

THE SUPPLY OF SERVICES:

Impact assessment

JULY 2012

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Title: The Supply of Services IA No: Lead department or agency: Department of Business, innovation and Skills Other departments or agencies:	Impact Assessment (IA)	
	Date: 02/05/2012	
	Stage: Development/Options	
	Source of intervention: Domestic	
	Type of measure: Primary legislation	
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Summary: Intervention and Options		RPC Opinion: AMBER

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£m	£m	£m	Yes/No
			In/Out/zero net cost

What is the problem under consideration? Why is government intervention necessary?

The 2009 Consumer Law Review highlighted a number of problems in the current consumer law framework. The Review suggested that existing consumer rights are unhelpful to both businesses and consumers. When supplying a service, businesses currently only have to meet a “reasonable care and skill” standard with no statutory obligation to offer remedies in the event of a breach. This is in contrast to the supply of goods where consumers enjoy far more protection. Clarifying existing legislation and taking modest steps to bring some consistency between various consumer rights regimes will reduce burdens on business and give greater empowerment to consumers.

What are the policy objectives and the intended effects?

The Government’s policy objective is to simplify, clarify and align the law as far as possible. The Government intends to simplify the current implied term of “reasonable care and skill”, by making it a “statutory guarantee” and introduce core statutory rights of remedy for consumers where that guarantee has been breached. The intended effect of this change would be to make it clear to consumers and to businesses that, as a minimum, the contract for the supply of a service comes with a guarantee that the service must be provided with reasonable care and skill; and where this standard is breached, consumers will at a minimum be entitled to a statutory remedy of a repair or replacement.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

We have considered the following options:

Option 0: Do Nothing

Option 1: Change the current liability standard of “reasonable care and skill” from an implied term to a “statutory guarantee”; and introduce core statutory rights of remedy for consumers where that guarantee is breached

Option 2 Guidance and Best Practice: Issue guidance on current provisions with Best Practice guides (illustrated with case studies).

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?				Yes / No / N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister



Date: 12/07/2012

Summary: Analysis & Evidence

Policy Option 1

Description:

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

No monetary costs have been identified in the proposed legislation although it is accepted that there may be costs associated with informing the interested parties of the changes. These costs are likely to fall on business providing services to consumers and intermediary bodies advising consumers of their rights and remedies should disputes occur, for example staff training, changes to standard terms via receipts/contracts etc. These are considered short term costs.

Other key non-monetised costs by 'main affected groups'

No direct/long term monetised costs are expected as a result of clarifying the existing law. However, businesses which currently rely on consumer inertia, faced with complex and uncertain law, to avoid providing redress in cases where they have demonstrated a lack of reasonable care and skill, will in future risk facing larger numbers of claims and higher costs. We are at present unable to quantify these costs but they will be subject to business engagement in the consultation period.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

The key monetary benefits to business and consumers are difficult to quantify. It is however anticipated that both groups will benefit from the clarification/simplification in terms of time and resources needed to resolve disputes.

Other key non-monetised benefits by 'main affected groups'

The clarification and introduction of statutory remedies will contribute to the creation of a level playing field within the market and will increase consumer confidence. Businesses which currently offer low quality services will find it harder to continue to operate in this way if consumers become more assertive. They will tend to either improve their performance or risk being squeezed out of the market. There should be a reduction in the costs of dispute resolution.

Key assumptions/sensitivities/risks	Discount rate (%)	
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BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

Evidence Base (for summary sheets)

Purpose of this IA

The proposals set out in this Impact Assessment form a part of a proposed wider reform of consumer law, intended to simplify and clarify consumer law to reduce business compliance costs and empower consumers. The proposals in this Impact Assessment would require primary legislation to be implemented, which we propose to do via a Consumer Bill of Rights.

Following changes to the law it would be our intention that a communications campaign will be initiated in order to inform consumers and those who deal with consumers and also businesses of the changes to the law. The Consumer Landscape Review is being implemented and one of its objectives is to streamline the provision of advice on consumer issues through Citizens Advice. Therefore we are already talking to Citizens Advice about their role in communicating the changes that the consumer law reform programme will bring about. We will discuss awareness raising for businesses with a range of business representative bodies.

There is further information about the Consumer Law Reform programme in the Annex.

Background

The Consumer Law Review 2008 concluded that simplifying and modernising consumer protection legislation could bring benefits not only to consumers but also to business and the wider economy. It made recommendations to change the legislation to allow consumers and those dealing with consumers to be clear on their rights when undertaking a transaction and on their remedies should things go wrong.

The Review found strong public support for simplification and clarification of the law and highlighted a number of benefits this could bring. For example, consumer empowerment through increasing awareness of rights, remedies and obligations and removing discrepancies and inconsistencies across existing legislation. The conclusion was drawn that empowering consumers and greater consistency for business would inevitably lead to a stronger market and business growth.

The service sector accounts for 77% of the UK economy. It is highly varied covering a wide range of industries and activities. The impact of legislative change across service sectors is unlikely to be uniform.

The services sector can be divided into two categories:

- pure services – ie professional services where intellectual knowledge or a physical skill is being purchased; or
- a combination of a service and good (for example, installations where the provider will supply a good and arrange its installation as one contract, and repairs).

