

# **CONSUMER RIGHTS BILL**

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## **EXPLANATORY NOTES ON LORDS AMENDMENTS**

### **INTRODUCTION**

1. These Explanatory Notes relate to the Lords Amendments to the Consumer Rights Bill, as brought from the House of Lords on 9 December 2014. These Notes have been prepared by the Department for Business, Innovation and Skills in conjunction with the Department for Communities and Local Government and the Department for Culture, Media and Sport in order to assist the reader of the Bill and the Lords Amendments, and to help inform debate on the Lords Amendments. They do not form part of the Bill and have not been endorsed by Parliament.
2. These Notes, like the Lords Amendments themselves, refer to HL Bill 29, the Bill as first printed for the Lords.
3. These Notes need to be read in conjunction with the Lords Amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the effect of the Lords Amendments.
4. Lords Amendments 1 to 11 and 13 to 78 were tabled in the name of the Minister.
5. Lords Amendment 12\* was tabled by Lord Moynihan, Baroness Heyhoe Flint, Lord Clement-Jones and Lord Stevenson of Balmacara, and was opposed by the Government. In the following Commentary, an asterisk\* appears against Lords Amendment 12 on the basis that it is a non-Government amendment.

## **COMMENTARY ON LORDS AMENDMENTS**

### ***Lords Amendments to Part 1 – Consumer contracts for goods, digital content and services***

#### **Lords Amendment 1**

6. Lords Amendment 1 would rephrase clause 3(3)(e), which relates to Scotland, to remove reference to “consideration” as this is not a Scots law concept. The intention is to provide clarification without altering the existing policy and effect, that contracts which are gratuitous or not supported by consideration are not covered by Chapter 2 of Part 1 of the Bill on goods contracts. Lords Amendment 21 would make the same clarification for services contracts.

#### **Lords Amendment 2**

7. Lords Amendment 2 would ensure consistency of terminology across the Bill. It would replace “Chapter” with “Part”, so that the explanation of terminology given by clause 19(13), for the purpose of Chapter 2 of Part 1 on goods contracts, would also apply to the rest of Part 1 and thus to Chapter 3 on digital content (and see the notes on Lords Amendments 15 and 23).

#### **Lords Amendments 3, 5 and 8**

8. Lords Amendments 3, 5 and 8 would clarify how the rights to reject goods under the Bill work where a contract is severable. That is, where different parts of the consideration can be assigned to different parts of the performance – for example, an agreement to pay pro-rata for some goods supplied, no matter whether others are supplied.
9. The intention is to prevent the clearer remedies under the Bill from cutting across the existing common law position that some contracts are severable.
10. Where a contract is severable, these amendments would make it clear that if the fault is with goods in one part of the contract, the consumer has a right to reject those goods and terminate that part of the contract, and beyond that it is a question of the circumstances as to whether the consumer may or may not terminate other parts - or the whole - of the contract.
11. The amendment would not apply in Scotland as the amendment seeks only to prevent the consumer’s right to terminate the contract under the Bill from altering the existing position. The equivalent provision regarding Scotland in the Sale of Goods Act 1979 is already consistent with clause 20 of the Bill.

#### **Lords Amendments 4 and 6**

12. Lords Amendments 4 and 6 would ensure that any reasonable costs of returning rejected goods to the trader would be borne by the trader, except where the consumer returns the goods in person to where they obtained physical possession of them. This would include the trader paying postal costs.

#### **Lords Amendment 7**

13. Lords Amendment 7 would update a cross-reference in clause 21(8), to make sure that the requirements in clause 20 relating to how refunds are paid also apply

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where the consumer only rejects some of the goods. These requirements include the time within which the payment must be made and the form in which the refund must be provided.

