A SCOTTISH PARLIAMENT
AND THE SCOTTISH CONSUMER:
A POLICY PAPER

March 1997

Royal Exchange House, 100 Queen Street, Glasgow G1 3DN
A SCOTTISH PARLIAMENT AND THE SCOTTISH CONSUMER

1. Introduction

1.1 Once again, devolution is high on Scotland’s political agenda. If there is a change of
government at the next election, then it will bring an administration, either Labour or a
Lib/Lab coalition, committed to legislate for Scottish home rule on the basis of the
proposals of the Scottish Constitutional Convention.

1.2 Without taking a view on the advantages or disadvantages of devolution for Scotland, this
paper will consider what are the implications of the establishment of a Scottish parliament
for Scottish consumers. Broadly, we will consider how consumer policy will be developed
for Scotland; how consumer law will be enacted; and how the law relating to consumer
protection will be enforced.

1.3 First, however, it is necessary to set the parameters of the discussion. When the Scottish
Consumer Council (SCC) last considered the question of devolution in the 1970s, we took
the decision that in this context, ‘consumer affairs’ covered areas relating to the use of
goods and services purchased by the consumer as ‘shopper’. While recognising that the
SCC’s remit was much broader than this, concerning consumers of local and central
government services; education; housing; transport, etc, the SCC then considered that to
discuss fully the implications of devolution in all these areas would be an impossible task.

1.4 In addition, in these broader areas there are specialised organisations representing the
interests of health services users; parents; tenants; transport users, and so on, who would be
more focused than us on the implications for these particular areas of service provision.
The SCC therefore decided to confine our remarks to the interests of consumers of goods
and services in the narrow sense, especially since there was no other independent
organisation in Scotland representing specifically the interests of these consumers.

1.5 The Scottish Consumer Council continues to be very active across the range or public
service provision. We have said much about the needs of Scottish consumers in relation to
housing, health, education, transport, environmental matters and many others. We intend
to continue to play as important a part in these fields as we have in the past. However, as
far as the implications of devolution are concerned in these areas, the consequences are not
so complex. Much of the decision-making in these areas is already devolved to the Scottish
Office or to local government. Organisations with a narrower remit (such as Shelter, the
local health councils, school boards, transport users consultative committees) will be able to
focus on any implications of devolution in these areas.

1.6 However, no other organisation
in Scotland is currently considering, nor is likely to consider, the implications of devolution
for the development of consumer affairs policy, and the enactment and enforcement of
consumer law. We therefore consider it appropriate that for the purposes of this discussion
of the implications of devolution for consumer affairs, we approach it from the point of
view of the consumer of goods and services in the narrow sense, that is, of consumers of ‘high street’ goods and services. But this does not mean that the Scottish Consumer Council is contemplating a narrower focus of our role.

1.7 When embarking on a consideration of what input should come from the consumer perspective in relation to a Scottish parliament, Council considered it would be useful if we commissioned a small study into the way in which consumer affairs were exercised in other states with different measures of regional self-government. The following section contains a summary of the arrangements which exist in Australia (New South Wales), Germany (Bavaria) and Spain (Catalonia).

1.8 It is clear that there will be lessons to be learned from these different models of regional self-government. It may not be possible to make clear recommendations at this stage, but it is hoped that the paper will at least raise the issues, and present possible alternatives which should at least further discussion in this area.

1.9 It is also important that regardless of any changes which may be brought about if a Scottish parliament is created, there will be a continuing need to effectively represent the Scottish dimension in relation to consumer affairs in Westminster, and in Europe. It is important to remember that broad policy direction will continue to be heavily influenced by developments outwith Scotland.

2. Consumer affairs and consumer protection in other states

2.1 It was not possible to carry out a detailed study of the constitutional arrangements for devolution in the countries we selected, but what follows is a summary of the position to the extent that it might be useful in considering the Scottish position. In all of these countries, varying measures of autonomy have been granted to regions, depending on the constitutional position.

New South Wales

2.2 Australia is a federation of six sovereign States and the Northern Territories and the Australian Capital Territory. The powers of the Federal Parliament are laid down in the written Australian Constitution which can be changed only by referendum. State Parliaments are subject to the provisions of the Australian Constitution as well as their own State Constitutions. Under the Australian Constitution, State Governments are responsible for those powers not administered by the Federal Government. These powers and responsibilities include education, health, transport, agriculture, consumer affairs, fair trading and consumer protection. It is interesting to note that apart from the last three areas, all of these are presently included within the functions of the Scottish Office.

