

## THE SCOTTISH PARLIAMENT AND THE SCOTTISH CONSUMER

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### INTRODUCTION

This paper considers what are the implications of the establishment of a Scottish parliament for Scottish consumers. Broadly, it considers 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.

First, however, it is necessary to set the parameters of the discussion. When the Scottish Consumer Council (SCC) considered the question of devolution in the 1970s, it 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.

The Scottish Consumer Council continues to be very active across the range of public service provision. It has said much about the needs of Scottish consumers in relation to housing, health, education, transport, environmental matters and many others. The Scottish Consumer Council has published a paper (**Representing Scottish Consumers in a devolved Scotland**, June 1997) which considers how the vital work of representing the interests of

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### *The Scottish Parliament and Consumer Affairs*

consumers of goods and services, publicly and privately provided, will continue post-devolution, but this paper will not consider that.

This paper considers the implications of devolution for the development of consumer affairs policy, and the enactment and enforcement of consumer law.

When embarking on a consideration of what input should come from the consumer perspective in relation to a Scottish parliament, the Scottish Consumer Council considered it would be useful if it 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). It is clear that there are lessons to be learned from these different models of regional self-government. While it may not be possible to make clear recommendations at this stage, 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.

It is also important that regardless of any changes which may be brought about after 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.

#### **CONSUMER AFFAIRS AND CONSUMER PROTECTION IN OTHER STATES**

It was not possible to carry out a detailed study of the constitutional arrangements for devolution in the countries 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***

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

### *Scottish Affairs*

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.

In New South Wales, until recently consumer affairs were handled by the Department of Consumer Affairs. Following some reorganisation last 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.

As well as carrying out enforcement functions (see later), the Department of Fair Trading plays an important part in developing consumer policy by advising the State Government.

### ***Bavaria***

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.

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 legislative 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.

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

### *The Scottish Parliament and Consumer Affairs*

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.

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.

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.

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.

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

### *Scottish Affairs*

Culture, Science and Arts, Ministry of Finance, Ministry for Food, Agriculture and Forestry, Ministry for State Development and Environmental Affairs, and Ministry for Federal and European Affairs. In Bavaria, responsibility for food control rests with the Bavarian State Ministry of the Interior.

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*

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.

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 the new Scotland Act will). The constitutions can only ever be overruled by the national government by means of a very complicated procedure.

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.

### *The Scottish Parliament and Consumer Affairs*

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.

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.

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 control of academic and professional qualifications.

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.

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.

### *Scottish Affairs*

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.

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.

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.

### **THE DEVELOPMENT OF CONSUMER AFFAIRS POLICY**

The Scottish Consumer Concil has 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.

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

### *The Scottish Parliament and Consumer Affairs*

division. The activity of the 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.

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 the 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.

But I do not agree that there is no point in a separate consideration of consumer affairs policy in the 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 the SCC believes 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?

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 the Scottish parliament), and others, for example aspects of the enforcement of consumer protection legislation, which are best achieved through local government action. The Scottish Consumer Council 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

### *Scottish Affairs*

touch with the way the enforcement regime works here, it could be demonstrated that this would lead to more effective implementation of EC directives.

This can be seen, for example, in the context of the implementation of the EC's Directive 93/13/EEC on unfair contract terms. This Directive sought to approximate the laws of the member states relating to unfair terms in consumer contracts. The UK implemented the Directive through the Unfair Terms in Consumer Contracts Regulations 1994 which broadly introduced into UK law a prohibition against unfair terms in consumer contracts. However, the DTI originally chose to give the Office of Fair Trading (OFT) powers to enforce the Regulations, which essentially amounted to a power to take an injunction or interdict against those using unfair contract terms in their consumer contracts. The widely held view among consumer organisations was that this did not properly enforce the Directive because it provided not only that there should be adequate and effective means to prevent the use of unfair contract terms, but also that those means shall include provisions allowing persons or organisations to take action.

The Consumer Affairs Minister, Nigel Griffiths, appears now to accept that bodies other than the Office of Fair Trading should be entitled to take enforcement action, although which bodies and what powers they will have is still a matter for discussion. It remains to be clarified whether a Scottish consumer body, such as the Scottish Consumer Council, or local authority consumer and environmental protection departments, will be empowered to take action to interdict particular companies from using unfair contract terms in Scotland. A Scottish parliament with the power to implement EC directives into Scots law may well have taken a different view from the original Westminster one, especially since the OFT, with no physical presence in Scotland, may have been considered somewhat limited in its ability to protect Scottish consumers.