**Lords Amendments 9 to 11**

14. Lords Amendments 9 to 11 would alter the exemption to the rule (in clause 24(10)) that prevents a deduction for use from being applied if the consumer exercises the final right to reject within the first six months after receiving the goods. The amendments would establish that this exemption applies only to motor vehicles; that is, they would enable deductions for use to be made in the first six months in relation to motor vehicles only. This would tighten the exemption, which would otherwise potentially apply to all goods in which there is an active business to consumer second-hand market.
15. The amendments would include clarity that vehicles such as mobility scooters (referred to as invalid carriages in other legislation) are excepted from the definition of motor vehicle for these purposes.
16. The amendments would also provide an order making power, subject to the affirmative resolution procedure, to extend the exemption to the six month rule to other types of goods. The power would be exercisable if the inability to apply a deduction for use to those goods in the first six months causes significant detriment to traders.

**Lords Amendment 12\***

17. Lords Amendment 12\* would provide that websites which facilitate the resale of tickets for sporting, musical or cultural events must provide information about the identity of the seller of the ticket, including their name, their registered address (if an undertaking) and VAT registration number. Such websites would also be required to disclose where they themselves or the event organiser, or someone connected to themselves or the organiser, is the seller.
18. The amendment would require the seller to provide, and the website to publish, all relevant information about the ticket, including the face value, restrictions on the ticket, location of the seat where relevant and the booking identification or reference number. The seller would also be required to state where the ticket is sold in contravention of terms and conditions agreed by the original purchaser.
19. Where information would be required under Lords Amendment 12\* it would have to be provided prominently and accurately on the site before the buyer made a purchase, and sites would have to immediately remove tickets from sale when they were informed by the event organisers that the relevant information was inaccurate or incomplete. Information about tickets being sold in contravention of terms and conditions would have to be prominently displayed at every stage of the purchasing process.
20. Lords Amendment 12\* would come into force no later than six months after the Bill is passed.

**Lords Amendments 13 and 14**

21. Lords Amendment 13 would clarify that an update to digital content that improves existing features or adds new features will not be in breach of clause 36 (digital content to be as described) as long as the digital content continues to match the description and conform to the pre-contractual information provided by the trader.
22. Lords Amendment 14 would update a cross-reference in clause 40(2).

**Lords Amendments 15 and 23**

23. Lords Amendment 15 would clarify that there is no right to terminate a contract for a trader to supply digital content when the quality rights are breached. This would make explicit what is currently already implied by the omission of this remedy from the non-exhaustive list of potential remedies in the Bill in clause 42(7).
24. Lords Amendment 23 would ensure consistency regarding the gloss on treating contracts as at an end in clause 19(13) across Part 1 of the Bill.

**Lords Amendment 16**

25. Lords Amendment 16 would add clause 37 (other pre-contract information included in contract) to the list of provisions in clause 47(1) from which the trader cannot “contract out”.

**Lords Amendments 17 to 20**

26. Lords Amendments 17, 18 and 20 would have two effects. The first effect would be to remove from clause 47 the bar on excluding or restricting liability arising under clause 46 (remedy for damage to device or to other digital content). The second effect would be to clarify that any exclusions or restrictions of a trader’s liability under clause 46 would be subject to clause 62 (requirement for contract terms and notices to be fair).
27. The intention is to allow traders to exclude or restrict their liability for damage to the consumer’s device or other digital content to the extent that such a limitation of liability is fair.
28. Lords Amendment 19 would clarify that the cross-reference in subsection (2)(a) of clause 47 is to subsection (1).

**Lords Amendment 21**

29. Lords Amendment 21 would rephrase clause 48(3), which relates to Scotland, to remove reference to “consideration” as this is not a Scots law concept. The intention is to provide clarification, without altering the existing policy and effect, that contracts which are gratuitous or not supported by consideration are not covered by Chapter 4 of Part 1 of the Bill on services contracts. Lords Amendment 1 would make the same clarification for goods contracts.

**Lords Amendment 22**

30. Lords Amendment 22 would provide that the power in clause 48(5) can be used to provide that an exclusion from a provision of the Chapter only applies to a service in certain circumstances specified in the order. Clause 48(5) provides a power to

exclude, by order, a specified service from the application of a provision of Chapter 4 of Part 1 of the Bill. The intention is to give additional flexibility as to the subject matter of an order under clause 48(5) by enabling a more precise or limited exercise of the power where appropriate.

