 25 February 2014 c183

goods. If not, a right to reject the goods is already available.[28] Finally, the Minister argued that the Secretary of State could already make provisions for important national events.[29]

Without new clause 3, Stella Creasy questioned whether the Bill would do anything at all to protect consumers from ticket touts.[30] She reserved the right to return to the matter at an appropriate point.[31] A division on new clause 3 was held (during the Committee's fourteenth sitting) but the new clause was not agreed to.[32]

Clause 6 (Contracts for the hire of goods)

Clause 6 defines a contract for the hire of goods as it applies between a trader and a consumer. This clause attracted no debate in Committee, but Steve Baker took the opportunity to inform the Minister that there seems to be an omission in the Bill. It does not include the reverse of the clause – where the consumer transfers ownership of goods to the trader, such as in a deposit cap contract in banking. He said that he would table amendments on Report to rectify the omission. [33]

Clause 11 (Statutory rights under a goods contract)

In speaking to amendment 6 to **clause 11**, tabled by the Opposition, Stella Creasy argued that consumers should be given information on their statutory rights at the 'point of sale'.[34] She said that Citizens Advice was a strong proponent of the proposal and had come up with suggestions about the kind of information on consumer rights that could appear on the back of a till receipt.

Jenny Willott said that there was already a requirement in the new *Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013* for traders to remind consumers, prior to a sale, of their right to have goods that conform to contract. In addition, the Government had set-up an Implementation Group to consider how best to inform consumers of their rights. Members of this Implementation Group included representatives of Citizens Advice, Which?, MoneySavingExpert, business organisations, BIS officials and a broad range of other stakeholders.[35] The Minister said that one objective of the group was to consider whether the provision of mandatory information at the point of sale would be effective.[36] She argued that adding a requirement to the Bill would not be the right approach; the Government wanted to wait for the recommendations of the Implementation Group. [37]

Stella Creasy reserved the right to come back to the issue on Report. She said that it made no sense to Opposition Members to wait until people are 'ripped off' before giving them information about how to exercise their rights. [38]

In respect of **clause 11**, the Opposition also tabled amendment which sought to introduce a requirement for a trader to provide full details of the total cost of the goods prior to sale, including any additional service fees or charges that could be incurred by the buyer in

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28 PBC Deb 25 February 2014 c186
29 *Ibid*
30 PBC Deb 25 February 2014 c188
31 PBC Deb 25 February 2014 c190
32 PBC Deb 11 March 2014 cc604-5
33 PBC Deb 13 February 2014 c124
34 PBC Deb 13 February 2014 c149
35 PBC Deb 13 February 2014 c155
36 PBC Deb 13 February 2014 c156
37 *Ibid*
38 PBC Deb 13 February 2014 c159

purchasing the goods.[39] This pricing information to be displayed in all public communications.[40]

The Minister said that the Government was fully committed to providing clarity and transparency to consumers on cost. She highlighted again the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* which, when brought into force this summer, will require traders to disclose to consumers the total cost before a sale is made. She confirmed that it was the Government's intention for these new regulations to operate alongside the Bill. The Minister argued that a requirement for information on price to be included in all public communications would be enormously burdensome to business.[41] For example, every time a price was altered, all associated communications would have to be altered.

A number of Committee Members spoke on the issue of price transparency. The amendment was pressed to a vote, but was defeated.

Clause 12 (Other pre-contract information included in contract)

The Opposition tabled an amendment to **clause 12** to require all traders to provide consumers, prior to sale, with an appropriate point of contact and their full contact details.[42] Stella Creasy explained that the purpose of this requirement was to ensure that in the event of a faulty good being sold, the trader would take responsibility.[43] Using the example of ticket touting, she explained that it was not possible for a consumer to know whether genuine tickets are being offered for sale until money has been paid, by which time, if the site is false one, it is too late.[44] Having contact details would enable checks on the trader to take place before purchase.

The Minister reiterated that the new *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* would require traders to give information on their identity and contact details (and the identity and contact details of any trader on whose behalf they are acting).[45] Unconvinced that the new regulations would deal with secondary ticketing sites, and other causes of consumer detriment, Stella Creasy reserved the right to come back to the issue on Report.[46]

Clause 19 (Consumer's rights to enforce terms about goods)

Clause 19 of the Bill would require consumers, in certain circumstances, to seek a repair of a faulty good before they seek a refund. In speaking to amendment 11, Stella Creasy argued that there should be greater flexibility in the Bill to allow for those occasions when seeking a repair would not be feasible or fair to the consumer. Instead, the consumer should be able to go straight to a refund. The Shadow Minister argued that an appropriate test was already contained in the 'housing health and safety rating system' brought in under the *Housing Act 2004.* In effect, if a trader performs a service in a way that is liable to give cause to believe that there is a serious risk or hazard to property, and an environmental health officer agrees, the consumer should be able to claim an immediate refund without repair.[47]

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39 Amendment 7 to Cause 11
40 PBC Deb 13 February 2014 c141
41 PBC Deb 13 February 2014 cc143-144
42 Amendment 8 in Clause 12
43 PBC Deb 13 February 2014 c152
44 PBC Deb 13 February 2014 c158
45 PBC Deb 13 February 2014 c157
46 PBC Deb 13 February 2014 c159
47 PBC Deb 25 February 2014 cc190-192

Responding to the amendment, the Minister explained how clause 19 would work in practice. She said that if a consumer contracts for goods to be both supplied and installed, and the installation is not done correctly, the consumer would be entitled to ask for the goods to be installed again. That approach allows an opportunity in the first instance for the trader to put right the installation, provided that the goods themselves are fine. However, the Bill also provides the consumer with the option to go down the route of immediately seeking damages for the loss they have suffered. That could include the cost of the goods themselves and any consequential damage that the faulty installation has caused, depending on the specific circumstances of the case. She said that this was an important alternative option if the consumer has lost all faith in the trader's ability to carry out a safe installation.[48] Challenged on this alternative route, the Minister confirmed that the trader could not insist on the right to repair if the consumer has lost faith and has elected to pursue damages.[49]

Stella Creasy argued that pursuing damages would involve a costly legal procedure. The Opposition reserved the right to return to the matter on Third Reading.[50]

In respect of **Clause 19**, the Opposition also tabled an amendment to impose on traders a requirement to disclose to consumers the statutory remedies available to them when their rights have been breached (i.e. 'at the point of complaint').[51] Stella Creasy said that there was no requirement in the Bill as drafted for a trader, either at the point of sale or at point of complaint, to tell consumers what their statutory rights or remedies are.

The Minister reiterated the points she had raised earlier (in respect of amendment 6 in **clause 11**). She said that the new *Consumer Contracts Regulations* would require traders to remind consumers, before contract, that goods should conform to the sales contract. In addition, an Implementation Group was currently looking at the different ways that consumers could effectively access information.[52] The Minister argued that to put a requirement on traders to provide information along the lines of the amendment would be too prescriptive. [53]

The Opposition's amendment, supported by both Andy McDonald and Fiona O'Donnell, was pressed to a vote but was defeated.

Clause 20 (The right to reject a good)

Clause 20 of the Bill sets out the conditions under which a consumer could reject goods and receive a full refund. Importantly, the Bill sets a 30-day limit in which someone can exercise their right to reject goods and be paid their money back (known as their short-term right to reject').

The Opposition tabled a series of amendments to clause 20.[54]The amendments sought to impose a 30-day payback period, in all the different instances in which somebody might exercise the right to reject within 30 days.[55] In circumstances where the trader failed to refund a consumer within 30 days, the consumer would have the right to seek damages from the trader proportionate to the loss that the delay has caused. A proviso was included in some of the amendments to the effect that a trader and a consumer could waiver the 30-day limit to

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48 PBC Deb 25 February 2014 c193
49 PBC Deb 25 February 2014 c194
50 PBC Deb 25 February 2014 c194
51 Amendment 10 to Clause 19
52 PBC Deb 25 February 2014 cc202-204
53 PBC Deb 25 February 2014 c205
54 Amendments 13, 14, 16, 17, and 18. Discussed at the same time were amendments 24 to Clause 24; amendment 36 to Clause 45 and amendment 37 to Clause 46
55 PBC Deb 25 February 2014 cc213-214

provide a refund if there was a particular reason why it might take a long time to recoup payment.[56] In addition, the amendments sought to make it a legal requirement for the trader to provide a refund using the same method of payment as that used by the consumer to obtain the goods or digital content.