Services (be they pure or combined) will involve variable costs to the consumer and the value of the contract is likely to influence the consumer's willingness to complain and assert his/her rights if the service does not meet their expectations. The Office of Fair Trading's Consumer Detriment Survey 2008 concluded that consumers were directly influenced by the cost of the service and by the perceived cost (both in terms of money and time) in complaining and seeking redress. Consumers quoted lack of confidence in reaching a solution as a reason for not complaining to the supplier (a possible illustration of the confusion and complexity in the current legal regime). Consumers also quoted the cost of the service (where monies had already been paid) or the need for the service (ie the installation of a bathroom) as reasons to pursue a complaint.

While it would be desirable to develop a single, clear legal regime for the supply of both goods and services, this would mean changing the liability standard for services from one based on fault (lack of reasonable care and skill) to one of strict liability. Such a radical step would be likely to result in a variable impact across different service sectors and could result in serious unintended consequences as well as significant potential benefits. The full impact of such change would be impossible to assess in advance, so the Government prefers a more cautious approach at this stage.

The proposals below for the supply of services are modest but will provide a framework for business and consumers to approach disputes with greater clarity about what the law provides and what remedies it offers when the business fails to meet the required standard. This will make it easier to agree remedies outside of the court process, thus reducing costs. Other proposals are being considered, including the introduction of a “fit for purpose” test, particularly where goods and services are combined, which will be discussed in the consultation paper. This will include a call to stakeholders to present evidence to either support or reject such proposals. Should evidence be presented to support the introduction of a new liability standard for some services, when combined with goods (either across a range of transactions or in specific instances) the Government may decide to bring forward proposals to such effect. The impact of any such measures will be presented in the final IA. At this stage, the consultation stage IA only considers the impact of the more modest measures which the Government is actively planning to take forward.

The proposals will bring an element of consistency between the remedies for goods and services which will help both businesses and consumers to understand their consumer rights. This will have the knock-on effect of reducing resources needed by business to address complaints and disputes. Some differences will however remain.

PROBLEM UNDER CONSIDERATION

The proposals below will only be effective in cases where the supplier of the services accepts liability for the absence of “reasonable care and skill” or in any event is prepared to offer a remedy to an aggrieved consumer. Where the supplier does not accept liability and refuses any remedy, the consumer can still seek redress via the courts under existing contract and common law.

These proposals relate to business to consumer transactions only. Nothing in these proposals will change the nature or relationship of business to business contracts.

The OFT's 2008 Consumer Detriment survey estimated that, during the course of 2007, the overall value of revealed consumer detriment in the UK economy was £6.6 billion. Although this included both goods and services, it found that the greatest proportion of total detriment was among the 'professional and financial services' group, while another large service sector, 'home maintenance and improvement', also accounted for five per cent of all consumer problems reported. The survey analysed the nature of consumer complaints but it is difficult to untangle the services from the goods in the statement used. However In categorising the nature of the complaint the survey found that 'Poor Service Quality' was a key problem experienced by consumers. The survey showed a total detriment to the UK of £783,326,160 (estimated to be equivalent to £863,463,675 in 2011 prices) in the “Poor Service Quality” category. The survey estimated that in line with the number of problems and complaints recorded on the Consumer Direct database the actual detriment in the “Poor Service Quality” category would rise to £1,465,598,100 in 2011. The survey estimated that it took an average of 5.18 man hours to address each complaint relating to “Poor Service Quality”.

It has been estimated¹ that the total volume of consumer complaints, including those not reported to consumer and regulatory bodies, is around 120 million a year: and that the cost to the UK economy of handling those complaints, including costs to businesses and to enforcement bodies and the judicial system is as high as £24 billion p.a. across the whole range of sectors, with the average cost to business per complaint handled standing at £200. These costs arise at various stages of the complaints handling process, increasing proportionately according to the complexity of the particular case, with the top 10% of cases (those going to mediation/arbitration and/or court) thought to account for nearly 80% of the costs. Even a modest reduction in complaint handling and dispute resolution costs therefore has the potential to be economically significant.

The Government believes that existing consumer rights in the provision of services should be clarified so that expectations are more grounded in reality and to make dispute resolution easier and cheaper. Basic consumer rights should be “guaranteed” and there should be a statutory right of remedy – neither of which exist at the moment. This will remove burdens on businesses and empower consumers and move consumer rights on services closer in line with those relating to purchases of goods².

The Government’s view is that the current framework of consumer rights in the provision of services gives rise to the following problems.

Implied Terms

When consumers buy a service, they enter into a contract³ with the business providing that service. Consumers can expect the service under the contract to be delivered with “reasonable care and skill” regardless of whether the contract make direct reference to the standard or not.

The law states that “reasonable care and skill” is an implied term into all service contracts, which means that where it is not expressly set out in the contract, it still applies. To do otherwise would result in negligence on the part of the business (negligence can be used as shorthand for the lack of reasonable care and skill). However, consumers may not be aware that this implied term is present in their favour.