### ***Lords Amendments to Part 3 – Miscellaneous and general***

#### **Lords Amendment 24**

31. Lords Amendment 24 would amend sections 120, 121 and 123 of the Communications Act 2003 (“the 2003 Act”) in relation to the regulation of premium rate services. It would clarify that the maximum penalty (currently £250,000) applies per contravention of (i) an approved code; (ii) directions given in accordance with such a code; or (iii) an order under section 122 of the 2003 Act.
32. The amendment would provide that the provisions about enforcement that may be made by an approved code may include provision that, where there has been more than one contravention of the code or directions given in accordance with it, either a single penalty (which does not exceed the maximum penalty) may be imposed in respect of all those contraventions, or separate penalties (each of which does not exceed the maximum penalty) may be imposed on the person in respect of each of those contraventions, according to whether the person imposing the penalty determines that a single penalty or separate penalties are appropriate and proportionate to those contraventions.
33. In addition, it would provide that Ofcom, when exercising its powers to enforce conditions under section 120 of the 2003 Act, can, where it has issued a notification relating to more than one contravention of an approved code, directions given in accordance with such a code or an order under section 122, either impose one penalty to cover all those contraventions together, or a separate penalty for each contravention. It would be for Ofcom to determine whether a single penalty or separate penalties would be appropriate and proportionate to the particular contraventions.

#### **Lords Amendment 25**

34. Lords Amendment 25 would change the current process for appointing Competition Appeal Tribunal (“CAT”) Chairs to make it easier for judges from Scotland and Northern Ireland to be able to sit in the Tribunal. It would do this by providing for the Lord Chief Justices of England and Wales and Northern Ireland and the Lord President of the Court of Session to be able to nominate judges sitting in their respective High Courts or the Court of Session for deployment as CAT Chairs.
35. As a consequence of the change, the current eight year limit on CAT Chair appointments would not apply as regards judges nominated for deployment as Chairs and they would be able to be deployed to sit in the Tribunal until their retirement from the judiciary if they wish.

**Lords Amendment 26**

36. Lords Amendment 26 would impose additional requirements on letting agents in relation to homes in England, namely that if an agent holds money on behalf of their clients as part of their letting agent or property management work then, as well as publicising their fees, the agent must publish a statement which states whether or not that agent is a member of a client money protection scheme.
37. The amendment would further require agents who are required to belong to a redress scheme for dealing with complaints to publish, as part of their fee list, which redress scheme they are a member of.
38. Letting agents would be able to publish additional statements along with the list of fees and to provide any explanation or clarification as long as they also publish a complete list of fees and the two additional statements.

**Lords Amendments 27, 30, 31, 32, 33, 34, 35, 36 and 37**

39. These Lords Amendments would all extend the duty to publicise letting agents' fees so that it applied in Wales as well as England. As housing is a devolved issue, it would be necessary to replace references to "Secretary of State" with "appropriate national authority" (see Lords Amendment 40) and to leave out references to the duty applying in England.

**Lords Amendment 28**

40. Lords Amendment 28 would enable the Secretary of State (or, if Lords Amendment 27 were agreed to, the appropriate national authority) to specify by regulations other ways in which a letting agent must publicise the statements on client money protection and which redress scheme they have joined.

**Lords Amendment 29**

41. Lords Amendment 29 would provide definitions of a client money protection scheme and a redress scheme. A client money protection scheme is defined as a scheme which enables a client on whose behalf a letting agent holds money to be compensated by that scheme if all or part of that money is not repaid in circumstances where the scheme applies.
42. A redress scheme means a scheme which has been approved by the Secretary of State by order under section 83 or 84 of the Enterprise and Regulatory Reform Act 2013.