Stella Creasy said that the Opposition simply could not understand why consumers had to wait an unspecified time to get their money back. A number of Committee members spoke on the amendments. Andy McDonald said that the Opposition's amendments met with the approval of a range of bodies, including Citizens Advice, the British Retail Consortium and the Federation of Small Businesses. He said there was an attraction to the simple approach of a 30-day payback period, which could be readily understood.[57]

However, the Minister disagreed. She said that the Bill gave consumers scope to get a refund if they are entitled to it – if their statutory rights are breached – but also to claim damages as an alternative to exercising their right to reject.[58] She argued that the Bill already protects the consumer from being fobbed off with store vouchers or a credit note when returning faulty goods bought with money.[59]

Stella Creasy argued that among the consumer and business groups that had earlier given evidence, there was an acceptance that a 30 days refund period was not an unreasonable deadline to set. The Opposition reserved the right to come back to the matter on Report.[60]

Clause 23 (Right to single repair or replacement)

Clause 23 of the Bill provides a right to a single repair or replacement of a faulty good when a consumer discovers something is wrong with the good after the first 30-days period, and, if the repair is not done properly, to a refund. The Opposition tabled amendments to this clause to impose a standard 30-day time period in which to undertake a repair, unless the consumer agrees to a time extension.[61] Stella Creasy confirmed that Citizens Advice supported this proposal.[62] The amendments attracted a great deal of debate in Committee across all parties.

The Minister argued that the limit of one repair or one replacement already addressed the risk that consumers may become trapped in a cycle of failed repairs to goods. She highlighted a recent consumer detriment survey which found that, of the consumers who experienced a problem, only 4% had a problem with a failed or delayed repair. She said that a 2012 BIS consultation had explored with stakeholders how a time limit might operate. Businesses had highlighted how, in certain circumstances, a fixed time period for repairs or replacements could be problematic.[63] The example given was of a luxury sofa made in Italy, where a repair might take longer than 30 days.[64] There was also concern that the imposition of a time limit might lead to a reduction in the quality of repairs.[65] The Minister said that Government had come to the view that the best approach was a simple limit of one repair or replacement of goods, which must be provided within a reasonable time and without significant inconvenience to the consumer. If the repair process caused inconvenience, compensation was provided for in the Bill; consumers could get either a price reduction or a refund under the Bill.

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56 PBC Deb 25 February 2014 c215
57 PBC Deb 25 February 2014 c216
58 PBC Deb 25 February 2014 c 222
59 PBC Deb 25 February 2014 c221
60 PBC Deb 25 February 2014 c227
61 Amendments 21 and 22 to Clause 23
62 PBC Deb 25 February 2014 c243
63 PBC Deb 25 February 2014 cc255-256
64 PBC Deb 25 February 2014 cc256-7
65 PBC Deb 25 February 2014 c257

In respect of **clause 23**, the Opposition tabled another amendment.[66] This sought to provide that where the quality of the goods provided are either hazardous or so poor as to cause the consumer to fear risk to life and limb (and to reasonably lose confidence in the trader's ability to provide goods), the consumer may refuse a repair and exercise an immediate right to reject the goods and demand a refund. The Shadow Minister explained that the Opposition's amendment would cover cases where a consumer discovers a dangerous fault after the 30-day time period.

In response, the Minister said that in the circumstances outlined (and after the 30-day time period in which to reject), the Bill would not require the consumer to submit to a repair. The Bill retains the existing right for the consumer to seek damages from the trader instead.[67] She explained that in practice the consumer could either elect to have the good repaired or elect to pursue damages. The consumer would only have to have one replacement or repair before he/she would have the right to reject those options and get their money back if the replacement or repair did not work.[68] Stella Creasy reserved the right for the Opposition to return to the issue on Report. [69]

Clause 24 (Right to price reduction or final right to reject)

Clause 24 of the Bill provoked a great deal of debate in Committee. Under clause 24, if the final right to reject a faulty good is exercised by the consumer within 6 months of delivery of the goods, the trader may not apply a deduction to account for the use that the consumer has had up to that point (i.e. the consumer will receive a full refund).[70] But an exception is made under sub-section 10 of clause 24 in cases where there is independent evidence of an active business-to-consumer second-hand market in 'corresponding goods'. In such cases, a deduction for use may be applied within the initial 6 month period (and after that period). However, the Explanatory Notes to the Bill are careful to state that this does not mean that the deduction is linked to the second-hand value of the goods in any way – the deduction is only to take account of the use the consumer has had.[71] Amendments tabled by the Opposition sought to remove this exception.[72]

It was the view of the Opposition that the Bill may, intentionally, penalise people who buy cars and create a loophole that might be exploited by traders. More generally, the notion in the Bill that a given situation is judged on whether there is a second-hand market for the goods creates a worrying precedent. According to the Opposition, this was effectively asking the consumer to account for the depreciation in value of a faulty good over a six month period.[73]

The Minister explained how the Government envisaged clause 24 would work in practice. She said that if a fault was identified in the first 30 days, the consumer would (with all goods) have the right to reject and get a full refund. If a fault develops between day 30 and six months, the consumer has to accept one repair. If the repair fails, or a second fault develops in the first six months, the consumer has the right to reject the good and get a refund. The assumption is that in the first 6 months, for almost everything, the consumer would receive a full refund if, after accepting a repair or replacement, an item does not work. The Minister

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66 Amendment 23 in Clause 23
67 PBC Deb 25 February 2014 c263
68 PBC Deb 25 February 2014 c264
69 PBC Deb 25 February 2014 c264
70 Clause 24(1)
71 *Consumer Rights Bill* – Explanatory Notes, Bill 161-EN, page35
72 Amendments 25 and 26 of Clause 24
73 PBC Deb 27 February 2014 cc269-270

said that the 'deduction for use' provision in clause 24(10) would only apply to a very small group of complex high-value goods (such as a high performance car) in the first 6 months.[74]

The Minister reiterated that the deduction for use takes account of the use that the customer has had of the goods; it is not the value of the goods at that point. She said that in respect of high-value or complex manufactured goods there was concern that removing the right to make a deduction for use, even within the first six months, could bring significant detriment to the trader. However, the Minister said that the trader would only be able to apply a deduction during that 6 month period if they can demonstrate an active business-to-consumer second-hand market in goods of the same make and model ('corresponding goods'). The exemption would not apply to goods that are commonly traded between consumers, such as on eBay or other online auction sites.[75] She said that it was important to have the exception for the very small group of items involved.[76]

During a wide-ranging debate, in which a number of Members made contributions, the Minister reiterated that the existence of a second-hand market is the test that triggers whether a deduction for use can be considered; it is not the factor that decides what deduction is then given. She said that this was an important distinction. She said that traders could already apply a deduction for use at any point, on any good – currently it applies across the board. In contrast, the Bill introduces an underlying assumption during the first six months after purchase that the deduction for use cannot be applied except in certain limited circumstances.[77]

Stella Creasy argued that a loophole was created by clause 24. She asked the Minister to think about how the clause could be amended so that the fact that there is a second-hand market in a good could not, in itself, allow the trader to refund to the consumer significantly less than the price paid.[78] The Minister declined to make such a commitment and the Opposition's amendments were pressed to a vote, but were defeated.

Clause 30 (Goods under guarantee)

Clause 30 of the Bill deals with guarantees that are freely given to a consumer when they purchase a good without any extra charge (i.e. guarantees that are not paid for). Such guarantees must include a statement informing the consumer that they have rights under the Bill that are not affected by the guarantee, the guarantee must also be written in 'plain and intelligible language'.

The Opposition tabled an amendment that would have required all consumers sold a warranty, to be properly informed of both their statutory rights under the Bill and additional rights given under the guarantee.[79] A number of Members spoke in Committee about the consumer detriment caused by some extended guarantees purchased in good faith by consumers.

The Minister pointed out that paid for extended warranties were not covered by clause 30; although they would be covered by the Bill's unfair terms provisions and were also covered by Financial Conduct Authority regulations.[80] Moreover, if a trader includes in a guarantee a term that is contrary to a consumer's statutory rights, then it would not be binding; statutory rights would take priority. The Minister confirmed that the Implementation Group was also

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74 PBC Deb 27 February 2014 c274
75 PBC Deb 27 February 2014 cc273-274
76 PBC Deb 27 February 2014 c276
77 PBC Deb 27 February 2014 c277
78 PBC Deb 27 February 2014 cc277-278
79 Amendment 27 to Clause 30
80 Paid for guarantees generally come under contract law

considering consumers could get the right information about their statutory rights, at the right time in the right way. She did not think that including a disclosure requirement in the Bill was the right way forward. [81]

Stella Creasy said that the Opposition remained concerned about how consumers access information about their statutory rights, and they would return to this issue on Report. [82]

New clause 2 (Right to corrective action)

New clause 2, tabled by Fiona O'Donnell, referred to product recall.[83] Product recalls occur when a fault presenting a safety risk to consumers is uncovered in a product or product line. Currently, the *General Product Safety Regulations 2005* state that all products must be safe and that liability and responsibility for unsafe products lie with the manufacturer or the importer who places it on the market.

Fiona O'Donnell drew attention to the fact that there is currently no single Government agency tasked with actively monitoring and policing safety recalls for white goods and electrical appliances. She said that according to estimates from the Electrical Safety Council (ESC), 1 million recalled electrical products were still in use across the country. This was not only a consumer rights issue; badly handled recalls caused reputational and financial damage to British businesses and posed serious public safety concerns. She argued that the issue should have been included in the Bill.[84] Although the ESC and organisations such as Which? and Recall UK were all trying to raise consumer awareness of product recalls, Fiona O'Donnell argued that the Government should do more to place the onus on manufacturers and suppliers.