In some circumstances, businesses may exclude or limit their liability for negligence in a contract with a consumer, ie limit the extent of “reasonable care and skill” they must show when supplying the service or at the very least limit their liability arising out of the failure to display reasonable care and skill.

This can only be done where the supplier and the customer expressly agree to the limitation or it is consistent with the way both parties have acted. It is sufficient for the supplier to include such limitations on their standard terms and conditions where the consumer has implicitly or explicitly agreed to them. The exclusions must be considered to be “reasonable” or they will not be enforceable⁴. But consumers may not be aware of this limitation or have any appreciation of when limitations of liability would be found to be reasonable, tending to take the limitation of liability therefore at face value.

As a result, consumers may be waiving their statutory rights when entering into such service contracts or even in cases where such waivers would be unenforceable, they may think they

¹ Pindar, Eisenegger and Hart – evidence to BERR Consumer Law Review, July 2008

² The proposals to clarify and simplify the legal provisions for Goods are the subject of a different IA but will form part of the consultation package. The proposals on Goods seek to improve the clarity of the law through a combination of modernising language and structure, clarifying points that have previously been undefined and by better aligning the various strands of the consumer law framework

³ A contract can be a physical document agreed by both parties or a verbal agreement

⁴ Unfair Contract Terms Act (UCTA) - Section 2

have done so. In contrast, Section 6 of the Unfair Contract Terms Act makes it clear that the implied term that goods must be of satisfactory quality, cannot be excluded or restricted by another term⁵

The proposals will not remove altogether the rights of service providers to limit their liability but if accepted it will not be possible for a supplier to exclude responsibility for meeting the core consumer expectations if "reasonable care and skill" have not been provided.

Current Remedies

There are currently no statutory remedies available to consumers, if a business is negligent in the provision of a service, with one very particular exception⁶. Consumers must either agree a remedy with a business; or, if the business does not accept liability or the parties cannot agree on a suitable remedy, consumers have to take legal action under the general law of contract. If they are successful, the Courts will generally make an award of damages (financial compensation) in their favour.

The awarding of damages for breach of contract is based in the general principle that as far as money can provide, the consumer should be in the same position as they would have been if the contract had been performed. Damages would allow the consumer to engage with a different party to supply the service where the contract had been terminated, but the extent of any damages will be hard to predict as they will depend on the facts. Existing remedies are therefore flexible, but somewhat unpredictable and complex and therefore not easy to agree outside the courtroom. Consumers have little understanding of what remedies they might receive and this may deter them from pressing their case.

Formal legal action is not attractive to either businesses or consumers, so the Government aim is to provide a simpler and more transparent basis for dispute resolution outside the Courts. This will not suit every case, but it should allow a proportion of the cases which currently go to Court to be resolved privately, in some cases perhaps without the need for lawyers to get involved.

The proposals are based (loosely) on the current approach to statutory remedies where goods fail to meet the necessary quality standard. If a good does not conform to the contract, there are existing clear statutory remedies available, ie a short-term right to reject; repair or replacement; reduction in price or; the contract rescinded.

RATIONALE FOR INTERVENTION

The current legal framework suffers from the following drawbacks:

- The law as it stands is inconsistent between the supply of goods and the supply of services. This creates confusion amongst businesses and consumers and creates added costs to both parties when disputes arise. This is particularly likely to occur when a consumer purchases a good and service at the same time or as complements to each other;
- It allows businesses to exclude or limit their liability for negligence. Although this may only occur where the grounds for doing so are reasonable (and does not apply to death or personal injury), it allows for the situation where a consumer has no statutory protections if there is a fault with a service they have purchased. As consumers cannot judge whether exclusions of liability are reasonable, they may often think they have no remedy and be

⁵ This is the current position under the Sale of Goods Act 1979

⁶ This is where installation of goods forms part of contract for the transfer of goods and the goods were installed by the transferor negligently, then the goods will not conform to the contract and so the remedies in relation to goods will be available to the consumer

unable to persuade the business to offer one, even if in practice they would have a successful claim if the case ever came to court;

- It provides for no⁷ statutory remedies where there has been a breach of contract (again, unlike the law on goods), which means there is a greater likelihood of costly legal action for both business and consumer.

The proposed Consumer Bill is an opportunity to address all of the above and so simplify and improve consumer rights in the provision of services.

POLICY OBJECTIVE

The Government's policy objective is to simplify and improve the law as far as possible in order to:

- Reduce costs and burdens on business resulting from complex law, compliance regimes and consumer disputes;
- Empower consumers by making the law less inaccessible and removing opportunities for rogue traders to exploit complex law to their own advantage;
- Increase consumer confidence as clearer rights will encourage consumers to purchase from new suppliers, try out new services and so assist market entry and innovation, making markets work better.

The overall approach to simplifying the current legal regime will result in a reduction in the time spent by both consumers and suppliers in identifying their rights and appropriate remedies, thereby reducing the overall burden on both parties.

DESCRIPTION OF OPTIONS CONSIDERED (INCLUDING DO NOTHING)

OPTION 0: DO NOTHING

Doing nothing would maintain the current complex and confusing legislation. Maintaining the status quo would not take advantage of the opportunity to simplify the rights of consumers when purchasing a service in line with other areas of consumer interest ie the supply of goods.

