

LAW COMMISSION - Freedom of Information Act

Previously Released Information/Disclosure Log

Notes

- Logs are updated at the end of each quarter
- Questions are produced in their original format
- Attachments are included with questions

FY09-10

	Topic	Page
Quarter 1	1. Common purpose	2
	2. Hillsborough stadium disaster	3
	3. Deloitte & Touche (UK)	5
	4. Biased evidence	6
	5. Ambush defence tactics	7
Quarter 2	6. Annual salaries	8
	7. Financial information for years 2006/07 and 2007/08	9
Quarter 3	8. Common Law in Family Courts	11
	9. Conflict of Interest	12
	10. Fiduciary Duty	13
Quarter 4	11. Unfair Contracts Bill	14
	12. Paucity of private (criminal) prosecutions	26

Quarter 1

Topic	1. Common purpose
Date of Response	6 May 2009
Question	Please provide the following information: Charity "Common Purpose"; meaning the training organisation of that name: http://www.commonpurpose.org/home.aspx . 1) On a yearly basis from 2000 onwards, unless of course money was paid to Common Purpose from an earlier period, in which case please include information from the earlier period. 2. Name all persons/positions who have attended a Common Purpose course? 3. How much money has been paid to this organisation? 4. Please provide copies of invoices/receipts.

Answer

The Law Commission has no records of this supplier as none of our staff have attended any of their courses.

Topic	2. Hillsborough stadium disaster
Date of Response	11 May 2009
Question	Does the Law Commission hold any as yet unpublished information relating to the Hillsborough stadium disaster? For example, you might have proposals, whether implemented or not, that were suggested for changes to the law of negligence following the cases against South Yorkshire Police. Do you hold anything, that is "hold for FOI purposes" - I understand meaning hold or hold on behalf of anyone else - relating to the disaster and, if so, please disclose the information. In order to meet the Culture Secretary's (i.e. Government's) wish for any information held by public bodies not yet public concerning the tragedy to be fully disclosed, please could you also, if there is any information, disclose that on your website so the wider public can see it (my personal details, as requester, of course being kept undisclosed). Information about the Culture Secretary, Andy Burnham,'s comments can be found on the BBC News website today. He has said that, if public bodies do have anything on the disaster that is not already public, there should be full disclosure of that information.

Answer

In 1995 we published a consultation paper on Liability for Psychiatric Illness. As part of the consultation we looked at the House of Lords decision in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 which arose from the Hillsborough disaster. We expressed concern about the decision and consulted on the following issues:

1. What the law should be where a defendant had negligently injured or imperilled someone other than the claimant and the claimant had foreseeably suffered a psychiatric illness;
2. How a close tie of love and affection between the claimant and the immediate victim (the person suffering the physical injury) should be established;
3. Whether the requirement that there be a closeness in time and space and perception through a claimant's own unaided senses should be abandoned where the claimant had a close proximity to the immediate victim.

Following the consultation process, we published a final report and draft Bill on Liability for Psychiatric Illness in 1998. This report made the following recommendations:

1. That there should be legislation stating that a claimant who suffers a reasonably foreseeable recognisable psychiatric illness as a result of a person with whom the claimant has a close tie of love and affection suffering physical injury or imperilment as a result of the defendant's negligence should be able to recover damages. This should be regardless of the claimant's proximity to the accident (in time and space).
2. That there should be a fixed list of relationships where a close tie of love and affection is deemed to exist. These are: spouse, parent, child, brother or sister and cohabiting couples who have cohabited for two years or more.
3. That the statutory duty to prevent psychiatric illness should not be imposed where it is not just or reasonable to do so. It should also not be imposed where the claimant voluntarily accepted the risk, excluded the duty or was involved in illegal conduct.

The Final Report (Law Com Report 249) is available in full on our website at [http://www.lawcom.gov.uk/docs/lc249\(1\).pdf](http://www.lawcom.gov.uk/docs/lc249(1).pdf). The consultation paper (Law Commission Consultation Paper No 137) was published by HMSO in 1995, and should be available in most law libraries. We have slowly been putting past consultation papers onto our website, but currently we only include papers published since 1996. If you think that there would be an interest in this particular consultation paper, do let us know and I will ask our communication team to see if they can get the document scanned and uploaded.

We do hold some unpublished material which we used in drafting the consultation paper and the final report. Our file register lists 7 files in long term store. I have not ordered or read the files, so I can not be sure what is in them. However, I have added some notes about what they are likely to contain, based on normal Law Commission working practices.

1. Liability for Psychiatric Illness: Consultation Paper (Parts 1 to 5)

File Number: 42/127/33. This is likely to include some background notes and discussion of the *Alcock* decision

2. Liability for Psychiatric Illness: Responses to CP 137 (Parts 1 to 6)

File Number: 42/127/35. Around 150 people and organisations responded to our consultation paper, and these files would normally include their replies to the questions we asked. A list of respondents is available at Appendix B of our Final Report.

3. Liability for Psychiatric Illness: Analysis of Responses to CP 137

File Number: 42/127/48. This would be our own summary of the responses.

4. Liability for Psychiatric Illness: Policy Paper

File Number: 42/127/51. This would normally contain the internal discussions leading to our final report.

5. Liability for Psychiatric Illness: Draft Bill. File Number: 42/127/56

This would include our instructions to Parliamentary Counsel.

6. Liability for Psychiatric Illness: Final report

File Number: 42/127/57

7. Liability for Psychiatric Illness: Post Publication

File Number: 42/127/67

It is unlikely that these files would contain any information relating to the Hillsborough stadium disaster itself that is not already in the public domain. However, I would stress again, I have not read them.