2.3 In New South Wales, until recently consumer affairs were handled by the Department of Consumer Affairs. Following some reorganisation this year, the Department has been transformed into a Department of Fair Trading. Its mission is to “seek to promote an environment conducive to business – with the employment and prosperity that brings – while at the same time protecting consumers’ rights”. The Department has a network of offices in more than 20 places.
2.4 As well as carrying out enforcement functions (see section 5) the Department of Fair Trading plays an important part in developing consumer policy by advising the State Government.

**Bavaria**

2.5 Bavaria is one of the sixteen federal states – the *Länder* – in Germany. Federalism is one of the constitutional principles which cannot be tampered with. One of the consistent themes that permeates German Basic Law (*Grundgesetz*) is that wherever practicable, powers are devolved rather than centralised. The main purpose of federalism is to safeguard the nation's freedom and the distribution of responsibilities between states and the federal government is an essential element of the checks and balances outlined in the Basic Law.

2.6 The *Länder* are not mere provinces, but are states with their own powers. The powers of the states cannot be reduced. But the federal constitution is binding upon the states and the federal parliament is responsible for major legislation and policy. The state parliaments have prime responsibility for two major legislation and policy areas: education and law and order. Administration of federal legislation is mainly the responsibility of the states to allow greater consideration of local needs and issues and thus bring government closer to the people. In many cases, state powers are delegated further to local authorities.

2.7 The Federal Government has exclusive responsibility for foreign affairs, defence, monetary matters, railways, air transport, and some elements of taxation. In some matters, the state may pass laws on matters not covered by federal law. The Federation may only legislate where it is necessary to have uniform law throughout the whole country. The areas where the Federation has decided there has to be uniform law include commercial law, nuclear energy, labour and land law, housing, shipping, road transport, refuse disposal, air pollution and noise abatement. The states have more or less ceased to have any jurisdiction in these areas.

2.8 Where the federal government has the power to adopt framework laws, the states have a certain amount of latitude in implementing the laws. This applies, for example, to education, nature conservation, landscape management, regional planning and water management. There are also a number of areas which are jointly planned, regulated, and financed by the federal government and the states. These include university building, improvement of regional industrial and agricultural structures and coastal preservation.

2.9 Most administrative responsibilities are carried out by the states independently. States fill in any gaps left by federal legislation or in areas not covered specifically by Basic Law. These include education, conservation, the protection of monuments and historic sites, the preservation of architectural traditions, and the promotion of regional culture.

2.10 One of the basic legal frameworks for consumer protection is set out at federal level by the Law on Foodstuffs, Tobacco Products, Cosmetics and other Consumer Goods of 15 August 1974. This provides a framework within which the Federal Government may issue by-laws that lay down detailed regulations on subjects such as food additives or labelling. Basic food legislation, and the detailed regulations, are enacted by the Federal Parliament. But the states are free to decide the form of their own food control.
administration, and may issue rules for this purpose. Food control is generally delegated to local authorities.

2.11 The Free State of Bavaria is the largest state in the Federal Republic of Germany with a population of 11 million and an area of 70,533 square kilometres. The State Government is the supreme executive authority in Bavaria. Elected for a four year term, it is composed of the Minister President, the State Ministers and the State Secretaries. The Minister President decides on the political guidelines, presides in the State Government and directs its business. With the consent of Parliament, he appoints and dismisses the State Ministers and represents Bavaria within Germany and internationally. The nine state ministries are:

- Chancellery
- Ministry of the Interior
- Ministry of Justice
- Ministry for Education and Culture, Science and Arts
- Ministry of Finance
- Ministry for Food, Agriculture and Forestry
- Ministry for State Development and Environmental Affairs
- Ministry for Federal and European Affairs.

In Bavaria, responsibility for food control rests with the Bavarian State Ministry of the Interior.

2.12 The German Länder have been particularly successful in establishing a voice in Europe. The Bavarian State Ministry for Federal and European Affairs maintains strong contact with all federal and EC agencies, and the Bundesrat (the upper house of the federal parliament, where the states are strongly represented) has secured an important say for the states in questions of European policy. The Free State has set up an office in Brussels to represent Bavaria's interests in the EU and to increase the exchange of information between Brussels and Munich.