OPTION 1: INTRODUCE CORE STATUTORY RIGHTS FOR CONSUMERS WHERE SERVICE PROVIDERS FAIL TO EXERCISE REASONABLE CARE AND SKILL

The basis of the proposals outlined below is to introduce clear minimum standards to address complaints between consumers and business. The proposals will aid business and consumers in reaching agreement to rectify any disputes where the standard of "reasonable care and skill" has not been observed. It is anticipated the resulting legislative framework will help business and consumers to work together to resolve disputes away from the court process. The proposals will facilitate the agreement of swift solutions with limited burdens on business and consumers.

Under this proposal, the Government would make the current implied term of "reasonable care and skill" a "statutory guarantee" for consumers and introduce core statutory rights of remedy for consumers where that guarantee had not been met.

⁷ Subject to the caveat explained above at footnote 6

Under the proposals businesses will not be able to exclude or limit their liability in cases of negligence, for the basic statutory remedies. The Government is proposing a consumer guarantee, which as a minimum will be that services must be provided with reasonable care and skill. Where this standard is breached consumers will, as a minimum, be able to ask for the statutory remedies set out above. This will give consumers a clear message that their “basic rights are guaranteed”.

Proposed Statutory Remedies

It is proposed to introduce two tiers of remedies:

Tier 1:

- A timely repair of the fault (ie bring the service into line with the original contract)
- A timely replacement service provision (provide the entire service again)

Tier 2:

- A reduction in price to allow the consumer to have the service completed in line with the original contract specification but with the required level of care and skill

Under this Tiered approach the consumer will be able to request the business to rectify the fault either by repairing or replacing the part of the service which carries the fault before moving to the Tier Two remedy which will be a reduction in the price of the service. This approach would allow the original business to prioritise the most cost effective means to address the fault in question.

In line with the proposals on goods, consumers would have the right to pursue the Tier Two remedy after two failed repairs or a failed replacement or if the repair or replacement had not been performed in a timely fashion (ie Tier One remedies have not been successful). It is proposed that the supplier will have 30 days (for each repair) in which to repair or replace the service before the consumer can move to the Tier Two remedy. Under the proposals neither consumer nor trader can insist on a Tier One remedy where the repair or replacement would be disproportionate to the original value of the service or a repair or replacement is impossible. (For example where there has been a change in circumstances between the time of the original supply of the service and the identification/diagnosis of the fault).

Any consumer not satisfied with these basic remedies would still have the option of pursuing normal contractual remedies (usually claims for damages) under general contract law. This would be necessary, for example, if the consumer wanted to claim for damage to his property or personal injury from a negligent service. Such claims would not be covered by the basic statutory remedies set out above. Businesses could still exclude their liability for some such wider claims to the extent that such exclusions were reasonable, as under the current law.

The proposed statutory remedies also do not cater for the complete breakdown of trust between the two parties which leads to the desire to terminate the contract completely. Where there is a breakdown of trust because the breach has been so serious the consumer does not want the supplier to repair or replace the service, the consumer would still be able to seek to terminate the contract and apply for damages, but they would have to do this through the courts, using the existing law on contractual remedies.

The Government does not see the need to codify these complex existing remedies in legislation as to do so may have unintended consequences (and higher costs) for businesses.

It is proposed, however, to include in the legislation a confirmation that the new statutory remedies do not exclude recourse, as now, to claims for damages for breach of contract through the courts.

Option 2 Guidance and dissemination of Good Practice

Some responses to the Consumer Law review raised the possibility of leaving the legislative framework as it is and addressing the problems via the issue of Guidance and dissemination of Good Practice to businesses, consumers and the courts. This was a minority view. The overriding opinion was that Guidance can have limitations if it is designed to underpin the law with courts interpreting legislation where appropriate. Government agrees that in this case it is the underlying law which needs to be clarified and simplified and issuing guidance would not, by itself, deliver the same gains as legal change.

The implementation process will, however, make Guidance available with scenario based examples to help business and consumers understand their new rights, obligations and the available remedies to avoid the need to use the court system.

Differences from the Proposed Regime for sale of goods

Although a key aim of the proposed Bill is to bring consistency to the rights of consumers for the purchase of goods and the purchase of services, the different nature of the contractual relationships between the consumer and supplier of goods and the consumer and the supplier of services does not facilitate an exact match across both areas.

The proposals will leave three major differences between consumer protection for the purchase of goods and protection for the purchase of services.