If you would like to pursue this issue further, do let me know which files you are interested in. I will then order them and look through them. You will understand that I cannot say whether which ones can be released until I have seen them.

Topic	3. Deloitte & Touche (UK)
Date of Response	18 May 2009
Question	Can you please tell me how many times Deloitte & Touche (UK) have had investigations into them or allegations of corruption made against them?

Answer

The Law Commission does not hold records of this nature about individuals or companies. I am, therefore, unable to provide the information which you request.

Topic	4. Biased evidence
Date of Response	22 May 2009
Question	If an NGO (non-government organisation) was assisting police in a criminal case would it be biased or a conflict of interest for the DNA techniques used to have been funded by the NGO assisting the prosecution?

Answer

The Law Commission has no information to release to you on the query you raise under the FOI Act nor does it deal with, give advice on or comment on individual cases. You may wish to direct your query to the Ministry of Justice who may be able to help you. data.access@justice.gsi.gov.uk

You may wish to know that the Law Commission is currently conducting a consultation on the Admissibility of Expert Evidence in Criminal Proceedings in England and Wales which, whilst not addressing the query you raise, may be of interest. You can download a copy from our website www.lawcom.gsi.gov.uk.

Topic	5. Ambush defence tactics
Date of Response	22 May 2009
Question	Can a defense lawyer (in civil cases) wait until minutes before entering the court room before "ambushing" the prosecution with their defense? Following on from this when asking the judge in the said case for an adjournment to read the defense is it right for the judge to reply with "keep quiet" and ignore the topic brought to the judges attention?

Answer

The Law Commission has no information on the matter which you have raised in your request as we have no remit over court proceedings.

You may wish to address your query to the Ministry of Justice's data access section who should be able to refer your query to the correct person.
data.access@justice.gsi.gov.uk.

Quarter 2

Topic	6. Annual salaries
Date of Response	28 July 2009
Question	The annual salary details from the last three financial years for: 1) The Board Director/Committee Chair, 2) All chief executives, 3) All deputy executives/directors/chairs.

Answer

I set out below the information that you have requested. Please let me know if there is anything further you require.

Commissioners

2008-09	£121,635
2007-08	£118,668
2006-07	£115,661

Chief Executive

2008-09	Payband 1: £59,600-116,000
2007-08	Payband 1: £59,600-116,000
2006-07	Payband 1: £58,500- 116,000

Chairman

The Chairman of the Commission is a judge and continues to be paid his salary as a judge while he is Chairman of the Commission. The current Chairman was a High Court judge until 29 September 2008 (£170,200), when he was appointed to the Court of Appeal (£193,800).

Topic	7. Financial information for years 2006/07 and 2007/08
Date of Response	11 August 2009
Question	Information on the number of staff employed, both permanent and temporary, grants in aid received from Government (each source to be listed separately), any other sources of income, gross expenditure and net expenditure (operating costs).

Answer

Please see the link for the Law Commission's website. We have pdf copies of all of our annual reports that are available on our website, which contain the answers to most of your questions. http://www.lawcom.gov.uk/ann_reports.htm.

In addition to above:

1) Grants in Aid RECEIVED by Law Commission: FY 06-07 and FY 07-08 – None.

2) The majority of the Law Commission's funding comes from an allocation from the Ministry of justice. Other income received (including that which directly reimburses the salaries of any consultants, secondees etc) is detailed below:

FY 06-07	Amount	Details	Project it related to
1	74405.00	Department for Work and Pensions	Private Pensions Consolidation
2	23000.00	Tribunals Group (DCA/MoJ)	Tribunals
3	200.00	Unclaimed cash found in office	N/A
	97605 (Total)		

FY 07-08	Amount	Details	Project it related to
1	33333.00	Department for Business, Enterprise and Regulatory Reform	Consumer Law (Remedies for Faulty Goods)
2	21720.00	Department for Work and Pensions	Private Pensions Consolidation
3	10000.00	Tribunals Group (DCA/MoJ)	Tribunals
	65053 (Total)		

3) Total Law Commission expenditure (including income):

FY 06-07	3572969	<i>GROSS EXPENDITURE</i>
	<u>-97605</u>	<i>Income</i>
	3475364	<i>NET EXPENDITURE (TOTAL FUNDING FROM MOJ excluding rent)</i>
	<u>560000</u>	<i>Rent as detailed in our Annual Report</i>
	4035364	TOTAL

-

FY 07-08	3626149	<i>GROSS EXPENDITURE</i>
	<u>-65053</u>	<i>Income</i>
	3561096	<i>NET EXPENDITURE (TOTAL FUNDING FROM MOJ excluding rent)</i>
	<u>560000</u>	<i>Rent as detailed in our Annual Report</i>
	4121096	TOTAL

-

4) Full time equivalent (FTE) details of Law Commission staff in place as at 31st March:

FY 06-07	FTE	Category
	51.90	Permanent/Seconded or Fixed Term Appointment on payroll
	1.00	Temporary Agency Staff
FY 07-08	FTE	Category
	50.20	Permanent/Seconded or Fixed Term Appointment on payroll
	3.60	Temporary Agency Staff

Quarter 3

Topic	8. Common Law in Family Courts
Date of Response	29 October 2009
Question	Please state whether or not the Family Courts operate under Common Law. If they do operate under Common Law then please provide the recorded information that states that parents/relatives/grandparents are guilty until proven innocent. If the Family Court's do not operate under Common Law, please state under what Law they operate. Many families are having to jump through assessment hoops to prove they are innocent without any evidence or facts that prove them guilty and whose heritage in the form of their children are being ripped away forever.