Catalonia

2.13 Spain is governed by a constitutional monarchy with a Parliament comprising two chambers – the Congress and the Senate. The country is divided into municipal districts, provinces and autonomous regions. The 1978 Constitution provided that provinces joined by common historical, cultural, and economic features could constitute Autonomous Communities. In 1979 the Autonomy Statutes of Catalonia and the Basque Country were approved. There are now 17 Autonomous Communities covering the whole of Spanish Territory. Some of them have more autonomy than others. The Basque Country, Galicia and Catalonia were autonomous before the Spanish Civil War in 1936-39, and have a greater degree of autonomy now. There are different procedures for gaining autonomy, and different regions have differing levels of autonomy. While this has resulted in a bureaucratic and unwieldy system, there are aspects of the arrangements which look attractive.

2.14 Each autonomous region is subject to the national constitution and to its own regional constitution. At the simplest level, these constitutions allow the region to organise its own institutions of government and draw up the boundaries of its relationship with national
government (rather like a new Scotland Act will). The constitutions can only ever be
overruled by the national government by means of a very complicated procedure.

2.15 The Catalan Assembly has its own president, a presiding council and a standing committee
which looks after assembly affairs when it is not in session. The regional executive
approves draft laws to be sent to the assembly and issues decrees and resolutions which do
not have to be approved by the assembly. There are also a number of regional ministries.
These bodies have regional authority in matters of health, hygiene and consumer protection.
Legislation on the co-ordination of basic health policies and foreign health policies comes
under the exclusive jurisdiction of national authorities.

2.16 It has been said that it is the à la carte aspects of Spanish constitutional reform that makes
it so interesting for Britain. From the outset Catalonia was empowered to exercise more
extensive legislative and administrative powers than other autonomous communities. It can
be contrasted with the classic federal state because in federalism, the regions tend from the
outset to assume control over a clearly defined area and inherit clearly structured
institutions. In Spain, each region has been free to decide whether or not to request
autonomous status, but it has been, and will be, able to decide on the level of autonomy
required.

2.17 An article of the Spanish constitution specifies which powers – foreign affairs, defence,
customs and international affairs – are to remain exclusive to the national government.
Other powers are described as shared between national and regional government –
including agriculture, encouragement of economic development, and the maintenance of
historic buildings. A number of powers can be delegated to the autonomous communities
by Act of Parliament these include: overall system of communications, post and
telecommunications, control of air-space and air-transport and of academic and
professional qualifications.

2.18 While the administration of justice, fiscal powers, public security and international affairs
are, theoretically, exclusive to national government, in practice in some respects
responsibility has been assumed by the autonomous communities.

2.19 Catalonia covers 6% of Spain’s land area, but with 6 million inhabitants has 15% of the
population. Catalonia has a high degree of autonomy in relation to linguistic and cultural
matters. The autonomous communities have the power to enact legislation on most
consumer protection matters including fair trading. They also have the main responsibility
for the enforcement of consumer protection. Nationally there is a Ministry of Health and
Consumer Affairs. Within the Ministry there is a Secretarial General de Consumo
(Secretariat for Consumer Affairs). This includes the National Institute for Consumer
Affairs (INC) and the Directorate of Food Hygiene and Consumer Protection. Each
autonomous community has a sub-directorate for consumer protection.

2.20 Consumer protection directorates of the autonomous communities are responsible for a
wide range of consumer protection activities. In addition to enforcement activities the
autonomous communities also provide consumer advice. EU price indications legislation
has yet to be implemented at the national level in Spain. But some autonomous
communities, including Catalonia, have introduced their own legislation. The autonomous
communities' consumer protection directorates have responsibility for enforcing price legislation.

2.21 The autonomous communities also have powers to take action against misleading advertising. There are tourism sub-directorates in the autonomous communities which can bring actions for damages, etc, against a travel agency and can act, under the misleading advertising legislation, if there is a misdescription of a holiday. Enforcement of trade mark issues is generally national, but the consumer protection enforcement agencies of the autonomous communities may get involved if there are safety implications. Competition policy is a national matter which is the responsibility of the Ministry of Economics and Finance.

2.22 The autonomous regions are essentially executors of national policy in the inspection and control of foodstuffs. Policy is set nationally by the Ministry of Health and Consumer Affairs on health issues, and the Ministry of Agriculture, Fisheries and Food for agricultural or fraud issues.