- The liability standard for services will remain fault based – “absence of reasonable care and skill”, whereas the liability standard for goods is outcome-based or “strict” – “satisfactory quality”. This is because the quality of a service is much harder to judge and may be entirely subjective. The consumer pays for the expertise of the service provider, perhaps on an ongoing basis, rather than for a tangible item at a fixed point in time.
- There will be no statutory right to rescission (termination) of a service contract or therefore any accompanying sliding scale or formula to determine “deduction for use”. It is unlikely services will include a “physical entity” which can be returned to the supplier. Although it is likely an element of the service has been enjoyed by the consumer, a number of factors will have contributed to the breakdown of the contract which cannot be addressed by a single approach. The second tier remedy for services is therefore a reduction in the price only, which the Government thinks should be calculated with reference to the cost to the consumer of completing the contract in line with the original contract specification. This will depend entirely on the circumstances, so no attempt (as with goods) has been made to set out a sliding scale in the law for how it should be calculated. However, this issue may be addressed in guidance in order to ease dispute resolution
- Consumer protection for the purchase of services will not include a right to reject the service (ie terminate the contact) in the short term. In relation to goods, this right is only available until the consumer has “accepted” the goods and there are particular rules governing the meaning of “acceptance”. With a service contract, once the service has begun, it is difficult to see how a “right to reject” would work. The nature of the relationship between the consumer and the supplier in the majority of cases is such that once liability has been accepted the supplier should be given the opportunity to repair or

re-do the service. This will not affect the rights of the consumer to seek redress under contract law where either liability is not accepted or there is a breakdown of trust leading to the consumer wanting to terminate the contract.

MONETISED AND NON-MONETISED COSTS AND BENEFITS OF EACH OPTION (INCLUDING ADMINISTRATIVE BURDEN)

OPTION 0: DO NOTHING

There are no benefits or costs associated with this option as the status quo is maintained.

OPTION 1: INTRODUCE CORE STATUTORY GUARANTEES FOR CONSUMERS WHERE SERVICE PROVIDERS FAIL TO EXERCISE REASONABLE CARE AND SKILL

Costs

Although it does not specify remedies or a statutory guarantee, current legislation provides for basic consumer rights. However the rights can be waived to the extent that business exclusions of liability are reasonable, which is hard for consumers to assess. Remedies that are available are not set out in statute and are therefore difficult for the consumer to access. The result is that the law is inaccessible and it is very hard for most consumers to exercise the rights that they may have, especially where the business is unhelpful. Government knows that this is a problem, but the exact extent of the problem and the cost it implies for business and consumers is impossible to quantify without a very substantial and very expensive data gathering exercise.

The proposed changes which the Government intends to make are designed to clarify the law and make it more accessible, not, primarily, to change its substance.

The impact of such change is particularly hard to assess across all service sectors, given the almost infinite multiplicity of potential transactions and the uncertain extent to which consumers exercise existing rights. It is considered however that there will be no significant changes to the costs burdens on **most** business as the proposals will largely be in line with current good business practice

The potential impacts should be as follows:

- For businesses which always manage to exercise reasonable care and skill – **no change**
- For businesses which sometimes fail to exercise reasonable care and skill, but in those cases are willing to compensate the consumer for any losses suffered as a result – **probably positive change** as the expected remedies will be clearer and more bounded and consumer expectations are more likely to be reasonable and in line with business policy. Less time will need to be spent training staff and handling disputes and less money spent on legal advice. The only negative impact could come from consumers who would currently be deterred from complaining at all, instead being willing to step forward. Some businesses in this category have told BIS that they would prefer dissatisfied customers to come forward, even if this resulted in short-term costs to them, because such consumers might otherwise be alienated from the business for the longer term and because they value consumer insight on poor performance, which enables them to improve their service offering.
- For businesses which sometimes fail to exercise reasonable care and skill and in those cases seek to avoid liability to consumers – **negative change**. These businesses will find

it harder to exclude liability contractually and consumers are more likely to challenge them to offer the core statutory remedies.

Available data does not permit an easy classification of businesses into each of the three categories above, but the Government believes that the vast majority of businesses are in the first two categories and that the overall impact of this change will therefore be positive for business. The fact that all the main business representative organisations consider the change to be a reasonable one, lends support to this view.

If the proposed change is successful in contributing towards improved consumer awareness and confidence, it may indirectly lead to an increase in short term costs for some businesses – as more consumers seek to enforce their rights. But there might also be a short term increase in consumer detriment – as businesses gain clarity on the limitation of their liability under statute, and some consumers may increasingly settle for easy statutory remedies, rather than complex contractual ones, even in cases where the contractual remedies might, in the end, be more generous. There could also be longer term cost reductions to business, with the law providing enough clarity to reduce the number of baseless consumer claims, providing confidence to business to refuse them.

Currently, exclusions or limitations in liability are only allowed on the grounds of reasonableness and there can be few, or any, instances where it would be reasonable for a business to waive all liability towards consumers for breach of the statutory implied terms. Therefore, this proposal reflects current practice in the majority of cases, by articulating the minimum remedies that a consumer may expect if a service is not provided with reasonable care and skill.

Specifying repair or replacement as a first tier remedy would also impose no extra costs on business, because if it was cheaper to move straight to a second tier remedy, that would remain an option.

There will be some short term costs, during a transition period, associated with the need for business to understand the new statutory remedies. (For example, staff training and awareness raising and consumer information material should providers choose to display) These costs have yet to be determined and will be subject to further information gathering exercises during the consultation period (evidence gathering during consultation will include direct contact with potentially affected businesses via survey, focus group and ad hoc discussions).