Answer

You ask a number of questions in that e mail which appear to relate to the removal of children from their families. When courts remove children from their families they apply the provisions of the Children Act 1989 and the tests contained in that Act. A copy of the Children Act can be found at the following link: <http://www.opsi.gov.uk/acts/acts1989/ukp>.

You give some opinions about the way that the law operates in this area. The Law Commission's statutory function is to review the current law and to recommend its reform. We are not currently conducting any review in the area of Children Law. Unfortunately we are not able to give legal advice on specific matters.

If you have not already received legal advice, I would suggest that you contact a solicitor who specialises in family law. If you are experiencing difficulty in finding a suitable one, you could contact the Law Society, who will be able to recommend local firms of solicitors. They can be contacted by telephone on 0870 806 6575 or 020 7242 1222, or at 113 Chancery Lane, London, WC2A 1PL.

Alternatively, you can contact your local Citizens' Advice Bureau, who may themselves be able to assist you or who may be able to refer you to other sources of free legal advice. Information on the location of Citizens' Advice Bureaux can be obtained from your local library or a telephone directory service.

Topic	9. Conflict of Interest
Date of Response	30 October 2009
Question	Can you please state the rules that apply in order that there is no conflict of Interest for families or their children who have been taken for adoption. It is most concerning that 'His Honour Judge Polden who became the designated Family Law Judge for Kent on 1 st September 2008 having distinguished himself as a District Judge in the region for many years' Had previously also been a practising partner in a local Kent firm of solicitors, which would indicate a clear conflict of interest. Please name the firm of solicitors and period of interest in said firm. Are Judges required to make a declaration comprising of any and all interests and are these available for Public Record.

Answer

The Law Commission's statutory function is to review the current law and to recommend its reform. Unfortunately we do not hold any information relating to the judiciary of the sort that you describe and therefore cannot assist with your request.

You could consider contacting the Data Access and Compliance Unit at the Ministry of Justice to see if they can assist. The unit can be located at 6th Floor, 102 Petty France, London, SW1H 9AJ. data.access@justice.gsi.gov.uk.

Topic	10. Fiduciary Duty
Date of Response	11 November 2009
Question	What information does your department hold about your fiduciary duty and is this to the people. i.e. real men/women/their offspring(children) or to the Crown i.e. City of London?

Answer

You refer in your email to HMCS, by which I understand you to mean Her Majesty's Courts Service. HMCS is an executive agency of the Ministry of Justice. You may wish to consider contacting HMCS directly, its website is at <http://www.hmcourts-service.gov.uk/>

You ask what information we hold about our fiduciary duty. I am not entirely clear what you mean by this. The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed.

The Law Commission's duties are set out in that Act of Parliament. The current text of the Act is available on our website at <http://www.lawcom.gov.uk/act.htm> and can also be found on the UK Statute Law Database at <http://www.statutelaw.gov.uk>.

Quarter 4

Topic	11. Unfair Contracts Bill
Date of Response	8 February 2010
Question	Please supply copies of any correspondence between the Law Commission and BIS relating to the Unfair Terms in Contracts report since July 2006?

Answer

You asked for copies of any correspondence between the Law Commission and BIS relating to the Unfair Terms in Contracts report since July 2006. We have since searched through our records and have found the following documents:

1. Emails between Law Commission and BERR between 9 December and 10 December 2008 (see attachment 1)
2. Emails between Law Commission and BERR, cc MoJ dated 18 September 2006 (see attachment 2)
3. Emails between Law Commission and BERR, cc MoJ between 25 July 2007 and 8 August 2007 (see attachment 3)
4. Memo Law Commission to BERR, cc MoJ dated 25 July 2007 (see attachment 4)
5. Internal memo Law Commission dated 9 December 2008 (see attachment 5)

I attach copies of all of these documents.

Attachment 1

From: [REDACTED] Law Commission
Sent: 10 December 2008 15:37
To: [REDACTED] BERR
Cc: [REDACTED] MoJ
Subject: RE: Meeting the EU Commission

Dear [REDACTED]

Good to hear from you - and I look forward to hearing more about the Paris conference. And yes, it would be good to talk to Guiseppa Abbamonte directly, rather than trying to figure what on earth he is intending to do, from a distance. I understand that [REDACTED] is talking to you about dates.

Meanwhile, I asked [REDACTED] to look at possible effect of maximum harmonisation of unfair terms provisions - and enclose the memo he wrote on the subject. It deals with four possible problems with maximum harmonisation in this area:

- negotiated terms;
- other legal rules stating that terms were of no effect;
- the Financial Ombudsman Service's general jurisdiction to come to a fair and reasonable decision when looking at terms in financial services contracts;
- FSA rules that require contract terms to be presented in a particular way.

The first two could be solved by something in the recitals, confirming that the harmonised field does not cover negotiated terms, and does not cover terms rendered of no effect for reasons of public policy.

The FOS point and the FSA point would both be covered by a carve out for financial services. However, there may be other compulsory ombudsmen schemes (covering estate agents, for example), and the issue of an ombudsman scheme having a general fair and reasonable jurisdiction that goes further than the law may also apply to other areas.

I'm very happy to discuss this, if you think it would be useful.

Best wishes

[REDACTED]

-----Original Message-----

From: [REDACTED] BERR

Sent: 09 December 2008 09:29

To: [REDACTED] Law Commission

Subject: Meeting the EU Commission

Dear [REDACTED]

I was speaking to Giuseppe Abbamonte - the lead official on the Consumer Rights Directive - a week or so ago, and he said he would be very interested in coming to London to speak to you about the consumer remedy consultation. I think this would have to be in January at the earliest but I wanted to discuss dates with you. I think he prefers Fridays but let me know what dates are good for you.