3. The development of consumer affairs policy

3.1 We have recently considered the development of consumer affairs policy in the context of the Office of Fair Trading's (OFT's) consultation on its Consumer Affairs Strategy. A key question which will arise following the creation of a Scottish parliament is to what extent will the development of consumer affairs policy in relation to Scotland be devolved? At present, there is no Scottish ministerial responsibility for consumer affairs, and UK responsibility rests with the Department of Trade and Industry (DTI), and specifically, the Consumer Affairs and Competition Directorate. There is a Parliamentary Under Secretary for State for Corporate and Consumer Affairs within the DTI and it may be considered that the status quo should prevail, that there is no need for a distinct approach to consumer affairs policy in Scotland.

3.2 The arguments for the status quo are that many of the legislative proposals which emanate from the DTI are a result of European consumer policy and therefore there would be no point in having a separate Scottish policy division. The activity of a Scottish parliament in relation to consumer affairs work would be constrained by the need to ensure conformity with European legislation. In addition, certain aspects of consumer policy, particularly competition policy, are seen as part of the macroeconomic policy of the United Kingdom Government, which is again increasingly constrained by the European Union. Scotland will have limited scope for pursuing independent economic or industrial policy, and this will also be the case with consumer affairs policy.

3.3 There is much to take seriously in these arguments. It will be very important to ensure that the Scottish dimension is represented to those responsible for developing consumer policy within Westminster government departments responsible for consumer affairs, and also at the level of the European Union. At the very least it would be essential for a Scottish parliament to establish an office in Brussels, as the German Länder have done. It would also be crucial that such an office had the resources and remit to provide input on consumer policy matters of relevance to Scottish consumers.
3.4 But the SCC does not agree that there would be no point in a separate consideration of consumer affairs policy in a Scottish parliament, for various reasons. The first is a principled objection. The Maastricht Treaty’s preamble talks of a European Union "in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity."

The interpretation of this principle is always going to be subjective, but we believe that it is highly relevant in relation to matters concerning consumer protection. The Edinburgh European Council in December 1992 adopted a lengthy text giving guidance on how the subsidiarity principle could be exercised in practice. It can be summarised as follows:

- Does the issue under consideration have transnational aspects?
- Are there economies of scale to be had from local action?
- Are there qualitative or quantitative indicators demonstrating that local action will be more effective than member state action?

3.5 The application of the subsidiarity principle shows that there will be some issues which may be best left at member state level, others which are best dealt with regionally, (that is, devolved to a Scottish parliament) and others, for example, aspects of the enforcement of consumer protection legislation, which are best achieved through local government action. We believe that the subsidiarity principle justifies the Scottish parliament having the power to decide policy on the implementation of EC directives, because in being closer to the citizens of Scotland, and in touch with the way the enforcement regime works here, it could be demonstrated that this would lead to more effective implementation of EC directives. For example, if a Scottish parliament had the power to legislate for Scotland to implement the EC’s Unfair Terms in Consumer Contracts Directive, it would have been free to take a different policy approach to the DTI. The DTI gave the power to take action on behalf of the generality of consumers to the OFT, and denied other relevant consumer organisations the power to take action. This method of implementing the Directive is being challenged by the Consumers’ Association, as being contrary to the terms of the Directive. A Scottish parliament may well have taken a different view from the Westminster view, especially since the OFT has no physical presence in Scotland, and there may have been some doubt as to their ability to take such a role in relation to Scottish consumers.

3.6 Another example of how a Scottish parliament may have developed more appropriate policy for Scotland is in relation to the draft EC Directive on Access to Justice. That draft contained a proposal for ‘national entities’ to have the power to act in other member states on behalf of consumers affected in the home country by actions in breach of various consumer protection directives, including package travel, timeshare, doorstep selling. The UK Government were unhappy with this proposal because “it did not sit well with our civil law”. If fact, there was nothing in the proposals which conflicted fundamentally with the principles of the Scots legal system, which has much in common with other European countries. Again, a Scottish parliament faced with the policy considerations attached to this proposal, may well have taken a different view.

3.7 It may be something of a compromise to conclude that the best solution may be some kind of shared responsibility, between Westminster and the executive of a Scottish parliament,
for the development of consumer affairs policy. At the very least this means that there
should be some kind of ministerial responsibility in Scotland for consumer affairs.
However, in practice, it may be the only workable solution. If there was no ministerial
responsibility in Scotland for consumer affairs, then there would be no change to the
present situation which we have already stated is unsatisfactory. If consumer affairs were
completely devolved to a Scottish parliament, then apart from the resources questions that
would raise, it would also not necessarily be in the consumer interest.