OPTION 2: GUIDANCE AND DISSEMINATION OF GOOD PRACTICE

There are no benefits or costs associated with this option as the status quo is maintained. The issue of Guidance and Good Practice is unlikely to help resolve the issue of complexity and confusion in the current legislation.

Question: Do you have any evidence that could help to refine the costs presented above?

Benefits

The change proposed above will make consumer rights more accessible and easier to understand for both business and consumer. It will also reduce the cost of consumer detriment by speeding up the time to resolve disputes, leading to a saving to business in relation to ensuring compliance with the law.

The TNS-BMRB Research Report, 'Home Repairs and Improvements' (June 2011) found that larger, national traders acknowledged the complexity of consumer law and provided staff

training to understand the law and to increase confidence in dealing with complaints. Other traders felt able to rely on legal advisors to handle difficult situations, if the need arose. This proposal is intended to reduce these costs through simplification and clarification. The same report found, in qualitative interviews with businesses, most reported having a basic understanding of consumer legislation but felt they lacked confidence in their knowledge and said they deferred to the customer in many instances.

Overall, the proposal should lead to:

- Reduced need for business and consumers to take legal advice;
- Reduced number of cases resulting in litigation;
- Reduced training for new staff.

The Association of Convenience Stores and the Federation of Small Businesses both argue that awareness of the current law is especially low among small businesses and we therefore believe that these changes will be especially beneficial to this group. This is reinforced by the OFT report which also found that 'SMEs in particular are likely to have less awareness of the detail of consumer protection laws, and how they can access relevant information to assist compliance.'⁸

There are also specific benefits arising directly out of these proposals, which are described below:

- Business will be able to prioritise the most cost effective remedy as consumers would have to give businesses the opportunity to repair or replace any fault in a timely fashion, before moving to the second tier remedy of a price reduction;
- Businesses and consumers would have clarity on the number of repairs or replacements to be attempted before moving to second tier remedies. Although we do not know the average number of repairs or replacements attempted currently, this will prevent a long cycle of failed repairs;
- The majority of simple claims could in future be resolved quickly and amicably by business and consumers with reference to the core statutory rights;
- Consumers will at a minimum be entitled to the tier 1 remedies of repair and replacement. Businesses may still exclude or limit their liability for wider damage or other contractual claims as long as such limitations are reasonable, as per the current regime.

The aim of the proposal is to ensure that a consumer will never be worse off as a result of entering into a contract for the provision of a service, to minimise the burden on businesses and, wherever possible see the completion of the contract as originally agreed.

Question: Do you have any evidence that could help to refine the costs presented above?

RATIONALE AND EVIDENCE THAT JUSTIFY THE LEVEL OF ANALYSIS USED IN THE IA (PROPORTIONALITY APPROACH)

A full quantification of the costs and benefits resulting from a change of this nature would be almost impossible to undertake. Calculating the impact of increased consumer confidence

⁸ OFT, 'Consumer Law and Business Practice, Drivers of compliance and non-compliance' (2010), p.6

leading to a more vigorous competitive environment in the UK economy would alone be a major task and would need to be measured over a number of years. Assessing the extent to which service businesses, across the entire multitude of service categories, currently seek to recognise or avoid liability when things go wrong and suppress or alternatively encourage consumer complaints would be a major exercise.

The cost of such research would, the Government believes, be disproportionate given the relatively non-controversial nature of the proposals.

The existing evidence points to two conclusions. First, consumers have more problems with services than they do with goods and so suffer a higher level of consumer detriment as a result of those problems (the OFT Survey found that the main type of problem experienced by consumers was poor service quality and that service sectors featured highly in the list of sectors where problems had occurred). Secondly, consumers enjoy fewer rights than they do when they purchase goods. Existing rights are confusing and difficult to exercise, because they depend on an ability to assess whether the service provider has exercised reasonable care and skill in a field of expertise in which the consumer probably has little understanding.

It is difficult to assess what should be changed and to analyse the impact of such changes. For that reason our proposals are cautious – seeking increased certainty in straightforward cases, but without changing the statutory liability standard of reasonable care and skill. In support of this, there is some evidence to suggest that consumers themselves have difficulty quantifying the precise costs of a complaint. The TNS report (referred to above) found that 33 per cent of consumers who reported a problem said the detriment could not be easily assessed in money terms. The stress and inconvenience of a typical home improvement was considered detrimental, regardless of whether problems occurred.

The Government is aware that there may be multiple reasons why consumers may complain more about services than they do about goods; services constitute the major part of the UK economy and are used by consumers for different purposes. For example, a person who employs a solicitor or an accountant, or financial adviser, may not consider that they are acting as a “consumer” in the same way as they do when they purchase a good. The same argument is also likely to apply with private sector provision of statutory services, such as health and education. Users of these services are likely to have a different set of more personal priorities in mind than when they act as consumers on the High Street. Hence, the range of service provision and the reasons why they are used may give rise to a higher number of problems and **complaints: this** may have little to do with the limitations of complex consumer law in many cases.