In giving the Government's position, the Minister said that it would be disproportionate to place a duty on the Secretary of State to gather evidence of recalls and provide estimates for unaccounted products. Fiona O'Donnell pressed the matter to a vote but was defeated.[85]

4.2 Sale of digital content

Clause 36 (Digital content to be as described)

The Opposition tabled an amendment to **clause 36** that would have required the trader to provide full details of the total cost of digital content prior to sale, including details of any additional service fees or charges that could be incurred by the buyer in purchasing the digital content. The trader to obtain the consumer's explicit consent to purchase the digital content at that price prior to sale.[86]

The Minister confirmed that under the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* the total price of digital content would be made clear to the consumer before purchase. Furthermore, the Regulations would make it clear that the consumer's express consent must be given before any extra charges are made in addition to the main price; pre-ticked boxes would not be enough to signify express consent. The Minister said that under Part 2 of the Bill, which deals with unfair terms, additional charges could not be hidden in the small print. If they were hidden away they would be assessable for fairness.[87] In short, with online sales, the Minister said that the trader must make the consumer aware of the total price before the consumer places an order. Although the

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81 PBC Deb 27 February 2014 cc293-94
82 PBC Deb 27 February 2014 c297
83 PBC Deb 11 March 2014 c591
84 PBC Deb 11 March 2014 cc592-595
85 PBC Deb 11 March 2014 c604
86 Amendment 32 to Clause 36
87 PBC Deb 27 February 2014 cc319-322

amendment was withdrawn, Stella Creasy put on record the Opposition's view that further investigation of this issue was needed.

The Opposition also tabled amendments to **clauses 36 and 50** to ensure that online platforms act to protect children from inappropriate advertising. Speaking to the amendments Stella Creasy said that some payday lenders were a good example of how companies use online content (such as games) to test advertising and marketing rules.[88]

In response, the Minister said that the Advertising Standards Authority (ASA) operated a strict code, with a particular focus on children, and that ASA rules apply online. She explained that regulations on advertising fell within the remit of the Department for Culture, Media and Sport (DCMS). The Shadow Minister withdrew the amendments on the basis that the Minister would write to DCMS with the Committee's concerns and would also look at how the issue might be accommodated in the Bill.[89]

Clause 43 (Right to repair or replacement of digital content)

In respect of digital content (as with goods), the Opposition tabled an amendment to **clause 43** impose a standard 30-day time period in which a trader must undertake a repair or replacement of faulty digital content.[90]

Again, the Minister said that the Government had concerns about introducing a rigid 30-day time limit. She sought to reassure the Committee that (as with goods) significant protections were already built into the Bill to ensure that repair or replacement of faulty digital content were carried out within a reasonable time and without significant inconvenience to the consumer. [91] A route was available for compensation if consumers were to find themselves disadvantaged.[92] However, Stella Creasy was not convinced and the Opposition reserved the right to return to the matter on Report.[93]

4.3 Sale of services

Clause 48 (Service contracts covered by Part 1)

Clause 48 includes a power, exercisable by statutory instrument, to disapply the provisions of the Bill to a particular service or services.[94] This clause was debated at length in Committee, with a number of Members making contributions including Mark Durkan, Sheila Gilmore and Fiona O'Donnell. The Shadow Minister asked which services the Government intended to exclude from the Bill and, in particular, whether any areas of passenger provision would be excluded.[95]

The Minister explained that there was a similar power in existing legislation which had been used to disapply provisions to the services provided by an advocate in a court or tribunal, a company director, a director of a building society and the management of a provident society, and to services rendered by an arbitrator. She thought it was likely that the power in the Bill would be used to exclude the same sorts of services. She said that services such as passenger air and bus travel were normally provided under a contract, and therefore the Bill's provisions on services would apply. However, the Government proposed to exclude rail passenger services, as they were covered by the National Rail Conditions of Carriage; but

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88 Amendment 30 in Clause 36 and amendment 39 in Clause 50
89 PBC Deb 27 February 2014 c315
90 Amendments 34 and 35 in clause 43
91 PBC Deb 25 February 2014 c258
92 PBC Deb 25 February 2014 cc258-9
93 PBC Deb 25 February 2014 c260
94 Clause 48(5)
95 PBC Deb 4 March 2014 c343

only when the National Rail Conditions offered equivalent protection to that provided in the Bill.[96] The Minister said that concerns had been raised with the Government that train operators would increase fares for passengers if they had to comply with two separate sets of regulations.[97]

The Shadow Minister argued that if the Government did not use the power in **clause 48(5)** at the point at which the Bill is enacted, National Rail would be covered, by default, by both the National Rail Conditions of Carriage and the provisions of the Bill. Rail users would be in a state of limbo, not quite sure which rights apply to them. She urged the Government to clarify the situation ahead of Report. She put on record the Opposition's concerns and their request for more information.[98]

Clause 49 (Service to be performed with reasonable care and skill)

Clause 49 of the Bill requires a service to be performed by the trader with 'reasonable care and skill'. In debating this clause, the Opposition raised the issue of nuisance phone calls. It also raised concerns about the information that companies are able to collect about consumers as part of providing a service to them.[99] It tabled an amendment requiring traders to use 'reasonable care and skill' in their management of that information.[100]

The Minister agreed that consumers' personal data should be protected, but argued that consumer's rights about the collection, processing and disclosure of personal data were already covered by the *Data Protection Act 1998* (DPA 1998) and enforced by the Information Commissioner's Office (ICO).[101] On the issue of nuisance calls and consumer consent, the Minister said that the DCMS was already looking at potential solutions, both legislative and non-legislative, and an action plan with more details would be published, perhaps in time for the issue to be revisited on Report, or certainly by the time the Bill had come back from the Lords.[102]

In respect of **clause 49**, the Opposition also tabled an amendment to extend the Bill's general duty on service providers to act with 'reasonable care and skill' to the financial services sector.[103] This followed attempts made by the Shadow Treasury team to amend the *Financial Services (Banking Reform) Act 2013.* Stella Creasy explained that the aim of the amendment was to impose on the financial services sector both a 'fiduciary duty', a high standard of care owed to all direct customers, and a 'general duty' of care owed to all consumers across the sector.[104] It was the Opposition's view that the amendment would add greatly to consumers' confidence in banking services.[105]

The Minister said that the *Financial Services (Banking Reform) Act 2013* had introduced the concept of the ring-fenced bank, which was one of the recommendations of the Independent Commission on Banking chaired by Sir John Vickers. Other measures in the 2013 Act implemented the recommendations of the Parliamentary Commission on Banking Standards about the conduct of individuals in banks. She said that the Parliamentary Commission did not recommend the induction of either a fiduciary duty or a general duty of care for banks. The Minister said it was the Government's view that the induction of either type of duty in

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96 PBC Deb 4 March 2014 cc346-347
97 PBC Deb 4 March 2014 cc346-7
98 PBC Deb 4 March 2014 c352
99 PBC Deb 4 March 2014 cc373-374
100 Amendment 47 in Clause 49
101 PBC Deb 4 March 2014 cc387-390
102 PBC Deb 4 March 2014 cc389-390
103 Amendment 46 in Clause 49
104 PBC Deb 4 March 2014 c367
105 PBC Deb 4 March 2014 c368

legislation would not help to drive up standards within ring-fenced banks, or assist consumers. She said that ring-fenced banks were already subject to duties to their customers under general law as well as obligations in their contract with the customer. Where they hold funds or other property on behalf of the customer, they would be subject to fiduciary duties. There were also regulatory obligations imposed under the *Financial Services and Markets Act 2000*. The Minister argued that there was nothing to be gained by adding a fiduciary duty in this Bill, especially when it could not be as precise or as readily enforceable as the specific obligations in the regulator's rules or the terms of a contract. [106]

The Shadow Minister said that the Opposition would return to this issue, not only in the Bill but in the House more generally, on the basis that there was evidence that people still do not receive the level of care and skill that they expect from financial services.[107]

Clause 51 (Reasonable price to be paid for a service)

Clause 51 of the Bill deals with the consumer's right to pay a reasonable price for a service where the method of calculation is not set out in advance. The Opposition tabled a large number of amendments to this clause and there was a wide-ranging debate in Committee. There were divisions on two amendments, 51 and 52 (both defeated). The debate focused on amendment 51 and the Midata Project.

By way of background information, the Midata Project, started in 2011, is a voluntary programme the Government has undertaken with industry. The aim is that over time, consumers will be given increasing access to their personal transactions data in a portable, electronic format in four sectors: energy, mobile phones, credit cards and current accounts. Individuals would then be able to use this data to make more informed choices about products and services.

There were a number of parts to amendment 51. First, it required the Government to use the powers associated with the 'Midata Project', found in the *Enterprise and Regulatory Reform Act 2013,* to overcome the reluctance of companies to release data. Second, the amendment required a framework to be set for managing this data. Third, the amendment required a report into whether data should be provided in a format that people could access in a portable way and how that might be determined. Fourth, it required the regulator to report on the provision of guidance that would enable third parties to make a request for data and how the released data could be used to secure social and consumer benefits. The final part of amendment 51 was concerned with data protection, including data collection and ensuring primacy of ownership of data by the public. Stella Creasy said that taken as a whole, amendment 51 sought to provide people with the information they need to understand whether they are paying a fair price.[108] She said that the amendment was about the value of data in empowering consumers, in particular, in respect of bank, energy and supermarket purchases.