Another example of how a Scottish parliament might 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' (for example, consumer organisations such as Consumers' Association, the Scottish Consumer Council, or local authority consumer and environmental protection departments) 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, and doorstep selling. The UK Government were unhappy with this proposal because 'it did not sit well with our civil law'. In fact, there was nothing in the

### *The Scottish Parliament and Consumer Affairs*

proposals which conflicted fundamentally with the principles of the Scots legal system which, being rooted in Roman civil law, has much in common with other European countries, rather than the English common law based system. Again, a Scottish parliament faced with the policy considerations attached to this proposal might well have taken a different view.

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 the 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. This would help to ensure proper liaison between the Scottish parliament and Westminster for implementation of consumer policy reforms. In practice, it may be the only workable solution, because the total devolution of consumer affairs issues to the Scottish parliament would not provide the necessary consistency north and south of the border.

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 the one I work for and Consumers' Association, but more significantly perhaps by the Office of Fair Trading, whose Director General is responsible for promoting and safeguarding the economic interests of UK consumers. He has various statutory functions which include consumer credit licensing, controlling misleading advertisements, and regulating the activities of estate agents. 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.

At the very least, the OFT should have an office in Scotland, charged with the responsibility for carrying out the functions of the OFT here, 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.

### **THE ENACTMENT OF CONSUMER LAW**

The Scottish Consumer Council's original consideration of the question of devolution was partly in response to the White Paper **Our Changing Democracy: Devolution to Scotland and Wales** issued by the Labour Government in 1975. The White Paper proposed, and the Scotland Act 1978

### *Scottish Affairs*

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).

The Constitution Unit, in its report **Scotland's Parliament: Fundamentals for a New Scotland Act** (1996), 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.

In addition to this point, at the time, the SCC commented that there were problems about the demarcation between major areas of consumer law (which were not devolved) and the civil law (which was devolved under the 1978 Act), including the law of contract, reparation, property and conveyancing, trusts, bankruptcy and succession. The areas of consumer law which were not devolved 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.

The Scottish Consumer Council's position then was, as it is now, a practical one: considering the technical means by which consumer law could effectively be enacted following a Scottish parliament. Our views have been 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.

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:

*The Scottish Parliament and Consumer Affairs*

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 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.

The present White Paper **Scotland's Parliament** (July 1997) appears to favour the approach taken by the Constitution Unit by stating, at paragraph 2.4: 'All matters that are not specifically reserved ... will be devolved.' But the White Paper does list the areas which will be devolved, as well as the reserved powers, presumably for ease of reference. It remains to be seen to what extent the draft Scotland Bill will follow the model later developed by the Constitution Unit (**Illustrative drafts for a new Scotland Bill**, Constitution Unit, Spring 1997) which simply lists 40 exclusive powers of the UK Parliament, giving power to a Scottish parliament to legislate on anything else.

The White Paper proposes that the areas to be reserved to Westminster will include, broadly, the UK constitution; UK foreign policy; UK defence and national security; border protection and controls; UK economic and fiscal stability; common markets for UK goods and services (and competition policy and consumer protection are included here); employment legislation; social security; regulation of certain professions; transport safety and regulation; and other miscellaneous matters subject to UK or GB regulation or operation such as the National Lottery or data protection.

The reservation of 'consumer protection' to Westminster, while at the same time stating elsewhere in the White Paper that 'civil law except in relation to matters which are reserved', does give considerable scope for debate and discussion. It is not clear whether 'consumer protection' includes all areas of consumer law, for example contracts for the sale and supply of goods, which are really part of the Scots private law of contract, or whether what was

### *Scottish Affairs*

intended was the reservation to Westminster of the power to legislate on the powers of the Director General of Fair Trading. The fact that much consumer protection enforcement is carried out by local authority consumer and environmental protection departments also increases the potential for confusion since the White Paper also envisages that the Scottish parliament would have jurisdiction in relation to local government. Would this give power to the Scottish parliament, for instance, to enact new consumer protection measures as long as they were to be enforced by local authorities?