It would also be useful to have a catch-up. There was a stormy conference in Paris about the Directive with a lot of opposition voiced across a whole range of areas.

Sorry to miss your Christmas party but thank you for the invite.

Kind regards

[REDACTED]

[REDACTED]

EU and International Consumer Policy Team

[REDACTED]

Department for Business, Enterprise and Regulatory Reform

1 Victoria Street, London SW1H 0ET

Attachment 2

From: [REDACTED] Law Commission

Sent: 18 September 2006 15:06

To: [REDACTED] BERR

Subject: RE: Unfair Terms in Contracts: Govt response to Law Commissions - PDF LETTERS TO LAW COMMISSIONERS

Thanks a lot for reminding me about this. I've asked for our website to be updated as soon as poss.

Would you be able to give me the details of your site, so we can arrange a link to the public copy of the letter?

All best wishes

[REDACTED]

-----Original Message-----

From: [REDACTED] BERR

Sent: 18 September 2006 12:43

To: [REDACTED] Law Commission

Cc: [REDACTED]

Subject: Unfair Terms in Contracts: Govt response to Law Commissions - PDF LETTERS TO LAW COMMISSIONERS

[REDACTED],
I attach the PDFs of the Government's response of 24 July 06 to the Chairmen of the Law Commissions on their joint report on unfair terms in contracts (pub Feb 2005). I note from the Law Commission website however that the Govt response does not appear and that the text still reads "We have not yet heard whether the Department of Trade and Industry intends to implement our recommendations and draft Bill". Our CCP website is in the process of being updated to include the response, and I take it this is the case with regard to yours?

Thanks, [REDACTED].

[REDACTED] BERR
Consumer & Competition Policy
Branch 5a Bay 421
1 Victoria Street
London
SW1H 0EH
GTN 215 0333

Attachment 3

From: [REDACTED] Law Commission

Sent: 08 August 2007 14:31

To: [REDACTED] BERR

Cc: [REDACTED]

Subject: RE: Unfair Terms in Contracts: preparing an RIA

Glad to hear it was helpful. As far as numbers of small businesses are concerned, the SBS official stats say that there are 4.2 million small businesses with up to 9 employees in the UK. Of these, 3.17m with no employees, and 1.04m have with between 1 and 9 employees. If you want a further breakdown by number of employees and region (eg to take out the NI figures) see <http://stats.berr.gov.uk/ed/sme/>.

The question about franchisees is more difficult as the term doesn't have any precise meaning. The British Franchising Association told us that their members have around 30,000 franchisees - but there must be lots of people in franchise type arrangements that aren't members of the BFA.

It would be helpful to know more about when you will be conducting the public consultation - as the Financial Markets Law Committee was asking about this.

Cheers

[REDACTED]

-----Original Message-----

From: [REDACTED] BERR

Sent: 08 August 2007 13:25

To: [REDACTED] Law Commission

Cc: [REDACTED]

Subject: RE: Unfair Terms in Contracts: preparing an RIA

Dear [REDACTED],

sorry it's taken me so long to respond to your note re: preparation of an impact assessment on the Law Commissions' reforms of the unfair contract terms legislation. I have now had a chance to look through your initial thoughts regarding the potential impact on courts resulting from the small business recommendation, and have found the information very helpful. Especially the very clear (logical), concise way you have set this information out. So, thanks for that.

I have since heard from [REDACTED] at MoJ (30 July) requesting information on numbers of small businesses with x employees etc, and how many of them are franchise businesses. I am yet to find this info out and get back to her. However, in the interim, I have not heard anything back from [REDACTED] at MoJ on your note. It would be helpful to have an MoJ view, and an idea of costings based on your 'findings', as this information will help inform the RIA to help test assumption of impact when we eventually conduct a public consultation on proposals for the new unfair contracts legislative framework.

Much appreciate your efforts on this.

[REDACTED]

[REDACTED]

Consumer and Competition Policy Directorate 1
Department for Business, Enterprise and Regulatory Reform
1 Victoria Street
London SW1H 0ET

[REDACTED]

From: [REDACTED] Law Commission

Sent: 25 July 2007 16:42

To: [REDACTED] BERR

Cc: [REDACTED]

Subject: Unfair Terms in Contracts: preparing an RIA

Dear [REDACTED]

I promised to send you our initial thought on the impact of our recommendations on unfair terms, concentrating on any additional cases that may be generated within the courts. I enclose a memo on what we have come up with.

As you can see, we think that the new legislation may result in a few more trials, at least initially - and people test out the effect of the legislation. However, the number is limited: at most the reforms would double the number of cases currently litigated by small businesses under UCTA. They are very unlikely to do more than this. Such evidence as we can find suggests that small businesses are litigation adverse - and reluctant to take large businesses to court. The best figures we have come up with are: no more than one additional trial in the High Court; 10 in the county court; and 30 in the small claims procedure.

Do get back to me if you have any questions about this.

I am also copying this to [REDACTED] at the MoJ who may well be able to help with the cost to the MoJ of the additional cases we have outlined.