Responding to amendment 51, the Minister said it was the intention of the Government to review the progress of the Midata Project, before considering whether it should use powers under the *Enterprise and Regulatory Reform Act 2013*.[109] The Minister argued that amendment 51 prejudged the outcome of the Government's review and did not address the question of the usability of data.

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[106] PBC Deb 4 March 2014 c370
[107] PBC Deb 4 March 2014 cc372-373
[108] PBC Deb 4 March 2014 c413
[109] PBC Deb 4 March 2014 cc424-425

Stella Creasy was unconvinced that companies would release price sensitive data of their own volition, when there was no commercial or competitive advantage for them to do so. She pressed amendment 51 to a vote but was defeated.

Clause 56 (Right to a price reduction)

As with goods and digital content, the Opposition also tabled an amendment to **clause 56** to set a 30-day time limit for a trader to provide a refund for a substandard service.[110] The Shadow Minister argued that as a matter of consistency, since the Bill imposes a 30-day time limit in which consumers must return goods or wait for deliveries, consumers should also have the benefit of a 30-day time limit for a refund.[111] The Shadow Minister reserved the right to return to this issue on Report.[112]

In respect of **clause 56**, the Opposition also tabled an amendment that when considering an appropriate level of refund, consideration should be given to returning the consumer to the position they would have been in if the trader had not breached the contract.[113] Stella Creasy explained that this was a probing amendment designed to help the Opposition gain from the Government a greater understanding of how they saw the right to a price reduction working when it comes to financial services. The Opposition asked how the Bill would fit in with the current guidance from the Financial Ombudsman on determining an appropriate remedy for a poor financial service.[114]

The Minister said that under the Bill, a consumer would be entitled to a discount for a substandard service, the amount of the discount would normally reflect the value of the service that the consumer had received. In contrast, the amendment would codify the law on damages, which was not the aim of clause 56.[115] She recognised that there may be circumstances where a full refund of the price would not capture all the losses arising from a poorly performed service. She said that to recover the additional costs, the consumer would need to seek damages, and this option was available to consumers under clause 54 of the Bill. The Minister thought that a price reduction would probably not be appropriate in respect of issues around financial services but that the damages option might be.[116]

New clause 7 (Consumer representation in the regulation of services)

The **new clause 7**, tabled by the Opposition, sought to impose on the Secretary of State an obligation to set out in guidance a requirement for all statutory regulators to provide (a) formal representation for consumers on all governance bodies; (b) an annual competition and health check within their industry (approved by the Consumer Association); and (c) periodic consideration of whether there is a need for independent advice, free at the point of delivery, to ensure consumers' rights are protected.[117]

Stella Creasy gave the energy and banking markets as good examples of where there has been consistent and persistent concern that the regulator has not taken into account the views of consumers.[118] The new clause also sought to impose levies on industries that were clearly shown to be causing consumer detriment; such levies to be used to pay for a system

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110 Amendment 61 in Clause 56
111 PBC Deb 6 March 2014 c454
112 PBC Deb 6 March 2014 c457
113 Amendment 62 to Clause 56
114 PBC Deb 6 March 2014 cc450-451
115 PBC Deb 6 March 2014 c451
116 PBC Deb 6 March 2014 c452
117 PBC Deb 11 March 2014 cc621-628
118 PBC Deb 11 March 2014 c622

of redress that would provide advice and support to affected consumers.[119] Although there was considerable debate in Committee, the new clause was withdrawn.[120]

4.4 General new clauses on consumer protection

New clause 5 (Ombudsman services)

New clause 5 was about the implementation of the European Directive on Alternative Dispute Resolution (ADR).[121] The Directive has to be applied by next year (2015). Member States are required to provide an ADR services for all consumers across all sectors. In tabling new clause 5, the Opposition sought answers from the Government on how the Directive would fit in with the Bill. It referred to the Government's recent consultation document (published on 11 March 2014) on the implementation of the Directive.[122]

Stella Creasy said that it made no sense to the Opposition to deal separately with the Consumer Rights Bill and the implementation of the ADR Directive without reference to each other.[123] She argued that the Bill should have been informed and influenced by the requirements of the Directive.[124]

In response, the Minister said that the consultation document sets out the Government's proposals for ensuring wide coverage of ADR and how it intends to implement the requirements that ADR bodies will have to meet. The Government was also using the opportunity of the consultation to call for evidence on possible longer-tem reform of the ADR landscape. She said that the Government was consulting on a broad range of options, the intention was to introduce primary legislation or detailed regulations to transpose the ADR Directive in spring 2015.[125] The Minster stressed the importance of consulting fully and taking into account all responses.

The new clause was withdrawn but the Opposition reserved the right to return to the matter on Report. It also put on record its concerns about the management of the Bill and the EU Directive implementation process.[126]

New clause 6 (Report on work of the implementation group)

New clause 6, tabled by the Opposition, would have required the Secretary of State to report to Parliament on the work of the Implementation Group to ensure consumers and businesses were adequately informed of the changes in the law introduced by the Bill, especially with regard to the provision of key rights at the point of sale.[127] However, despite a long debate, the clause was withdrawn.

New clause 8 (Annual report: consumer rights)

The Opposition's **new clause 8(1)** sought to place an additional reporting requirement on the Secretary of State to prepare and publish an annual report of the effect of public policy in the area of consumer affairs and to lay a copy of the report before Parliament. At subsection (2), the new clause would also have required an assessment of the effect on (a) household bills

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119 PBC Deb 11 March 2014 c625
120 PBC Deb 11 March 2014 c628
121 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) OJ L 165/63, 18 June 2013
122 Department for Business Innovation & Skills, 'Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation', March 2014, [online] (accessed 8 April 2014)
123 PBC Deb 11 March 2014 c610
124 PBC Deb 11 March 2014 cc609-610
125 PBC Deb 11 March 2014 cc611-12
126 PBC Deb 11 March 2014 c616
127 PBC Deb 11 March 2014 c617

and (b) affordability, with particular regard to low income households. Stella Creasy argued that Government policy could substantially affect people who were already struggling financially, yet no assessment was made on people's ability to pay and, therefore, on whether the policy itself was sustainable.[128]

The Minister said that the Government had consulted widely on the Bill, undertaken the appropriate impact assessments and had examined carefully the economic and wider impacts on traders, consumers and public enforcers. The Bill strengthens and clarifies consumer rights while removing burdens that are no longer valuable. She argued that on balance the Bill was deregulatory.[129]

On the issue raised by the Opposition of links between consumer rights policy and investment in infrastructure by utilities, the Minister confirmed that the Public Accounts Committee had recently been working on that very issue. She said that the Government placed strong emphasis on affordability analysis when developing the policy framework to be enforced by the independent regulators within its overall strategic objectives for sectors.[130] In addition, the Minister confirmed that affordability analysis was undertaken by all the economic regulators as a core part of their work. Specifically, Ofcom, Ofwat, Ofgem, the Office of Rail Regulation and the Civil Aviation Authority all have a statutory duty to protect consumer interests.[131]

In withdrawing the new clause, Stella Creasy reserved the right to return to the matter on Report; it was the Opposition's view that this was an issue on which the whole House should decide.[132]

5 Part 2 of the Bill – Unfair Contract Terms

This section of the Paper provides information on significant areas of debate in Committee on Part 2 of the Bill, but no Opposition amendments were agreed. For ease of reference, the headings used in this section correspond to those used in the Bill.

By way of background information, **Schedule 2** (Part 1) to the Bill, introduced by **clause 63**, contains an indicative and non-exhaustive list of terms that may be regarded as unfair, this is known as the 'grey list'. The terms on the list are not automatically unfair, but may be used to assist a court when considering the application of the fairness test to a particular case. Equally, terms not found on the list in Schedule 2 may be found by a court to be unfair by application of the fairness test.

Clause 62 (Requirement for contract terms and notices to be fair)

Amendment 62 in **clause 62**, tabled by the Opposition, was a probing amendment on the definition of a 'consumer notice' for the purpose of the unfair contract terms provisions of the Bill.[133]

The Minister confirmed that clause 62 sets out the core requirement that contracts and notices must be fair. The Government had based its explanation of what constitutes a consumer notice on the current regime; specifically the *Unfair Contract Terms Act 1977*. She confirmed that the Law Commission had consulted broadly and, as a result, had

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128 PBC Deb 13 March 2014 c634
129 PBC Deb 13 March 2014 c637
130 PBC Deb 13 March 2014 c638
131 PBC Deb 13 March 2014 c638
132 PBC Deb 13 March 2014 c641
133 PBC Deb 6 March 2014 c459-460

recommended that the Government keep the definition that already exists, as it is generally understood.[134]

Clause 63 (Contract terms which may or must be regarded as unfair)

Amendment 70 to **clause 63**, tabled by the Opposition, sought to impose an obligation on a trader to draw to the consumer's attention, prior to purchase, any grey list term included in the contract and their rights to challenge these terms under the legislation.