Nevertheless, available evidence points to a greater problem with detriment in some services; and consumers do consider “substandard services” as the main cause for complaint. The Consumer Law Review also gathered evidence from a variety of sources advocating simplification of the law on sale of goods and services and an academic report commissioned by BIS proposed radical reform⁹

The Government has considered all the above and as a result our proposal is aimed at simplification and clarification of the existing framework. The Government has focused on describing the costs and benefits at this stage in qualitative terms – as attempting to collect quantitative data would be time consuming and disproportionate to the outcomes. However, we are inviting respondents to the consultation to comment on the costs and benefits they see arising out of these changes (including providing quantitative data) in order to better inform the final Impact Assessment.

⁹ Consumer Law Review – Call for Evidence Summary of Responses – July 2009

RISKS AND ASSUMPTIONS

The risks attached to the introduction of these proposals are minimal. However, there may be scope for confusion where professional or trade bodies have introduced codes of practice settling standards above the provisions of the proposed legislation. We would need to be clear in the consultation and resulting legislation (including implementation) that the proposals would be minimum and that they would not prevent professional or trade bodies adopting Codes of Practice which offer more protection to consumers although they would have not statutory basis.

DIRECT COSTS AND BENEFITS TO BUSINESS CALCULATIONS (FOLLOWING OIOO METHODOLOGY)

The Government believes that the net impact on business of these proposals will be positive making it an “out” for OIOO purposes. But the costs and benefits have not yet been quantified for the purposes of OIOO analysis.

WIDER IMPACTS

As highlighted in the benefit section above, the proposed measures are likely to have a positive impact on competition, making markets more dynamic. This impact has not yet been quantified.

Effects on SME and Micro-businesses

Official statistics show¹⁰ show that over 98% of businesses (by number) operating in the UK are SMEs under the EU definition – ie have less than 250 employees. Approximately 97% of these employ less than 10 staff (ie micro-businesses). SMEs should not be excluded from the proposals for the following reasons:

- It is important that all business are able to operate on a level playing field;
- The exclusion of micro-businesses from statutory guarantees could reduce consumer confidence in dealing with such businesses;
- Consumers may choose to deal with larger companies bound by the regulations which would result in unfair competition.

A recent BIS report (The Regulatory Impact on the UK’s Small Businesses 2010) focused on the experience of the UK’s smallest businesses and summarised the experience they reported in dealing with the overall – cumulative - regulatory burden.

Although Consumer Protection was mapped as an obligation on small businesses it was not listed as a major burden on the business (in comparison to regulations relating to employment, health and safety, planning and building controls, DPA and the environment – especially waste and procurement).

In terms of the wider regulatory environment small businesses want regulatory certainty (Anderson Review cited in the above report). The report is clear that in most cases small business want prescriptive rather than principle based regulation as a means to give clarity to themselves and their customers. The participants of the study ask for guidance based on type and size of business with clear definitions of what minimum legal compliance looks like and what would be illegal.

¹⁰IDBR and HMRC sample surveys

The proposed reforms take consumer law in this direction. We will be seeking a waiver from the micro-exemption currently in place for new regulations for the reasons set out above.

SUMMARY AND PREFERRED OPTION WITH DESCRIPTION OF IMPLEMENTATION PLAN

The preferred course of action is Option 1. This would involve introducing through the proposed Consumer Bill of Rights (Primary legislation) a statutory guarantee for consumers purchasing services.

A twelve week public consultation exercise is scheduled to begin in June/July 2012 where the proposals will be tested with major stakeholder groups and representative bodies. The consultation exercise will comprise of a consultation document, further discussions with interest bodies, small scale research/survey activity to gather cost data and focus groups with individual businesses.

During the consultation period work will continue to develop an evidence base to illustrate the burdens on business under the current legislative regime and the likely benefits should the proposals be adopted.

Post Implementation

Following adoption of the Bill a communications exercise will be undertaken to ensure affected parties are aware of the changes and any action they need to take. The form of this communication has not yet been considered but a full plan will be developed once the Bill has received Assent and a timetable for implementation agreed.

Following the implementation of the Bill any evidence gathered on the burdens on business and consumers will be used as a base line for measuring the effectiveness of the new legislation. This will form part of a post implementation review which will be carried over a period of time (years). The details of the post implementation review will be agreed in due course.