Best wishes

[REDACTED]

[REDACTED]

Law Commission

[REDACTED]

<<notes on RIA.doc>>

Attachment 5

FROM: [REDACTED] Law Commission

TO: [REDACTED] BERR

[REDACTED] MoJ

DATE: 25 July 2007

Unfair Contract Terms: the impact of implementing our draft Bill

- 1.1 In order to implement our draft Bill, BERR needs to submit a regulatory impact assessment (RIA) to the appropriate Cabinet Committee. Preparing such an RIA will be difficult: there is little hard evidence about the effect of the present legislation, and any assessment of the changes can only be speculative.
- 1.2 Our recommendations are of two types. Most are designed to simplify the law – particularly for consumers, although some affect business and international contracts. The small business proposals, however, involve a significant extension of protection. For RIA purposes, it is important to distinguish between the two.
- 1.3 Below we begin by summarising the main simplifications. We then concentrate on estimating how many additional cases the small business reforms would bring into the court system.

The impact of simplification: consumer contracts

- 1.4 In January 2001, the DTI asked the Law Commissions to replace the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) with a unified regime, written in a clearer and more accessible style. This followed criticism that the current law is unduly complex: it relies on inconsistent and overlapping provisions, using different language and concepts to produce similar but not identical effects.
- 1.5 The problem is particularly acute for consumer or business advisers struggling to understand the current law. At present, advisers must understand two separate regimes.
 - (1) They use two separate tests: UCTA uses a “reasonableness” test, while the UTCCR use a “fairness” test. The UCTA test contains guidelines; the UTCCR contains a “grey list” of terms that may be regarded as unfair.
 - (2) They apply different burdens of proof.
 - (3) The UTCCR apply only to non-negotiated terms. Many UCTA provisions apply even if terms are negotiated – while others apply only where one party deals on the other’s “written standard terms of business” (a similar but by no means identical concept).
 - (4) UCTA applies only to exclusions and limitation of liability and indemnity clauses (widely defined) while the UTCCR apply to all terms other than the main subject matter of the contract and the adequacy of the price.
 - (5) UCTA contains a list of exclusions that do not apply to the UTCCR. It is common, for example, for people to think that insurance contracts are exempt from unfair terms review, even though they fall within the scope of the regulations.
- 1.6 Our unified regime for consumers makes little difference to substantive rights, but should mean that it is easier to train business and consumer advisers to understand the impact of the provisions. There are unlikely to be any additional cases brought within the court system.

The extension for small businesses

- 1.7 The small business recommendations change the substantive law. At present, the fairness test only applies to clauses that exclude liability – though this concept is defined very broadly in section 3 to cover any clause within a standard term contract that allows a party “to render a contractual performance substantially different from that which was reasonably expected”. The Law Commissions’ recommendations would allow a broader range of terms to be challenged. The fair and reasonable test would apply to any term which was not negotiated and which was not a core term.
- 1.8 When small businesses gave us examples of the sort of term that should be challenged, we found that many already fell within UCTA section 3, suggesting that UCTA is not well-understood.¹ However some examples were not covered by existing provisions, including terms which:
 - (1) required the small business to renew contracts at escalating prices;
 - (2) gave the supplier excessive discretion over prices;
 - (3) allowed the supplier to terminate for any minor fault, but which prevented the small business from terminating when the larger business was to blame;
 - (4) imposed excessively strict deadlines and penalties on small business suppliers.
- 1.9 The recommendations provided a tight definition of a small business: the extension would only apply if the standard terms were imposed on a business with nine or fewer employees. We also suggested additional measures to exclude sophisticated businesses with few employees, including an exemption for small businesses that were associated with large businesses, for contracts with a value of more than £500,000, and for all financial services contracts.
- 1.10 The question is how many additional cases would be generated by such an extension in the protections afforded small businesses.

How many cases are currently brought in England and Wales under UCTA?

- 1.11 Our starting point was to search through the BAILII database of all High Court and Court of Appeal judgments that raised issues under UCTA. This showed that in two years, from July 2005 to July 2007, UCTA had been raised in 18 cases.² This included 16 High Court cases and 2 cases in the Court of Appeal.³
- 1.12 We were interested to see who brought the challenge: was it a consumer, a small business or a large business? It appeared that in four cases, the term was challenged by a consumer, in 13 cases it was a large business, and in only two cases was the challenge by a small business.
- 1.13 We do not know whether in these two cases the small businesses would meet the definition of a small business contract that we have recommended. The judgment does not record the number of employees, which under current law is not relevant to the case. However, the description given suggested that the business was small. In *Snooks v Jani-King (GB) Ltd* [2006] EWHC, the claimant ran a cleaning company under a franchise agreement with the defendant. In *Regus (UK) Ltd v Epcot Solutions Ltd* [2007] EWHC 938, a term in a serviced office agreement was challenged by a small company providing professional IT training.
- 1.14 This suggests that each year, around one small business is involved in a High Court trial and uses the Unfair Contract Terms Act 1977 to challenge a term of the contract. Given that our recommended extensions are less significant than the existing provisions, we would expect no more than **one High Court case** a year to raise issues about the new provision.
- 1.15 We have not considered the effect of litigation before the Scottish courts.

¹ Unfair Terms in Contracts, Law Com No 292 and Scot Law Com No 199, para 5.8.

² The words “Unfair Contract Terms Act” arose in 22 cases in all – but in three it was not an issue in the case.

³ We were interested to see which section of UCTA was relied on: nine cases appeared to rely on section 3; four were about the Misrepresentation Act 1967, one raised issues about section 6, and the remaining four were about section 2. However, it was not always clear which sections were at issue, and some raised more than one section.

County court cases

- 1.16 There is no similar database of county court decisions to search. Thus we can only speculate about the number of cases leading to a county court trial which raise issues of unfair terms.