The Minister agreed that consumers should be informed about their rights. The Government had made a commitment to produce guidance on unfair terms. She said that **Schedule 3** to the Bill also made it clear that the Competition and Markets Authority would publish advice and information on this part of the Bill. However, she said that the Government did not agree that the Bill should stipulate how consumers are to be informed. As a general principle, the Government agreed that important terms of a contract should be drawn to a consumer's attention. Part 2 of the Bill requires all core terms to be both transparent and prominent, to avoid assessment for fairness. The Minister said that if terms were drawn to the consumer's attention, they were more likely to be found fair. She argued that a perverse consequence of the amendment could be that consumers are bound by terms that might otherwise be found unfair, and that this would clearly not be in the interests of the consumer.[135]

The Shadow Minister withdrew the amendment but reserved the right to return to the matter on Report.[136]

Schedule 2 (Consumer contract terms which may be regarded as unfair)

The Opposition tabled a large group of amendments, the purpose of which was to propose additions to the grey list contained in **Schedule 2** (Part 1). A number of Committee Members made substantial contributions to the debate on these amendments.

Before responding to this group of amendments, the Minister set out the Government's general approach to the grey list. She explained that the Law Commission had been asked to consider improvements to the grey list, and the three changes it had recommended were reflected in Part 2 of the Bill. The Government would also be taking a power to make changes later, if they are needed, subject to the agreement of Parliament. The Minister said that while there was acceptance that the grey list would evolve over time, changes should benefit consumers without placing undue burdens on businesses, because ultimately that would not be in consumers' interests either.[137]

Amendment 64 in Schedule 2 (Terms which permit 'double-charging')

Amendment 64 in **Schedule 2** sought to include on the grey list a term which requires a consumer to pay a charge for, or be liable for an element of, a good or service that another party has also been charged for in the course of the transaction. Stella Creasy said there was evidence of this practice of 'double-charging' in both the estate agency and pension brokerage industries.[138]

The Minister said that the Government preferred prices to be set by the market as a rule. Moreover, the amendment was so widely drawn it would relate to any sort of costs or liabilities under a consumer contract. She explained that, prior to 31 March 2014, the Office of Fair Trading (OFT) had a duty to supervise the working and enforcement of the *Estate*

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134 PBC Deb 6 March 2014 c461
135 PBC Deb 6 March 2014 c480
136 PBC Deb 6 March 2014 c489
137 PBC Deb 6 March 2014 c481
138 PBC Deb 6 March 2014 c465

Agents Act 1979. The OFT was empowered to take action against those who did not comply, including by banning estate agents where necessary. From 31 March 2014, the role was transferred to a lead enforcement authority – Powys County Council – which was now responsible for enforcing the provisions of the Act throughout the UK. The Minister confirmed that in an open competition, Powys County Council was judged to be the authority best placed to provide the function.[139] Funding would pass from the OFT to Powys County Council and would be ring-fenced to ensure delivery of that the service.[140]

More broadly, the Minister said that estate agents must belong to an approved redress scheme, giving consumers access to remedies when things go wrong. Under the *Consumer Protection from unfair Trading Regulations 2008* and the current unfair contract terms law, as well as their own industry codes, estate agents must make fees and charges clear for consumers.[141] The Minister confirmed that she had written to the redress scheme to draw their attention to the concerns that have been raised in Committee about the practice of double-charging, and had asked them to look into the issue. She said that she would also write to the lead enforcer at Powys County Council.[142] In addition, the Minister said that the Government would be working with the Property Ombudsman to tackle the issue of double-charging.[143]

The Opposition was not satisfied with the Minister's response. Stella Creasy said that the Opposition had genuine concerns about the ability of Powys County Council Trading Standards to supervise estate agencies and provide adequate consumer protection.[144] She said that the Property Ombudsman had indicated that the law on double-charging was not clear, which was why the Opposition was trying to provide clarity through the unfair terms provisions.[145] The amendment was pressed to a vote, but was defeated.

Amendment 65 in Schedule 2 (Terms which restrict access to information)

Amendment 65 in **Schedule 2** sought to include on the grey list any term which seeks to restrict the ability of a consumer to access information to enable them to ascertain whether the contract they are being offered could undermine their statutory rights. Again, the Opposition had in mind double-charging by estate agents. Stella Creasy argued that since the Bill would give consumers the right to pay a fair price, a contract term that restricts a consumer's ability to find out whether they are paying a fair price must be unfair. The grey list should therefore be amended to allow legal scrutiny of whether any such restriction in a contract was fair to consumers.[146]

The Minister agreed that consumers should not be prevented from accessing data about their use of a product or a service. This was a central driver for the Government's Midata Project. However, she said that the Government was not minded to legislate on issues relating to Midata until the conclusion of the review. She said that taking action now would prejudice the results of that review.[147]

Stella Creasy said that it was disappointing that the Minister had not given the assurances that the Opposition was seeking on unfair contract terms, since there was evidence that

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139 PBC Deb 6 March 2014 c482-3
140 *Ibid*
141 PBC Deb 6 March 2014 c484
142 PBC Deb 6 March 2014 c484
143 PBC Deb 6 March 2014 c484
144 PBC Deb 6 March 2014 c492
145 PBC Deb 6 March 2014 c490
146 PBC Deb 6 March 2014 c466-7
147 PBC Deb 6 March 2014 c484

consumers were having their access to information restricted.[148] She argued that the Government's Midata Project could be used as a template, rather than the totality, of the data that people might access, to see how it might apply across a range of services.[149] She confirmed that the Opposition would return to the matter of how consumers access information on Report (together with amendment 70 to **clause 63**).

Amendment 66, 67 and 68 in schedule 2 (Variations in a contract)

Stella Creasy confirmed that amendments 66 and 67 in **Schedule 2** had been suggested by the Financial Conduct Authority's Consumer Panel. They were concerned with variations in a contract, including price. In particular, the Opposition had in mind the case of Bank of Ireland mortgage holders who discovered that their contracts had been varied but they were still locked into them. The amendments were designed simply to give consumers the right to challenge any variation that is forced on them as an unfair contract term.[150]

Amendment 68 in **Schedule 2** was concerned with contracts for financial services. It sought to include on the grey list a term that directly causes financial detriment to the consumer such that it can be seen to reasonably alter the capacity of the consumer to pay the costs of the contract. In tabling this amendment Stella Creasy said that the Opposition was concerned about contracts that create debt for a consumer and are sold in such a way as to perpetuate debt. It had in mind the payday lending industry. The Opposition thought it unfair to sell a product that appears superficially to be about helping people financially when, in fact, the contract is designed to push them into debt so that they continue to buy the company's products.[151]

In responding to these amendments, the Minister explained that the Financial Conduct Authority (FCA) was responsible for the regulation of residential mortgage lending and sets the rules that mortgage lenders are required to meet to ensure that customers are treated fairly. However, decisions concerning the pricing and availability of mortgages, including the level of interest charged, were commercial decisions for lenders. As long as lenders meet the rules set out by the FCA, the Government would not seek to intervene in those decisions.

However, the Minister sought to reassure the Committee that terms such as those included in the amendments would already be accessible for fairness if they were not in plain, intelligible language. The Bill would add that they must also be prominent to avoid challenge. The Minister explained that the FCA was responsible for considering the fairness of terms under the *Unfair Terms in Consumer Contracts Regulations 1999*. It looks at standard terms in financial services contracts that are issued by authorised firms, including mortgages, general insurance and life assurance, bank, building society and credit union savings accounts, pensions' investments and long-term savings. The FCA also had powers under the *Financial Services and Markets Act 2000.*[152] Firms have an obligation to comply with the FCA's rules and its principles for business, which include that firms have to pay due regard to the interests of their customers and treat them fairly. They also have to communicate information to them in a way that is clear, fair and not misleading. The Minister said that the introduction of grey list terms as laid out in the amendments would reduce the valuable flexibility that lenders currently have in making commercial pricing decisions across the market. For all those reasons, the Government did not think that amendments 66 to 68 represented appropriate additions to the grey list.