**Lords Amendment 38**

43. Lords Amendment 38 would place a duty on every local weights and measures authority in England and Wales to enforce in its area the requirement for letting agents to publicise their fees and, where applicable, the additional requirements which would be imposed by Lords Amendment 26. It would replace the need for secondary legislation by making the duty explicit in the primary legislation.
44. The amendment would enable local weights and measures authorities who, on the balance of probabilities, are satisfied that a letting agent has breached the requirement, to impose a financial penalty on the agent in respect of that breach.

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45. The amendment would provide that while it is the duty of local weights and measures authorities to enforce the requirement in their area, they may also impose a penalty in respect of a breach which occurs in England and Wales but outside that authority's area. However, an agent may only be fined once in respect of the same breach.
46. The amendment would provide that local weights and measures authorities may fine letting agents in breach of the requirement up to £5,000. When imposing a fine, authorities must follow the process described in the new Schedule which would be inserted by Lords Amendment 77.
47. A local weights and measures authority in England would be required to have regard to any guidance issued by the Secretary of State about how letting agents should comply with the duty to publicise their fees and, where applicable, the additional requirements which would be imposed by Lords Amendment 26, and on how the authority should carry out its enforcement duties.
48. Similarly a local weights and measures authority in Wales would be required to have regard to any guidance issued by the Welsh Ministers about how letting agents should comply with the duty to publicise their fees and on how the authority should carry out its enforcement duties.
49. Both the Secretary of State and the Welsh Ministers would have the power to make secondary legislation which amends the enforcement provisions and make the necessary consequential amendments for England and Wales respectively.

**Lords Amendment 39**

50. Lords Amendment 39 would remove the existing clause 85 which would be in effect replaced in its entirety by Lords Amendment 38.

**Lords Amendment 40**

51. Lords Amendment 40 would define the term "the appropriate national authority". This is a new term which would be introduced because the duty for letting agents to publicise their fees would be extended to cover Wales as well as England.
52. In relation to England, the appropriate national authority would mean the Secretary of State while in relation to Wales it would mean the Welsh Ministers.

**Lords Amendments 41, 42, 43 and 44**

53. These Lords Amendments would add certain Welsh social housing providers to the list of exemptions from the requirement to publicise fees. These are registered social landlords and fully mutual housing associations. Landlords who are private registered providers of social housing are already exempt. Lords Amendment 43 would define a fully mutual housing association by reference to the Housing Associations Act 1985. Lords Amendment 44 would define a registered social landlord by reference to the Housing Act 1996.

**Lords Amendments 45 and 46**

54. Lords Amendments 45 and 46 would be required because the duty to publicise fees would be extended to cover Wales as well as England. Lords Amendment 45

would remove the limitation to a county council in England when defining local authority to ensure that county councils in Wales are included. Lords Amendment 46 would add county borough councils to the definition of local authority as these are a relevant type of Welsh council. Clause 84(3) excludes things done by local authorities from the definition of letting agency work for the purposes of Chapter 3 of Part 3.

#### **Lords Amendments 47, 48 and 49**

55. Lords Amendments 47, 48 and 49 would alter the procedural provisions applying to regulation-making powers in Chapter 3 of Part 3 to reflect the new powers that would be added by Lords Amendment 38 and the fact that the provisions in the Chapter would be applied to Wales by other Lords Amendments. Lords Amendment 47 would apply the affirmative procedure to regulations amending the enforcement provisions. Lords Amendments 48 and 49 would apply the negative procedure to other regulations made by the Welsh Ministers (as well as the Secretary of State) under the Chapter.

#### **Lords Amendment 50**

56. Lords Amendment 50 would expand the list of higher education providers which are required to join the higher education complaints handling scheme. All those providers delivering courses which are specifically or automatically designated to receive student support funding in England and Wales, and providers with degree awarding powers, would be required to join. This scheme was set up under the provisions of the Higher Education Act 2004 and is operated by the Office of the Independent Adjudicator for Higher Education.