Reluctance to sue

- 1.17 There are reasons to think that small businesses are relatively unlikely to bring county court cases against larger businesses. In 1997, John Baldwin's authoritative study of small claims found that only 0.6% of all small claims were brought by small firms/traders against large firms.⁴
- 1.18 This fits in with other evidence that small businesses are reluctant to consult solicitors or use legislation. For example the Annual Survey of Small Businesses 2004/05 found that only 4% of small and medium businesses had asked a solicitor for advice about regulations in the last 12 months.⁵ The survey also explored the use small businesses make of the legislation on late payment of debt that was specifically designed to help them. The survey found that out of those small and medium businesses that gave credit, 55% were aware of the legislation. But even when businesses were aware of the legislation, they were still reluctant to use it. Only 16% of those with awareness (9% of the total) had mentioned the legislation when chasing debts. And only 7% of those with awareness (4% of the total) had ever taken legal action under the legislation.⁶
- 1.19 This would suggest that the small businesses are unlikely to rush to litigate in the county court against larger businesses.

Estimating numbers

- 1.20 The Judicial Statistics 2006 show that in 2005, 47,521 cases were disposed of by small claims hearings. If one follows the Baldwin survey and assumes that 0.6% are brought by small businesses, it would suggest around 285 small claims hearings a year are brought by small businesses bringing cases against large businesses.
- 1.21 The Judicial Statistics also show that 17,318 fast and multi-track cases were disposed of by trial in 2005. The Civil Justice Audit in 2001 showed that most were personal injury or road traffic cases: only 2 out of 45 were classified as debt, and 10 were classified as others.⁷ This means that an even smaller proportion are likely to be contract disputes brought by small businesses. However, if one applies the same proportion (0.6%) to the 17,318 figure, this would give a figure of 103 fast and multi-track trials in which small businesses sue larger businesses.
- 1.22 How many of these cases would cite the Unfair Contract Terms Act? Clearly, there are some cases. The BAILII database includes one such case, and one case before the Court of Appeal was an appeal from the county court. Other than that, one can only guess.
- 1.23 If UCTA is mentioned in 10% of all cases brought by small businesses, one would be looking at around **30 small claims hearings**, and **10 other county court trials**.

How far does the legislation "cause" cases to be brought?

- 1.24 In many cases, UCTA was only a minor issue in the case. Most of the 18 cases raised multiple issues. Typically, the claimant brought a claim, which the defendant resisted by relying on a contractual term. The claimant then challenged the legitimacy of the term by arguing that the alleged term was not part of the

⁴ Small Claims in the County Courts of England and Wales, Clarendon Press, 1997, Table 2.1, p 26.

⁵ Small Business Service, Annual Survey of Small Businesses: UK 2004/5, p 123. The survey covers businesses with fewer than 250 employees.

⁶ Above, p 117-9.

⁷ J Shapland, A Sorsby and J Hibbert, A Civil Justice Audit, LCD Research Series 2/02, March 2002, p 155-6. More up-to-date information about this issue may be available from the court sampler survey, run for two months each year. However, the information given about this survey in the Judicial Statistics is difficult to interpret, and the survey does not distinguish between small and larger firms.

contract, or did not mean what the defendant alleged it to mean, or did not apply to the case in issue, or was unfair. The case might have ended up in court even if UCTA had not been passed. Thus the legislation did not necessarily cause the case to go to court. The dispute, and legal argument about the dispute, would probably have happened in any event.

- 1.25 We also expect this to be true for the extended provisions. The reforms will not cause disputes to arise, but will be used as an additional weapon when a large business argues that a small business is bound by a contractual term. The question is whether the presence of this argument is more or less likely to promote an early settlement of the dispute. Will the case be more likely to be pushed to a trial as the large business seeks to defend its contract term, or will it be less likely to go to trial, as the large business realises it must abandon an unfair position?
- 1.26 We think that, at first, new legislation may be more likely to push cases to litigation: the legislation is new and untested, and large businesses will seek to defend their existing terms. However, the effect will be small. It will also reduce over time, as the legislation becomes better understood. The provisions will then become only one more background factor against which businesses settle their disputes. It will neither cause nor reduce litigation.

Conclusion on trial numbers

- 1.27 On a very rough estimate, it is possible that in the first few years after implementation, the small business recommendations may result in the following increase in trials each year
- (1) 1 High Court trial;
 - (2) 10 county court trials under the fast track and multi-track;
 - (3) 30 small claims hearings.
- 1.28 There may also be one additional case in the Court of Appeal every two or three years.
- 1.29 We have not attempted to put a figure on the cost of these cases to the court service: we assume this data is available from the MoJ.

Settled cases

- 1.30 The reforms may also encourage small businesses to start legal proceedings over an issue, which is successfully settled before trial. This will result in legal costs to the parties, but not additional costs to the state.
- 1.31 Any indication of the number of such cases is purely speculative – though it may be ten times greater than the number of trials.

Cost of settled cases

- 1.32 We have sought information about the costs of this litigation to applicants. The only source we have found is a survey of legal aid costs published in 2001.⁸ It was carried out before the 2000 reforms, when self-employed people were still able to use legal aid to bring business related claims. The study included 115 cases brought by self-employed people against contractors. The occupations covered a wide span of businesses, though the biggest categories were builders, shopkeepers and drivers.
- 1.33 The cases typically involved the issue of court proceedings but not a trial. They were brought in both the High Court and the County Court, but not the small claims court (where legal aid was not available).
- 1.34 The **mean cost for the small business was £6,337** and the median cost was £3,148. There is no indication of the costs to the opponent, which is likely to be of a similar scale.