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148 PBC Deb 6 March 2014 c489
149 PBC Deb 6 March 2014 c489
150 PBC Deb 6 March 2014 c467
151 PBC Deb 6 March 2014 c467-8
152 PBC Deb 6 March 2014 c481

Amendments 66 and 67 were subsequently withdrawn by the Opposition.[153] However, in respect of amendment 68, the Opposition was not happy with the Minister's response. Stella Creasy argued that amendment 68 would address an unfair contract term knowingly pushing someone into a financially detrimental position. Although the Minister referred to other parts of the Bill, it was the Opposition's contention that additional, separate protection was needed. The Amendment was therefore pressed to a vote, but was defeated.[154]

Amendment 69 in Schedule 2 (Copycat websites)

Amendment 69 in **Schedule 2** was concerned with unofficial copycat websites, in particular, those that masquerade as official Government sites. It sought to include on the grey list any term on such websites providing for charges, unless the original provider of the service has approved the service and range of costs. In speaking to this amendment, Stella Creasy argued that when a consumer has been mis-sold a service because they believe they are using an official site that should be considered an example of unfair behaviour and be open to legal challenge.[155]

The Minister agreed that misleading websites that try to palm themselves off as legitimate Government websites needed to be stopped. To this end, the Government had committed an additional £120,000 to the National Trading Standards Board to investigate rogue traders. The Minister said that the Government was also working with search engines to take down misleading websites as they are identified.[156]

Amendment 69 was subsequently withdrawn. The Opposition agreed to give the Government time to see if its new approach works.[157]

Amendment 99 in Schedule 2 (Delivery of a service)

In tabling this amendment to Schedule 2 the Opposition was seeking clarification on whether the delivery of a service was also an important part of an unfair contract term. The amendment was withdrawn after the Minister confirmed that **paragraph 3** of the grey list covered that very point.[158]

Amendment 100 in Schedule 2 (Provision of public services)

Amendment 100 in **Schedule 2** was a probing amendment on consumer rights in the public sector. In the Bill, contracts that last indefinitely may be deemed unfair unless they are capable of being dissolved. The Opposition sought clarification of what it means to dissolve a service, arguing that there were many services provided in the public sector (such as social housing and social care) for which dissolution would not be practical.[159] However, the amendment was subsequently withdrawn on the basis that the Opposition had tabled new clause 9.[160]

New clause 9 raised a number of issues about the provision of public services, including outcomes to be achieved, consumer rights and redress. The new clause also contained a requirement on service providers to report on their 'formalised approach' to advocacy.

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153 PBC Deb 6 March 2014 c487
154 PBC Deb 6 March 2014 c491
155 PBC Deb 6 March 2014 c468
156 PBC Deb 6 March 2014 c485
157 PBC Deb 6 March 2014 c468
158 PBC Deb 6 March 2014 c488
159 PBC Deb 6 March 2014 cc468-9
160 *Ibid*

Stella Creasy highlighted research by Which? showing that two in five people did not report complaints about the delivery of public sector services.[161] The Opposition was firmly of the view that the Bill should contain a framework to ensure that people who use public services get access to advocacy at an earlier stage.[162] Stella Creasy asked the Minister if it was the Government's intention to use powers in the Bill to exclude public services.[163]

The Minister confirmed that she had written to the Committee on 12 February 2014, following the oral evidence sessions, to clarify what the Bill covers in terms of public services. She explained that it was the nature of the contract that determined whether delivery of a public service was covered by the Bill. Where services are delivered under a contract with a trader, consumers will have rights under the Bill, including the right to redress and the ability to pursue complaints through the same routes. However, in most cases public services were delivered under licence or statute (rather than contract) and would not be covered by the Bill. The Minister said that there were well established and well used alternative routes for patients and consumers of public services to be able to access support, advocacy, and assistance.[164] With the exception of rail passengers (who would be covered by the National Rail Conditions of Carriage) the Government had no plans to exclude any public services from Part 1 of the Bill.[165]

Given the strong differences of opinion between the Government and the Opposition on the issue, Stella Creasy said that the whole House should be given the opportunity to consider the matter. She withdrew the new clause but reserved the right to return to the issue on Report. [166]

Clause 64 (Exclusion from assessment of fairness)

Amendment 71 to **clause 64**, tabled by the Opposition, was concerned with hidden charges. The backdrop to this was the judgment given by the Supreme Court in the 2009 *OFT v Abbey National Case*.[167] This was essentially a case about bank charges in circumstances where a bank account holder went into unauthorised overdraft. In this case, the Supreme Court rejected the idea that the price of a contract could be split into the headline price and other charges. Stella Creasy explained that an unforeseen consequence of the judgment had been to make it harder for enforcement and consumer bodies to challenge prices that were disclosed in contractual small print; the notion of something being hidden in plain sight.[168] This could be extremely costly for consumers when it comes to mortgages or financial services.[169]

In giving the Government's position, the Minister said that the requirement in the Bill for 'core terms' to be both 'prominent' and 'transparent' in order for them to qualify as exempt would significantly enhance consumer protection.[170] In particular, the requirement for core terms to be 'transparent' would cover the issue of hiding terms in plain sight. She said that the provisions in the Bill reflected the recommendations of the Law Commission and the need to create a balance between protecting consumers and enabling traders to comply.[171] The amendment was withdrawn.

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161 PBC Deb 13 March 2014 c647
162 PBC Deb 13 March 2014 c644
163 PBC Deb 13 March 2014 c649
164 PBC Deb 13 March 2014 cc650-652
165 PBC Deb 13 March 2014 c652
166 PBC Deb 13 March 2014 c655
167 *OFT v Abbey National PLC and others* [2009] UKSC 6' [2009 EWCA 116; [2008]EQHC 875 (Comm)
168 PBC Deb 6 March 2014 c496
169 PBC Deb 6 March 2014 c497
170 PBC Deb 6 March 2014 c498
171 PBC Deb 6 March 2014 c499

Clause 68 (Requirement for transparency – legal protection insurance)

In speaking to amendment 75 to **clause 68**, Stella Creasy said that the Opposition was concerned about the potential conflict of interest in the way in which insurance services and legal protection were sold and managed. Legal protection insurance is usually sold as an 'add-on' to a home or car insurance policy for a small extra premium, but sometimes is free. It tends to have a limit on how much may be claimed.

Stella Creasy argued that the amendment would give consumers who take-out legal protection through their insurance policies greater certainty that any lawyer contracted through such a deal would act independently of the interests of the insurance company.[172] She drew attention to the work done by the Competition Commission which found that the industry was not working well for consumers. A series of conflicts of interest were creating incentives to increase the price of premiums, at the expense of quality of cover.[173]

Andy McDonald spoke in favour of the amendment. He explained that the current practice in 'before-the-event' legal expenses insurance was to direct consumers who might need to utilise the service to a limited number of providers (i.e. legal advisers). As a result, he argued that there was a real risk of over-emphasis on the financial returns gained from the relationship between the trader (insurance company) and the legal body that the consumer is directed to.[174] He argued that there was a risk of 'cherry-picking' of cases and of gross under-settlement, which would cause consumer detriment.[175]

Andy McDonald argued that this practice was not restricted to the commercial insurance market. He explained that since 1987, products had been developed for the benefit of members of the armed forces, whereby they could recover for personal injury through personal accident insurance. There was also the ability, through legal expenses insurance, to cover the cost of legal actions to claim damages for negligence by an employer or another party. He argued that the Ministry of Defence (MOD) chose to approve one single product. Under that policy, the MOD restricts the legal advisers that are available to one single firm.[176]

The Minister explained that the contract covering the legal services element was normally part of the insurance contract and as such, it was covered by FCA rules. The rules include that consumers are given all appropriate information.[177] The FCA had produced an 'Insurance Conduct of Business Sourcebook', in order to set out the standards that insurance companies are required to meet. She undertook to write to the Treasury and to the FCA with the concerns raised in Committee.[178]

Referring to the previous debate in Committee on double-charging (amendment 64 in Schedule 2), Stella Creasy said that this was another example of a simple consumer concern - whether someone should act on behalf of two parties, given that the needs of the purchaser of legal expenses insurance might not be the same as those of the insurer. There was a simple point about whether it was fair for people not to know that a conflict of interest might arise.[179] She said that the Opposition would wait to hear from the Government about the

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[172] PBC Deb 6 March 2014 c504
[173] PBC Deb 6 March 2014 c504
[174] PBC Deb 6 March 2014
[175] PBC Deb 6 March 2014 cc505-6
[176] PBC Deb 6 March 2014 cc506-507
[177] PBC Deb 6 March 2014 c508
[178] PBC Deb 6 March 2014 c509
[179] PBC Deb 6 March 2012 c509

response they receive from the FCA before considering whether the Bill might be a better vehicle to deal with the issue. On that basis, the amendment was withdrawn.[180]

Clause 68 (Requirement for transparency – provision of public services)

Amendments 98 and 110 to **clause 68**, tabled by the Opposition, were concerned with the provision of public sector services. Amendment 98 was concerned with public contracts and transparency. In speaking to this amendment, Stella Creasy made a distinction between data on an individual's direct relationship with a public service, and information contained in a 'data set' to which they may have contributed. She argued that both sets of information should be available to consumers to assess, so that they could exercise their right, under the Bill, to pay a fair price for a service.[181] Amendment 110 was designed to ensure that consumers could obtain any information that they might require in order to assess whether the price that they are paying for a public service was fair.