#### **Lords Amendments 51 and 52**

57. Lords Amendments 51 and 52 would ensure that any modifications to primary legislation made under the power conferred by clause 87(1) were subject to the affirmative procedure. These amendments would give effect to a recommendation of the Delegated Powers and Regulatory Reform Committee in its Third Report of Session 2014-15, published on 11 July 2014.<sup>1</sup>

#### **Lords Amendment 53**

58. Lords Amendment 53 would ensure that the Welsh Ministers, and not the Secretary of State, could make transitional, transitory and saving provision in connection with the coming into force in relation to Wales of Chapters 3 and 3A of Part 3 of the Bill (Duty of letting agents to publicise fees and student complaints scheme).

#### **Lords Amendment 54**

59. Lords Amendment 54 would ensure that the requirement for letting agents to publicise their fees - and, where applicable, the additional requirements which would be imposed by Lords Amendment 26 - extends to England and Wales only.

#### **Lords Amendments 55 and 56**

60. Lords Amendments 55 and 56 are technical amendments which would bring certain statutory instrument-making powers into force on Royal Assent. Lords

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<sup>1</sup> <http://www.publications.parliament.uk/pa/ld201415/ldselect/lddelreg/23/2302.htm>



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Amendment 56 would also provide a power for Welsh Ministers to bring into force Chapters 3 and 3A of Part 3 of the Bill (Duty of letting agents to publicise fees and student complaints scheme) in relation to Wales, as these Chapters are only applicable to England and Wales.

***Lords Amendments to the Schedules***

**Lords Amendment 57**

61. Lords Amendment 57 would ensure that an order to amend the list of regulators under paragraph 8 of Schedule 3 (Enforcement of the law on unfair contract terms and notices) would be subject to the affirmative resolution procedure.

**Lords Amendments 58 and 59**

62. As a result of Lords Amendment 38 local weights and measures authorities in England and Wales would be under a specific duty to enforce Chapter 3 of Part 3. This would enable that duty to be listed in paragraph 10 of Schedule 5. Lords Amendment 58 would add that duty to paragraph 10 and Lords Amendment 59 would make a consequential change to remove the reference to Chapter 3 of Part 3 from paragraph 11 of Schedule 5. This would preserve the position whereby the investigatory powers in the Schedule can be used to enforce the duty on letting agents to publicise their fees and, where applicable, the additional requirements which would be imposed by Lords Amendment 26.

**Lords Amendments 60 to 68**

63. Lords Amendments 60 to 68 would amend paragraph 23 of Schedule 5 which covers when a power to enter premises without a warrant can be exercised and the circumstances in which two working days' written notice must be given by consumer law enforcers. The intention with these amendments is to clarify that notice need only be given for "routine inspections" and to make any necessary consequential amendments. "Routine inspection" would be defined as any use of the power other than where the exemptions in sub-paragraph (5)(b) to (e) of paragraph 23 apply. Also notice would not have to be given for a "routine inspection" where notice has been waived by the occupier.

**Lords Amendment 69**

64. Lords Amendment 69 would retain some provisions originally considered to be obsolete. The provisions concerned insert provisions into the Criminal Justice and Police Act 2001 which are amended by Schedule 6.

**Lords Amendments 70, 71, 74 and 75**

65. Lords Amendments 70 and 71 would alter the power to amend the specified body that receives unclaimed damages in collective proceedings for breaches of competition law, so that only a charity can be the prescribed body. Lords Amendment 74 would correct a cross-reference to ensure that the affirmative resolution procedure applies to this power.

66. The provisions in the Bill regarding private actions in competition law allow for consumers and small and medium-sized enterprises to group together to take a case under the collective redress mechanism. There are also supporting provisions,

dealing with the situation where an underlying claimant may appeal against a representative being authorised. As currently drafted, regardless of the outcome of the appeal, the representative is liable for all costs incurred. The current drafting provides insufficient flexibility for the Competition Appeal Tribunal, as there may be instances where it is not appropriate for the representative to be liable for all the costs, for example where an underlying claimant commences an appeal which is not upheld.