3.8 The development of consumer affairs policy is of course the responsibility of government,
but government is advised and influenced by others, including consumer research
organisations like ourselves and Consumers' Association, but more significantly perhaps by
the OFT. Leaving aside the future of the SCC following the creation of a Scottish
parliament, it is relevant to consider how the OFT would position itself to be able to
properly advise a Scottish executive and parliament on consumer affairs. The OFT has no
physical presence in Scotland, and may find it difficult to fulfil its advice giving function
from a base in the south of England.

3.9 At the very least, we consider it appropriate that there should be an office of the OFT
should have an office in Scotland, charged with responsibility of carrying out the functions
of the OFT in Scotland, and adequately resourced for this purpose. This would have the
advantage of being able to develop a closer understanding and reflection of the needs of
Scottish consumers.

4. The Enactment of Consumer Law

4.1 When the SCC last considered the question of devolution, it was partly in response to a
White Paper "Our Changing Democracy: Devolution to Scotland and Wales" issued by
later adopted, a rigid approach specifying in great detail the legislative and executive
competences devolved from Westminster. Schedule 10 to the Act is split into three lists:
Part I lists the legislative powers devolved under a number of general headings; Part II lists
specific exemptions (reserved powers) within these general areas; and Part III, in an
attempt to achieve clarity, analyses a number of existing statutes in which the application of
the lists in Part I and Part II might still be unclear. Schedule 11 lists areas where executive
competence is devolved, but not the power to legislate (for example, the power to
administer the Race Relations Act, but not to change the Act itself).

4.2 The temptation is to take this approach this time round. The Constitution Unit, which is a
research project set up in April 1995 to conduct an independent inquiry into the
implementation of constitutional change, in "Scotland's Parliament: Fundamentals for a
New Scotland Act", has strongly criticised this approach. It is argued that the 1978 Act
was too detailed for its own good, especially by specifying particular statutes in Part III of
Schedule 10, because this would have meant constant updating. In addition, the other parts
of the schedules were open to different interpretations. Specifying the devolved powers in
such detail left a large grey area where the right of the Scottish Assembly to legislate may
be called into question. In these questionable cases, it would have been up to the courts to
decide whether to give a broad or a narrow interpretation to the description of a devolved
power.
4.3 At the time, the SCC commented that there were problems about the demarcation between the civil law (which was devolved under the 1978 Act), including the law of contract, reparation, property and conveyancing, trusts, bankruptcy and succession, and major areas of consumer law (which were not devolved). These areas included consumer credit, fair trading, trade descriptions, consumer safety and consumer protection. The SCC commented that there were real dangers in trying to draw lines of rigid demarcation between say, the Scots law of contract which was to be generally devolved, and the law relating to consumer credit which was not.

4.4 It is important to stress that the SCC’s position then was a practical one, considering the technical means by which consumer law could effectively be enacted following a Scottish parliament. We were not taking a political position on the merits of having a Scottish parliament, and we are not doing so now. The approach then as it is now is simply affected by the fact that the nature of consumer law is such that it cannot easily be separated from the remainder of Scots law.

4.5 Others who criticised the very rigid specification of devolved powers in the 1978 Act included the Law Society of Scotland and the Scottish Law Commission. The Law Society said

"It is difficult to trace any discernible principle or rationale upon which the subjects to be devolved have been selected... This will cause difficulty to the Judicial Committee of the Privy Council, or any other court, in attempting to provide a corpus of consistent rulings on the legislative competence of the Assembly”.

The Scottish Law Commission came down strongly against the method adopted by the Government. The Commission’s Memorandum to the Lord Advocate date 27 May 1975, concluded

"It is of central importance to select the best method of ensuring legal clarity on the scope of devolution. This... can in our opinion be best achieved, and probably only achieved, by specifying the powers to be retained by the United Kingdom government and, subject to the reservation of ultimate sovereignty to parliament, conferring upon the Assembly residual legislative competence”.

4.6 The model the Constitution Unit proposes for a new Scotland Act is as follows:

- An Act which lists only the powers retained at Westminster rather than those devolved.