Speaking to both amendments, Stella Creasy argued that access to the necessary information would inform the quality of the service that consumers received and would help to ensure that it is fit for purpose. It would also help to ensure that any remedies to which a consumer might have recourse were informed by accurate information.[182]

In respect of amendment 98, the Minister said that whilst the Government supported the principle behind the amendment, the Bill was not the appropriate mechanism for it. She confirmed that the Government had endorsed the adoption of 'Open Contracting Principles' in the UK's 'Open Government National Action Plan', which set out measures to deliver greater transparency of contractual data. In addition, she said that the Government had made a commitment to expand the requirement to publish to the wider public sector. When brought into force in June 2014, the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* would also require traders within scope to give comprehensive information to the consumer before they enter a contract.[183]

In respect of amendment 110, the Minister said that all public sector organisations were already subject to freedom of information requests, so there was a mechanism for accessing the information. She argued that many of the services highlighted by Members of the Committee would not, in fact, be covered by the Bill as they were not services provided under a contract but under a statutory duty. She said that only a small proportion of public services were provided under contract. The Minister rejected the amendment on the basis that it sought to extend the Bill into areas that it was not designed to cover.

Stella Creasy withdrew both the amendments but reserved the right to raise the issue with the whole House on Third Reading.[184]

6 Part 3 of the Bill

This section of the Paper provides information on significant areas of debate in Committee on Part 3 of the Bill, but no Opposition amendments were agreed. For ease of reference, the headings used in this section correspond to those used in the Bill.

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180 PBC Deb 6 March 2014 cc509-10
181 PBC Deb 6 March 2014 c510
182 PBC Deb 6 March 2014 c511
183 PBC Deb 6 March 2014 c515
184 PBC Deb 6 March 2014 c517

6.1 Investigatory powers

New clause 4 (Guidance on new investigatory powers)

Clause 77 of the Bill deals with investigatory powers. It brings into effect **Schedules 5** and **6** which deal with the role of Trading Standards and enforcers of the legislation. New clause 4, tabled by the Opposition, sought to impose a requirement on the Secretary of State to publish detailed guidance for all Trading Standards Services on the new investigatory powers.

Stella Creasy explained that the aim of **new clause 4** was to probe Government thinking on how the new investigatory powers would work within the new consumer landscape. The Opposition's concern was that, given the way in which the consumer landscape had been re-weighted, there would be an expectation on Trading Standards to undertake a number of roles, particularly at a local level. She questioned whether Trading Standards would have adequate resources to prevent gaps appearing in consumer law enforcement.[185] Stella Creasy drew attention to a 2012 survey, which appeared to show a fall of 13% in average spending on Trading Standards per head of the population in England.[186]

The Minister confirmed that Trading Standards would have an enhanced consumer enforcement role – the great majority of consumer law enforcement would be done by them. This is why the Government had committed £14 million of central Government funding into setting up the National Trading Standards Board, with responsibility for prioritising Trading Standards enforcement across local authority boundaries.[187] She said that the idea was to make better use of resources and to ensure that scams that run across local authority boundaries, and incompetent or rogue traders, were tackled.[188]

When questioned by various Committee Members on the training of Trading Standards officers, the Minister confirmed that the Trading Standards Institute would be looking into what training officers would need to enforce the new measures. She said that when the Government consulted on the draft Bill, the Local Government Association felt strongly that local authorities were best placed to determine the competence of their officers and that it should be left to them to design a Trading Standards Service that suits the local conditions.[189] The Minister said that the Government had recently published the Statutory Regulators Code which, subject to Parliamentary approval, would replace the current code. This new code would require regulators, including local authorities, to ensure that their officers have the necessary knowledge and skills to support those they regulate, to enable enforcers to choose proportionate and effective approaches.

Stella Creasy stated the Opposition's concern that the future of the Trading Standard Service would be as a regional, rather than a local service.[190]

Schedule 5 (Enforcers' rights to enter premises)

Paragraph 23 of **Schedule 5** requires that Trading Standards officers give 48 hours' notice before entering premises to conduct a routine inspection. The Opposition's amendment sought to remove this requirement from the Bill.[191]

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185 PBC Deb 11 March 2014 c530
186 PBC Deb 11 March 2014 cc531-532
187 PBC Deb 11 March 2014 c537
188 PBC Deb 11 March 2014 c537
189 PBC Deb 11 March 2014 c538
190 PBC Deb 11 March 2014 c543
191 Amendment 104 to Schedule 5

Stella Creasy explained that the Opposition had tabled the amendment because Trading Standards were concerned that the drafting of the Schedule would confuse, rather than clarify what powers officers have.[192] There was concern that the Bill would restrict inspections to only those business premises where there was prior suspicion of a problem.[193] She said that legal advice, sought by the Trading Standards Institute, appeared to suggest that although the burden of proof would be quite low, there would need to be an actual link between suspicion of rogue activity and the premises concerned. She argued that this would undermine the ability of the officers to investigate and follow leads.[194] Given these concerns the Opposition was of the view that it would be better to simply remove paragraph 23 of Schedule 5 entirely from the Bill.[195]

In response, the Minister reiterated several times that paragraph 23 of Schedule 5 dealt only with routine inspections, not situations where there was a suspicion that the law had been breached. She argued that paragraph 23 would ensure a better use of resources – by Trading Standards officers not having to make multiple visits for routine inspections.[196] She argued that far from inhibiting enforcers' ability to investigate wrongdoing, the Bill would support an intelligence-led approach to enforcement to tackle rogue activities. Moreover, Trading Standards already give notice in between 12% and 19% of their inspections.[197]

The Opposition pressed the amendment to a vote, but was defeated.[198]

6.2 Private actions in competition law

Clause 80 & Schedule 8

The Government resisted an Opposition amendment to **clause 80**, to require the Secretary of State to report within a year both on the impact of this measure and the case for extending these powers to all areas of consumer law. This was withdrawn without a vote, and the clause agreed unamended. The Government moved a number of minor amendments to **Schedule 8**; these were all agreed without a vote. The following paragraphs discuss these proceedings in more detail.

On **clause 80**, speaking for the Opposition, Stella Creasy noted that "business view the private actions approach … as one of the least effective in the UK" and therefore "it is welcome that the Government have consulted on how to reform the private actions framework." She noted concerns raised by the consumers group Which? that consumers might be unable to determine if a settlement they had been presented was "just and reasonable" for lack of information "on the detriment they faced":

> We are sympathetic to the points Which? makes about whether it would be right to require traders themselves to certify that a settlement was just and reasonable, and to allow courts to disallow costs for someone who proceeded with a case but lost it, on the basis that they had been offered a reasonable settlement but could not have reasonably known at the time that the settlement was reasonable.[199]

Robert Flello also raised this point: "how somebody can know whether they have a good case, and whether the offer made is just and reasonable or completely unjust and reasonable." Ms Creasy argued that a formal review, a year after these provisions had taken

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192 PBC Deb 11 March 2014c547
193 PBC Deb 11 March 2014 c547-548
194 PBC Deb 11 March 2014 c548
195 PBC Deb 11 March 2014 c549
196 PBC Deb 11 March 2014 c550
197 PBC Deb 11 March 2014 c553
198 PBC Deb 11 March 2014 c554
199 PBC Deb 11 March 2014 c580

effect, would help to assess if these provisions had been effective, "given that [the Government] are trying to encourage tentatively, not an explosion, but an increase in the amount of private action, in order to have a cleansing effect on consumer detriment in our contemporary economy and to ensure that businesses are aware that they will be held to account if they act unfairly or unjustly. Without the review process, we will not know whether the Bill will have that impact."[200]

In response, the Minister, Jenny Willott, argued that information on the impact of the new regime would be available as part of the CAT's annual review, and that, as had been noted earlier in the Committee's proceedings, the Government did not believe this procedure was appropriate for consumer law as a whole:

> Collective action cases can be commenced only in the Competition Appeal Tribunal. As part of its yearly work, CAT publishes an annual review containing a list of cases taken forward in the previous 12 months and a summary of the judgments made. That provides information about the number of cases commenced under the revised regime, and the level of redress paid to consumers. The report is not laid before Parliament, but it is publicly available on CAT's website, so the information will be on the public record … We discussed [the right for consumers to take collective action] this morning, and I highlighted the concerns that a number of people raised about the proposal … we believe that enhanced consumer measures are a better way of achieving a similar result, with fewer of the associated problems.[201]

Ms Willott went on to explain why, in the Government's view, there was already sufficient safeguard to allay concerns over the ability of consumers to assess if a settlement was just and reasonable:

> The Bill requires CAT to certify a settlement only when it is just and reasonable, and it requires all parties involved to submit evidence to CAT. One party will submit evidence of detriment to consumers and the other will provide evidence about its case. CAT will then certify whether the settlement is just and fair. That seems to be the appropriate place to do that. The Government believe that there is already a sufficient safeguard to allay concern in that area, because CAT must have sufficient evidence before it in order to feel able to agree that the settlement is just and reasonable …
>
> The second mechanism for alternative dispute resolution in this part of the Bill grants a new power for the CMA to approve voluntary redress schemes. When the UK competition authority finds an infringement, it is important that a business should have the opportunity to offer redress voluntarily, if it is so minded. Paragraph 12 of the schedule therefore enables the CMA to approve a redress scheme. A business will be able to offer a scheme after an infringement decision has been made, the evidence having been considered and made available, or at the time when a decision is made. Certification by the CMA will reassure consumers that the scheme is fair.[202]