67. Lords Amendment 75 would therefore allow the Competition Appeal Tribunal to allocate costs in certain types of appeal cases.

### **Lords Amendments 72 and 73**

68. Lords Amendments 72 and 73 would allow the Competition and Markets Authority (“CMA”) to approve an outline redress scheme submitted by a business, when a business offers to settle an investigation. The CMA would also have a power to withdraw its approval if the scheme did not comply with any conditions imposed. This would be a change to the process in order to achieve the original policy intent.

### **Lords Amendment 76**

69. Lords Amendment 76 would amend a cross-reference in paragraph 37 of Schedule 8 which was not revised following the introduction in Public Bill Committee of new section 47C(6) in paragraph 6 of Schedule 8. Paragraph 37 refers to 47C(7) which, after the addition of new section 47C(6), should read 47C(8).

### **Lords Amendment 77**

70. Lords Amendment 77 would insert a new Schedule into the Bill detailing the process for enforcement of the duty of letting agents to publicise fees and, where applicable, the additional requirements which would be imposed by Lords Amendment 26. Enforcement authorities would be required, within six months of having sufficient evidence that a breach of the duty has occurred or longer if the breach continues, to serve a notice on the agent that they propose to impose a financial penalty.
71. The Schedule would require this notice of intent to include the amount of the proposed financial penalty, the reasons for imposing the penalty and information about how the agent can make representations about the proposal to impose a financial penalty.
72. The Schedule would provide that the letting agent may, within 28 days from the day after the service of the notice of intent, make written representations to the enforcement authority about the proposal to impose a financial penalty.
73. The Schedule would require that, at the end of the 28 day period, the enforcement authority must decide whether or not to impose the financial penalty and the level of any penalty it decides to impose. If the authority decides to impose a penalty it must serve a final notice on the agent imposing that penalty. The final notice would have to require the penalty to be paid within the period of 28 days starting with the day after the day on which the notice was sent.

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74. The Schedule would require that the final notice must also include the amount of the financial penalty, the reasons for imposing the penalty, information on how to pay the penalty, how long the agent has to pay the penalty, information about how the agent can appeal the decision and the consequences if the agent does not pay within the specified time period.
75. The Schedule would provide that, at any time throughout this process, the enforcement authority may write to the agent on whom they have served a notice and either withdraw the notice of intent or final notice or reduce the amount specified to be paid in a notice of intent or final notice.
76. The Schedule would require that a letting agent who has been served a final notice by an English enforcement authority may appeal to the First-tier Tribunal. A letting agent served by a Welsh enforcement authority may appeal within 28 days (starting with the day after the day on which the final notice was sent) to the residential property tribunal. The grounds for appeal would be that:
- The decision to impose a financial penalty was based on an error of fact
  - The decision was wrong in law
  - The amount of the financial penalty is unreasonable or
  - The decision was unreasonable for any other reason.
77. Letting agents appealing to the First-tier Tribunal would have to comply with the requirements published by the Tribunal including any time constraints.
78. The Schedule would provide that if an agent has appealed, the final notice is suspended until the appeal is finally determined or withdrawn. Both the First-tier Tribunal and the residential property tribunal may quash, confirm or vary the final notice. When varying the final notice the financial penalty could not exceed £5,000.
79. The Schedule would provide that if an agent who has been served a final notice fails to pay all or some of the penalty which they are liable for, the enforcement authority who imposed the penalty may recover the money on the order of a court as if it were payable under a court order. When applying to the court for a court order a certificate which is signed by the chief finance officer of the local weights and measure authority which imposed the penalty and states the amount due has not been received by a date specified in the certificate would be conclusive evidence of that fact.
80. The Schedule would provide that a local weights and measures authority may retain and use the proceeds of a financial penalty for the purposes of any of its functions including functions which are not regarded as functions of a local weights and measure authority as such.

***Lords Amendments to the Title***

**Lords Amendment 78**

81. Lords Amendment 78 would update the long title of the Bill to include the Competition Appeal Tribunal as a consequence of Lords Amendment 25.