- Express provision for Westminster to legislate outside its areas of retained competence in certain circumstances, for example, to comply with international obligations, or when the Scottish parliament requests Westminster legislation; and for the Scottish parliament likewise to be able to encroach on Westminster’s retained powers when necessary – with their consent.
These arrangements will apply mostly to European legislation: it will be necessary to reconcile UK membership of the European Union (and liability for non-implementation with EC law) with an overlap of legislative competence between the EC and Scotland.

4.7 The Constitution Unit recognises that even if this is a better model, disputes about the precise scope of the Scottish Parliament’s competence will arise. They make various suggestions for the resolution or avoidance of these disputes, including:

- Scrutiny of bills in advance of introduction by the Scottish Law Officers and the Speaker of the Parliament.
- Provision for a direct challenge to Scottish Acts on vires grounds following Royal Assent but before entry into force.
- Provision for indirect challenges – where devolution points occur in the course of other cases – to be referred to the final court of appeal for an opinion (this is analogous to the procedure for taking opinions on points of EC law).

4.8 The 1978 Act provided for ‘devolution issues’ to be referred to the Inner House of the Court of Session on civil matters and the High Court of Justiciary on criminal matters with a right of appeal in each case to the Judicial Committee of the Privy Council. The Constitution Unit suggests that since the role of the Privy Council appears to be in decline, so the House of Lords perhaps should be the final court of appeal.

4.9 This approach is similar to that adopted in Spain and the autonomous communities, as we saw above. Such an approach may appear to be more appropriate for a Scottish parliament than the federal systems which operate in Australia and Germany.

4.10 It is likely that the areas reserved to Westminster would include foreign affairs, defence, social security, immigration and matters of macroeconomics. It has been suggested that these it would be much easier to embody on the face of a new Scotland Act the principles which would require reservation of powers to Westminster, rather than devolving others to a Scottish parliament. So for example, powers would be reserved in order to comply with UK international obligations, observance of human rights, maintenance of minimum standards of democracy, demands of equity throughout the UK.

4.11 In practice there will always be a grey area in which it is not clear whether the Scottish parliament is legislating in a reserved area or not, or circumstances in which the sovereign Westminster parliament feels a need to act in a devolved area in the interests of the United Kingdom as a whole. The doctrine of the sovereignty of the Westminster parliament means that even after devolution, Westminster will still retain the right to legislate in devolved areas if necessary. This will, after all, not be a federal system. In fact, this will be an advantage, avoiding the need for specifying rigidly the areas to be shared between Westminster and Scotland, and those to be devolved. It will mean, however, that there will have to be conventions developed between Westminster and a Scottish parliament to deal with these situations.
4.12 This approach certainly would appear to be more appropriate to the treatment of consumer law in any devolution legislation. The problems the SCC encountered with the approach taken in the 1978 Act could be avoided if it was assumed that the Scottish parliament had the power to legislate in every area of law unless the area was reserved to the Westminster parliament. This would mean that a Scottish parliament would be free to legislate, but would not be required to. Despite this ‘devolved unless’ approach, in practice since the trend in consumer law has been towards greater uniformity, not just in the UK, but in Europe as well, this would be likely to continue. The advantage of this would be that the Scottish legislative programme could include important areas of consumer law if deemed important enough to legislate for Scotland alone, regardless of the Westminster timetable. The Scottish parliament could be more responsive to the needs of Scottish consumers, but Scottish consumers would continue to benefit from UK legislation.

4.13 Even although, as we have said, the levels of consumer protection would probably continue to coincide with the rest of the UK, it is important to note that it would be possible with this approach for Scotland to decide to adopt a higher level of protection. Bearing in mind that most European directives set the minimum level, a Scottish parliament could decide that Scots consumers should benefit from a higher level of consumer protection than that decided at Westminster. In the example of the Unfair Terms in Consumer Contracts Directive given in paragraph 3.5 above, a Scottish parliament would be able, if it considered it to be in the interests of Scottish consumers, to grant Scottish consumer organisations the power to take action on behalf of consumers in relation to unfair contract terms.

4.14 It is therefore proposed that a Scottish parliament should be able to legislate in all areas of Scots law, except within those areas reserved to a Westminster parliament. This may seem on the face of it to be a bold step, but the other alternative of listing all the areas of law which should be devolved is more difficult and less capable of delivering a satisfactory result. This would mean that the policy would have to be developed in the Scottish parliament, either to legislate separately, or to agree to have an act of the Westminster parliament extend to Scotland, or to have it excluded. It would result in the implications for Scotland having to be considered by the DTI and the OFT.