The Minister was also asked about the risk that the Tribunal might not be given sufficient information to make this type of assessment. In her reply Ms Willott referred to the draft rules the Government had published, alongside the Bill, to transpose European requirements for alternative dispute resolution into national law:

> [The CAT] has a lot of experience in this area—it has been operating for a while, and it is extremely competent—and it has the power to ask for the evidence. Its members are

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200 PBC 11 March 2014 c582, cc580-1
201 *op.cit.* cc583-4. On the second of the Minister's points see, PBC Deb 11 March 2014 c559
202 PBC Deb 11 March 2014 c584

> experts in their field, who know a lot more than us mere mortals in Committee about the intricacies of cases before them …
>
> The draft rules that we published yesterday for CAT state that evidence must be submitted to it in order for it to consider a settlement offer. CAT can also ask third-party experts to provide evidence, and to comment on the evidence that a business has submitted. If CAT is concerned that it does not have all the information that it needs to make a decision, it can ask for more information. If a business refuses to provide that information, that may ultimately be contempt of court. The idea is that businesses would work with CAT, however; it is not in their interests not to.[203]

7 Government Amendments

7.1 Schedule 1 (Amendments consequential on Part 1)

Schedule 1 to the Bill lists amendments that are consequential on Part 1 of the Bill. Amendment 44, in Schedule 1, was a technical amendment, which tidied away an unnecessary piece of legislation. It was agreed to without debate.[204]

7.2 Schedule 5 (Investigatory powers etc.)

Amendments 76 to 86 concerned the investigatory powers in Schedule 5. They were minor amendments that were necessary to address technical issues in the existing drafting of the Schedule. They clarified provisions relating to a breach of the enforcers' legislation and offences under that legislation. The technical amendments were agreed to without debate.[205]

7.3 Schedule 6 (Investigatory powers: consequential amendments)

The Government made a number of minor technical amendments to Schedule 6 which were all agreed to without debate.[206]

7.4 Schedule 7 (Enterprise Act 2002: enhanced consumer measures)

Amendment 111, in Schedule 7, was a technical amendment, which did not change the practical intention of the Bill. This was agreed to without debate.[207]

Amendment 112 introduced a duty on private designated enforcers to act consistently with advice or guidance given by a primary authority when seeking an enforcement order or undertaking that includes enhanced consumer measures. The Minister told the Committee that the amendment would ensure that enforcement action is consistent and joined up, regardless of whether the enforcement body was a local authority or a private enforcer. [208]

The amendment was agreed to but there was some debate. In particular, the Opposition questioned whether private enforcement agencies, if given enhanced consumer measures, would have to take the guidance of a primary authority even if they felt that the authority's

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[203] PBC Deb 11 March 2014 c586. The Minister is referring to the Department's consultation document, *Alternative dispute resolution for consumers: implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation (BIS/14/575)*, March 2014. The consultation closes on 3 June 2014. For the background on this see, Library Research paper 14/5, pp 53-55.

[204] PBC 6 March 2014 cc457-8

[205] PBC 11 March 2014 cc544-545

[206] Amendments 87, 88, 89 to 96 to Schedule 6

[207] PBC 11 March 2014 cc567-8

[208] PBC 11 March 2014 c568

guidance was not appropriate. It was argued that the amendment might restrict the independence of operation of a private enforcer, such as Which? [209]

7.5 Schedule 8 (Private actions in competition law)

As noted above, the Government moved a series of amendments to **Schedule 8**, which were all agreed without a vote. First, the Minister moved two amendments to clarify that the territorial jurisdiction of the CAT would be the same as that of the High Court and the Court of Session. The drafting of the Bill had meant that it would have been possible "for a claim that has no connection to the UK to be brought before the CAT, such as a case where the infringement of competition law which did not take place in the UK or where both parties were based outside the UK." Amending this part of **Schedule 8** would align it with provisions in the *Enterprise Act 2002*, which "already provides that the CAT's jurisdiction "is the same as the jurisdiction of the ordinary courts."[210]

Second, the Minister moved two amendments to allow the CAT to order that any unclaimed damages be used to cover a claimant's legal costs:

> The Bill currently requires that all unclaimed damages be paid to the Access to Justice Foundation … One option to fund opt-out cases would be to use unclaimed damages to cover all or part of a claimant's costs, which could include any success fee agreed with a legal representative and any insurance taken out. It is imperative that consumers should be the beneficiaries of redress, and the amendment will mean that legal costs can be recovered only after consumers have claimed their redress …
>
> if there are cases that do not result in any unclaimed damages, the representative will not be able to recover their legal costs from the damages pot. Secondly, businesses will not be paying any additional redress; they will still be paying only for the harm that they caused. Thirdly, the use of unclaimed damages to pay costs will have to be approved by the CAT.[211]

Third, the Minister moved three amendments to introduce a 'just and reasonable' test for the CAT to apply to collective settlement cases.

In its scrutiny of the draft Bill, the BIS Committee had expressed concerns over the risk, in collective proceedings, of an unsuitable person being appointed representative. In evidence to the Committee, the commercial law firm Herbert Smith Freehills had suggested the CAT should be in a position to apply this test, "to ensure, for example, that: a class member is only able to act as representative if it has suitable funding arrangements in place (such that it would be able to meet a costs order against it); a class member is not able to act as representative if it is in effect acting on behalf of a law firm, third party funder, or special purpose vehicle; and a class member is only able to act as a representative if it has suitable governance arrangements in place for the conduct of the proceedings on behalf of the class."[212] In turn, the Government accepted the Committee's recommendation that the draft Bill should be amended in this respect.[213]

In Committee, Ms Willott explained that the Government believed the same test should apply to collective *settlements* as to collective proceedings:

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[209] PBC 11 March 2014 cc576-578
[210] PBC 11 March 2014 cc587-8
[211] *op.cit.* c588
[212] *Sixth report of Session 2013-14*, HC 697-III, Volume III (Additional written evidence) Ev w73, fn 62
[213] Cm 8796, January 2014 pp39-40. For more details see, Library Research paper 14/5, p46.

> The same instances in which it might be inappropriate for a class member to act as a representative in collective proceedings would also apply to a collective settlement. It is therefore important that the CAT be given the necessary discretion to reject a proposed representative if it deems the person to be unsuitable.[214]

Stella Creasy asked the Minister to explain how this might work in practice, to which Ms Willott replied:

> There may be scenarios in which it would be inappropriate for a class member to act as a representative—for example if … they had been declared bankrupt or did not have the financial means to act on behalf of the group [or there was] … a conflict of interest, or something like that … The exact reason why a class member was refused would be left to the CAT to explain. However, we envisage that the class of people would be able to submit an alternative class member to the CAT or, indeed, select a representative body to put someone forward to act on their behalf. However, we think that it is important that the CAT has discretion over whether to approve the class member if concerns have been raised.[215]

On this occasion, the Minister said she would write to the Committee, to answer a query from Ms Creasy about the options for redress should CAT object to a particular claimant being a group's representative. In this letter, Ms Willott said:[216]

> The Bill provides that the Tribunal may authorise a person or organisation to act as a representative on collective settlement only if the Tribunal considers that it is just and reasonable for that party to do so. If the Tribunal does not consider it just and reasonable to authorise a party as a representative, then ultimately the person or organisation could challenge that decision by judicial review.
>
> If the Tribunal were to come to the decision that it was not just and reasonable for a particular person to act as a settlement representative, then it would be acceptable for an alternative or organisation to put themselves forward as the representative. In practice, this is what the Government would expect to happen.

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214 PBC Deb 11 March 2014 c589

215 *op.cit.* c590

216 Commons Library Deposited Paper Dep2014-0411, 11 March 2014 (Letter dated 13/03/2014 from Jenny Willott MP … regarding the CAT authorisation of representatives in collective settlements)

Appendix 1 – Membership of the Committee

Chairs: David Amess, Sandra Osborne

19 members:

Baker, Steve (Wycombe) (Con)

Chishti, Rehman (Gillingham and Rainham) (Con)

Colvile, Oliver (Plymouth, Sutton and Devonport) (Con)

Creasy, Stella (Walthamstow) (Lab/Co-op)

Doughty, Stephen (Cardiff South and Penarth) (Lab/Co-op)

Durkan, Mark (Foyle) (SDLP)

Flello, Robert (Stoke-on-Trent South) (Lab)

Gilmore, Sheila (Edinburgh East) (Lab)

Glindon, Mrs Mary (North Tyneside) (Lab)

Gyimah, Mr Sam (Lord Commissioner of Her Majesty's Treasury)

Harris, Rebecca (Castle Point) (Con)

Kwarteng, Kwasi (Spelthorne) (Con)

McPartland, Stephen (Stevenage) (Con)

McDonald, Andy (Middlesbrough) (Lab)

Munt, Tessa (Wells) (LD)

Newmark, Mr Brooks (Braintree) (Con)

O'Donnell, Fiona (East Lothian) (Lab)

Sandys, Laura (South Thanet) (Con)

Willott, Jenny (Parliamentary Under-Secretary of State for Business, Innovation and Skills)