⁸ T Goriely and P Gupta, *Breaking the Code: the impact of legal aid reforms on general civil litigation*, IALS 2001.

Attachment 6

FROM: [REDACTED]
DATE: 9 December 2008

TO: [REDACTED]
CC:

Unfair Contract terms

- 1.35 This note considers the effect of maximum harmonisation of unfair contract terms law, looking specifically at whether any existing UK provisions would no longer be permitted under such a regime. It considers four main areas: controls on negotiated terms; rules rendering some terms of no effect; the additional “fair and reasonable” jurisdiction granted to the FOS under the Financial Services and Markets Act 2000; and provisions within the FSA rule book about how terms are presented to consumers.

Negotiated terms

- 1.36 Article 30(1) of the proposed Directive on Consumer Rights (“the Directive”) provides that “this chapter shall apply to contract terms drafted in advance...”. This suggests that Directive does not apply to negotiated terms, thus leaving such terms outside the harmonised field. The other view could be that negotiated terms are within the field, but the rules provided by the chapter do not apply and so negotiated terms cannot be assessed for fairness. We have considered the recitals to see which reading is more appropriate.
- 1.37 Recital 45 provides that “There is a need to protect consumers against unfair contract terms which have not been individually negotiated, such as standard terms. The rules on unfair terms should not apply to terms which the consumer agreed upon following a negotiation”.
- 1.38 This suggests that the rules do not apply to negotiated terms, as there is no need to protect consumers in such situations. The logic of maximum harmonisation would lead to the conclusion that member states may not provide for such rules. However, the Recital is ambiguous. It may be that there is simply a perceived need in Europe to make sure that standard terms are covered in all states, as this is where the main danger of unfairness lies. Although negotiated terms do not *need* to be covered, states may do so if they wish.
- 1.39 The Green Paper on the Consumer Acquis asked “To what extent should the discipline of unfair contract terms also cover individually negotiated terms?” Three options were given, the third of these being “Status quo – Community rules would continue to apply exclusively to non-negotiated or pre-formulated terms”. The use of the term “status-quo” suggests that, if this option was taken, member states would, as now, be entitled to have their own protection for negotiated terms, even in the event of maximum harmonisation.
- 1.40 This view was taken by France and Norway in their responses to the Green Paper. France stated that the field of the proposed directive was specifically limited to adhesion contracts, and the regulation of negotiated terms should be left to member states. Norway, also supporting the status quo option, suggested that they were doing so in order to be allowed to continue regulating negotiated terms at a national level.
- 1.41 However, other contributors responded on the basis that adopting the third option would restrict the rights of member states to legislate in this area. The business sector said that further protection than that provided by the UCPD would go against the freedom of contract. The European Parliament stated that it did not consider it appropriate to apply the rules on unfair terms to individually negotiated terms so as to restrict the freedom of the contracting parties to conclude contracts. This suggests that some interested parties thought that no additional protection should be allowed as regards negotiated terms.
- 1.42 Removing the protections for negotiated terms would be a major change for UK law. The Unfair Contract Terms Act 1977 covers many negotiated terms. Section 2(1) provides that liability for death or personal injury cannot be excluded in any circumstances. Section 3 then states that where one party deals as a consumer, the other party cannot restrict liability for breach of contract or claim to render a contractual performance substantially different from that which was

reasonably expected, except in so far as the term is reasonable. The implied terms arising from the Sale of Goods Act 1979 (sections 12 to 15) can also not be excluded as against consumers, even by negotiation.⁹

- 1.43 In our 2005 Report, the Law Commissions recommended that all non-core terms in consumer contracts should be reviewable for fairness, even if they purported to be individually negotiated. We quoted examples provided by the OFT, where a 100% deposit was negotiated down to 90%, and a 90% deposit was still unfair. It is common in such circumstances for salesmen to be given only a small amount of discretion within tight pre-set margins. Rather than provide an all or nothing test of whether negotiation has occurred, we thought that the presence of negotiation should be only one factor for the courts to take into account in assessing fairness.
- 1.44 We think that the better view is that negotiated terms fall outside the harmonised field. This point was put clearly by both France and Norway in the responses to the Green Paper. However, the issue is not beyond all doubt, and some business commentators thought that member states would be losing the right to legislate in this area. We think it would be helpful if the recitals were re-written to clarify that the negotiated terms were not only outside the Directive but also outside the harmonised field.

Terms of no effect

- 1.45 The question is whether a statutory provision stating that a term is of no effect (rather than considering whether it is unfair) would fall within the harmonised field.
- 1.46 There are ways, other than unfairness, by which a contract term may be held to be of no effect. Chitty on Contracts suggests that there are five general groups into which objects which on grounds of public policy invalidate a contract may be classed.¹⁰ These are: objects which are illegal by common law or by legislation; objects injurious to good government either in the field of domestic or foreign affairs; objects which interfere with the proper working of the machinery of justice; objects injurious to marriage and morality; and objects economically against the public interest. Whilst a contract may be invalid as a whole by virtue of public policy reasoning, if a contract term is severable then it may be that only one or a few terms are of no effect.
- 1.47 Examples of such terms include where a contract provides for trading with the enemy, a term providing for the sale or transfer of public appointments and terms involving maintenance and champerty. The first two are unlikely to occur in a consumer contract. However, the rules against “maintenance and champerty” outlaw contingency fees in court actions, and do apply to consumers.
- 1.48 We think that if a term is stated to be of no effect due to unfairness, then this must fall within the harmonised field and so such a provision would not be allowed in the event of maximum harmonisation. However, if a term is to be of no effect due to illegality¹¹ or public policy then the situation should fall outside of the harmonised field so that such a term may be declared to be of no effect.
- 1.49 Whether this would be the case under the proposed Directive is not beyond doubt and we feel that it would be helpful if it were clarified in a recital.