The Consumer Law Reform Programme

1. In response to the Retail Red Tape Challenge the Secretary of State for Business announced a consumer law reform programme¹¹ to clarify and simplify consumer rights. The consumer law reform programme aims to streamline and modernise rights found currently in 12 pieces of legislation and the investigatory powers of Trading Standards officers found scattered in around 60 pieces of legislation.
2. Consumer protection regulations have developed piecemeal over many decades, with confusing overlay of European legislation onto domestic legislation in recent years. Businesses complain that the complexity of the law imposes costs and uncertainty on them and consumer groups complain that consumers cannot understand their rights and so cannot enforce them. Even academics and lawyers complain that the law is too complex. The consumer law reform programme will overhaul this regime setting out a simpler framework in plain English that provides certainty where there is lack of clarity, removes overlaps and unnecessary rules, and updates the law where it is required.
3. The proposals for reform of consumer law will take forward the recommendations and conclusions of numerous academic research reports and public consultations over the last few years. The Davidson report in 2006 concluded that UK law on Sale of Goods was unnecessarily complex and this was reviewed by the Law Commission who made recommendations in 2009¹². In 2005 the Law Commission recommended simplification of Unfair Contract Terms law¹³. The University of East Anglia concluded in 2008 that the UK consumer protection regime had three key weaknesses – uneven enforcement, weak redress for consumers when things go wrong and excessively complex law¹⁴. A review of this regime in 2008 led by the Better Regulation Executive concluded that much consumer legislation could be simplified and modernised so that consumers and those dealing with consumers are clearer about the framework surrounding their transactions¹⁵. This review revealed strong support across the board for consolidating the legislation, making it much clearer and more accessible. Two further pieces of academic research have more recently made recommendations relating to consumer law for digital content and how the law could be simplified for goods and services¹⁶.
4. At the heart of the package of reform BIS will be bidding for a parliamentary slot for a Consumer Bill of Rights. The core of the Bill will overhaul core consumer rights in relation to faulty goods and poor services, and update the law to clarify rights for consumers when purchasing digital content. The Bill will also provide a generic set of Trading Standards investigatory powers in one place¹⁷, measures to empower consumers to challenge anti-competitive practices¹⁸, and possibly introduce civil court sanctions for breaches of consumer law and provide more effective powers for Local Authorities to regulate street trading.

¹¹ www.bis.gov.uk/news/topstories/2011/Jul/retail-red-tape

¹² Davidson Report 2006 www.bis.gov.uk/files/file44583.pdf;

http://lawcommission.justice.gov.uk/docs/lc317_Consumer_Remedies_In_Faulty_Goods.pdf

¹³ http://lawcommission.justice.gov.uk/docs/lc292_Unfair_Terms_In_Contracts.pdf

¹⁴ Benchmarking the performance of the UK framework supporting consumer empowerment. www.bis.gov.uk/files/file50027.pdf

¹⁵ www.bis.gov.uk/files/file52071.pdf

¹⁶ www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products;

www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1225-consolidation-simplification-uk-consumer-law

¹⁷ The RPC has recently reviewed Impact Assessments and a consultation is ongoing (May 2012).

¹⁸ The RPC has recently reviewed an Impact Assessment and a consultation is ongoing (May 2012).

5. The Bill will be accompanied by a package of secondary legislation that is intended to come into force at the same time using similar language. This will include implementation of the Consumer Rights Directive, updating and clarifying unfair contract terms legislation, and providing a clearer route for consumers to redress after misleading or aggressive practices.
6. We believe that the proposed Consumer Law Reform programme will reduce business compliance costs, for example by business spending less time on staff training in consumer law and reduced time and legal expense spent settling disputes with consumers. Retailers tell us they spend time dealing with consumers who are misinformed about their rights, often thinking that they have more rights than is the case, and that they tend to err on the side of caution when settling disputes where the law is unclear.
7. We also believe that the new framework of consumer law will empower consumers to assert their rights. Empowered consumers should stimulate competition and innovation since well protected, well informed consumers are likely to be more open to new market entrants and innovative products. The proposed reforms will therefore contribute to growth as companies seek commercial success through innovation and targeting consumer needs, rather than by misleading them and/or fobbing them off with poor quality goods and services. A clear consumer protection framework helps create a level playing field; those businesses which fail to comply with the law can be tackled through enforcement (private and public), ensuring that honest businesses are competing on a level footing against each other and not against rogues.
8. Whilst we have a fairly robust body of evidence about failings in the existing law and about consumer experiences, behaviour and understanding of consumer law, we need to gather more evidence about business behaviour in order to make a more informed assessment of the impact of the consumer law reform programme as a whole. Government believes that the case for change is very strong, but that the impact of specific change options needs more work.
9. Alongside the formal consultation process, we are therefore planning to gather additional input from different sized retailers and service providers in several sectors in order to estimate better the current baseline and from there make meaningful estimates of likely impact of our proposals. From early discussions with business groups it will probably not be possible to collect all the evidence we would like in enough granularity, for example retailers tell us that they do not always record under which law or whether as a goodwill gesture they offer consumers a refund so they would find it difficult to relate their data back to the Sale of Goods Act. However we are planning a pragmatic approach consisting of sampling, surveys and focus groups to gather, in particular, evidence of costs of implementing any change in consumer law (such as training and communication costs), current practice in resolving disputes, and estimates of the cost of legal advice.
10. We will also explore consumer understanding of the terminology used in consumer law and in the proposed new framework, so that we can adopt a plain English approach where possible.
11. The impact of the changes in the law will rely on consumers and those who deal with consumers knowing about and understanding the new framework of consumer law, and also on its effective enforcement. The Consumer Landscape Review is being implemented and one of its objectives is to streamline the provision of advice on consumer issues through Citizens Advice and the enforcement of consumer law through Trading Standards. Therefore we are already talking to Citizens Advice about their role in communicating the changes that the consumer law reform programme will bring about. We are also engaging

with Trading Standards and other enforcers to ensure that they are aware of the proposed changes and actively engaging in the policy development process. We will discuss awareness raising for businesses with a range of business representative bodies.

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