In practice there will always be grey areas 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. The White Paper proposes methods for the resolution of disputes between the Scottish Executive and the UK Government about vires. In fact, the proposal to give the Scottish parliament power to act in every area except those that are reserved will be an advantage, avoiding the need for specifying rigidly the areas to be shared between Westminster and Scotland, and those to be devolved.

This approach certainly would appear to be more appropriate to the treatment of consumer law in any devolution legislation and it is something of a pity that the White Paper reserves consumer protection to Westminster. We may well be able to avoid the problems encountered with the approach taken in the 1978 Act if the new Scotland Act gives the Scottish parliament the power to legislate in every area unless reserved to the Westminster parliament. This approach has been taken in the Constitution Unit's draft bill (Spring 1997), which empowers a Scottish parliament to 'legislate for the peace, order and good government of Scotland and its people, except in respect of the matters listed in Schedule 2 to this Act'. Despite what may appear to be an excessively long list of reserved powers (exactly what is meant by reserving 'the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal; the Court of Session as a civil court of first instance and of appeal; the sheriff courts; the district courts;' for example?) this model is the one which one would expect broadly to follow from the Government's White Paper.

If, as the White Paper states, the law relating to consumer protection is to be reserved to Westminster, then there will have to be discussion and agreement

### *The Scottish Parliament and Consumer Affairs*

about the definition of consumer protection law, and the extent to which that includes or does not include aspects of Scots civil law such as the law of contract, bankruptcy, and reparation. It may be impossible to draw up a definition in advance, perhaps requiring it to be developed gradually. It would mean that each aspect of consumer affairs policy as it arose would have to be discussed by the Scottish parliament, agreement reached about whether it was within the vires of the parliament or not, and 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 of consumer policy developments having to be considered by the DTI and the OFT.

On the other hand, if all consumer law, including the law governing consumer protection (if indeed the two are different), were within the control of a Scottish parliament, in practice the trend towards greater uniformity would be likely to continue. But the advantage would be that the Scottish legislative programme could include 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 could still benefit from UK legislation.

### **ENFORCEMENT OF CONSUMER LAW**

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.

I mentioned above some of the concerns which the Scottish Consumer Council 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, now 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

### *Scottish Affairs*

industries, unlicensed traders and illegal 'get 2ich 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. The Department provides a considerable number of consumer services, including such initiatives as the Register of Encumbered Vehicles (REVS) which provides a hotline number for prospective used car purchasers to check whether the car they are proposing to buy is carrying a debt for which the new owner could become liable. The Department also runs various tribunals, such as the Consumer Claims Tribunal (a bit like our small claims court), and the Building Disputes Tribunal. Consumer credit licensing is handled at federal level.

It is worth considering whether such a model would improve consumer protection in Scotland. Since local government reorganisation, consumer and environmental protection 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 consumer and environmental protection departments, may be an attractive option. It would have the benefit of consistency of approach, and possibly greater 'clout' in relation to larger traders. It would have implications for local government, though, that would have to be carefully considered, and it may be ruled out because of lack of resources.

### **CONCLUSION**

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

To summarise, the conclusions are as follows:

#### ***The Development of Consumer Affairs Policy***

Realistically, following the creation of the 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

### *The Scottish Parliament and Consumer Affairs*

Westminster. At the very least, the 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.

Consumer Affairs should be the responsibility of a department of state within the Scottish Office. This department should be responsible, for example, for taking forward the development of consumer policy within the Scottish parliament. The department should also be responsible for liaising with the relevant Westminster departments (in practice, this would almost always be the DTI), and for developing consumer policy to feed in at UK and European levels.

The OFT should open an office in Scotland, charged with carrying out most of the functions of the OFT here, 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.

#### ***The Enactment of Consumer Law***

The Scottish Consumer Council have considered the possible approaches to devolution of powers to the Scottish parliament, in the context of which approach would best suit consumer law. The SCC is in favour of an approach which reserves specific areas to Westminster, and devolves everything else to the Scottish parliament. The Scottish Consumer Council believes that the power to enact consumer law should not be reserved to Westminster. 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.

#### ***Enforcement of Consumer Law***

Following the establishment of 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. The Scottish Consumer Council was, however, impressed by the model provided by the New South Wales Department of Fair Trading and considers that it would be useful to carry out some further examination of the appropriateness of such a model for Scotland.

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