5. Enforcement of Consumer Law

5.1 At present, consumer protection and fair trading is enforced locally by local authority trading standards departments and nationally by the OFT, in terms of its statutory powers under the Fair Trading Act 1973, the Consumer Credit Act 1974, Estate Agency Act 1979, Control of Misleading Advertisements Regulations 1988, and the Unfair Terms in Consumer Contracts Regulations 1994. It may be questioned whether there would be any reason why the existence of a Scottish parliament should make any difference to this.

5.2 We mentioned above some of the concerns we had about the absence of a physical presence of the OFT in relation to some of its functions, and in this respect it could be suggested that a closer relationship between local authority trading standards departments, and the OFT may lead to an improvement in enforcement. New South Wales, with a similar population to Scotland has a unified Department of Fair Trading, responsible for investigating and taking action against traders who do not comply with the rules of fair trading, including misleading claims and advertising, sub-standard building work,
dishonesty in the property or car industries, unlicensed traders and illegal 'get rich quick' schemes; for running consumer claims and other tribunals; developing educational materials for schools; working with industry to develop codes of practice; weights and measures; ensuring compliance with product safety laws; and licensing of travel agents and estate agents. Consumer credit licensing is handled at federal level.

5.3 It is worth considering whether such a model would improve consumer protection in Scotland. Since local government reorganisation, trading standard departments have been reduced in size, and more limited resources may make it more difficult than it was for them to take strong action. A central consumer enforcement body, with local offices to take over the functions of trading standards departments may be an attractive option. It may be ruled out however, because of lack of resources.

6. Conclusion

6.1 This short paper has considered the implications of the establishment of a Scottish parliament for consumers in Scotland. While not exhaustive, we believe that the issues raised here must be carefully considered by any government in the preparation of the necessary devolution legislation.

To summarise, our conclusions are as follows:

The Development of Consumer Affairs Policy

6.2 Realistically, following the creation of a Scottish parliament, the broad direction of consumer affairs policy will continue to come from outwith Scotland. Then, as now, much will come from the European Union, and from the DTI at Westminster. It will, however, be crucial for the interests of Scottish consumers to be fed in at the appropriate level, whether at Europe or Westminster. At the very least, a Scottish parliament should establish an office in Brussels with sufficient resources and a wide enough remit to represent the interests of Scottish consumers in relation to proposals for directives in the field of consumer affairs.

6.3 In order to be capable of having an input, the Scottish parliament should establish a department of state within the Scottish Office with responsibility for consumer affairs. This department would be responsible for considering whether there should be a separate Scottish approach to the implementation of European directives, for example, or whether to leave the matter to UK regulation. The department would also be responsible for liaising with the relevant Westminster departments (in practice, this would almost always be the DTI), and for developing views on consumer policy to feed in at UK and European levels.

6.4 The OFT should open an office in Scotland, charged with carrying out most of the functions of the OFT in Scotland, and adequately resourced for this purpose. It would be for discussion which functions should be devolved, for instance, it may not be considered necessary to devolve the consumer credit licensing function.
6.5 It should be expressly accepted that a Scottish parliament would be able to legislate to implement European directives within Scotland, and that this could mean setting a higher standard of compliance than the rest of the UK, where that was considered appropriate.

The Enactment of Consumer Law

6.6 We have considered the possible approaches to devolution of powers to a Scottish parliament, in the context of which approach would best suit consumer law. We are in favour of an approach which reserves specific areas to Westminster, and devolves everything else to a Scottish parliament. This would mean that a Scottish parliament would be free to legislate, but not required to do so. Despite this ‘devolved unless’ approach, since the trend in consumer law has been towards greater uniformity, in Europe as well as the UK, in practice most consumer law may continue to be enacted by the Westminster parliament. But this approach would also mean that a Scottish legislative programme could include areas of consumer law if deemed important enough to legislate for Scotland alone.

Enforcement of Consumer Law

6.7 Following a Scottish parliament, it may not be necessary to make substantial change to the present methods of enforcing consumer law. It may be enough to establish a Scottish office of the OFT. We were, however, impressed by the model provided by the New South Wales Department of Fair Trading, in Australia, and consider that it would be useful to carry out some further examination of the appropriateness of such a model for Scotland.