The FOS

- 1.50 Section 228(2) of the Financial Services and Markets Act 2000 provides that “a complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all circumstances of the case”. This, in essence, gives the ombudsman a power to act outside the law. Ombudsmen need not apply rules or regulations directly, even though they use them as part of the process of deciding what is fair and reasonable in each case.
- 1.51 The question is: when the FOS approaches a dispute about potentially unfair terms in financial services contracts, would a maximum harmonised regime mean that it is limited to the strict application of the Regulations? Alternatively, may ombudsmen continue to take a more broad brush non-legalistic approach to what

⁹ Section 6 of the 1977 Act.

¹⁰ Chitty on Contracts (29th ed 2004) para 16-005.

¹¹ See, for example, Race Relations Act, s 72(1) and Sex Discrimination Act 1975, s 77(1).

is fair and reasonable in all the circumstances of the case? There a danger that the broader discretion set out in section 228 of FSMA could be considered invalid if it allows the ombudsmen to impose decisions on financial service providers which go beyond the Directive.

- 1.52 In 2006 the Law Commission carried out a survey of 50 ombudsman decisions concerned with the application of insurance policy terms.¹² We were interested to see how the FOS approached these types of case. We found that the FOS frequently followed the “spirit” of the Unfair Terms in Consumer Contracts Regulations, but tended not to take a technical or legalistic approach to them. Thus, although the FOS frequently addressed issues of fairness and transparency, the Regulations themselves were quoted in only two out of the 50 cases.
- 1.53 There were some differences of approach between the FOS’s broad-brush approach and the technicality of the Regulations. In particular, the FOS dealt differently with the matter of timing.
- 1.54 Currently, the FOS may hold that although a term is fair at the time of the contract, it has been applied in an unfair manner. An example was an insurance case about a stolen bicycle.¹³ A clause in the contract stated that theft would not be covered if a bike were not locked to a secure structure at the time. A bike, not so locked, was stolen, and the insurer refused to pay. However, the bike was stolen from a location where many other bikes, all securely locked, had also been stolen at the same time. As it appeared that the bike would have been stolen whether or not it was securely locked, there was no causal connection between the breach and the claim. The FOS held that the term had been applied unfairly. This is different from saying that the term was unfair at the time of contract – it would be reasonable for the insurer not to pay if the lack of a lock was causally connected to the theft.
- 1.55 The problem with the timing comes from Article 32(2) which states that “the unfairness of a contract term shall be assessed... at the time of the conclusion of the contract...”. This means that the ombudsman cannot take into account subsequent events (such as how the bicycle was stolen). The term is either fair (in which case it applies to all cases) or unfair (in which case it applies to none, irrespective of the circumstances). The ombudsman would find it difficult to say that a term which was fair at the time of the contract was applied in an unfair way in the particular circumstances of the case.
- 1.56 The danger is that:
- (1) Ombudsmen may be required to be more technical or legalistic in the way they approach unfair terms.
 - (2) Insurers would find it easier to appeal their decisions, on the grounds that they go further than the Regulations.
 - (3) There could be a challenge to the legality of the “fair and reasonableness” jurisdiction set out in section 228 of FSMA, in so far as it allows the FOS to go further than the Directive in deciding whether a term in a contract for financial services should not be applied because it is unfair.
- 1.57 The non-legalistic approach taken by the FOS is one of its great strengths. We think that it would be beneficial to seek a carve-out for financial services in the Directive, thus protecting a broad ombudsman approach in the fields of banking, insurance and pensions, where most of the significant disputes occur.

FSA handbook

- 1.58 The FSA handbook contains several requirements about how product information is presented. For example, under ICOBS Rule 6.4.4, protection insurers must provide the consumer with a policy summary that complies with the terms of Annex 2. The Annex includes many details of presentations, including a requirement that a “keyfacts logo” is put in a prominent position at the top of the policy summary. This is a clear rule, and insurers may be fined for its breach.
- 1.59 Article 31(4) of the Directive provides that “Member States shall refrain from imposing any presentational requirements as to the way contract terms are expressed or made available to the consumer”.

¹² Appendix B to the Law Commission’s Insurance Contract Law Issues Paper 2 – Warranties.

¹³ Discussed at p 113 of the Law Commission’s Issues Paper on Warranties.

- 1.60 In our view, FSA requirements such as Rule 6.4.4 fall squarely within the scope of this provision. We have considered suggestions that the Rule only covers pre-contractual information and not contractual terms themselves, but do not think that this distinction can be made. Article 31(2) of the Directive covers pre-contract information, stating that “contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract, with due regard to the means of communication used”. Article 31(4) specifically prevents additional presentational requirements.
- 1.61 If the UK Government wishes to preserve the FSA’s ability to require keyfact documents, we think it will need either to remove Article 31(4) or secure a carve-out for financial services.

Topic	12. Paucity of private (criminal) prosecutions
Date of Response	12 February 2010
Question	Are you taking steps to improve the position? Will "Class Actions" help?

Answer

The Law Commission is not currently looking at the issue of private prosecutions for fraud by representation or false accounting. I have also checked our records and it is not an issue that we have considered in previous work. Unfortunately, I am therefore unable to provide you with any information directly related to your enquiry.

By way of background, the Law Commission of England and Wales is a non-departmental public body established by the Law Commissions Act 1965. The Act sets out the functions of the Law Commission and places it under a duty to "keep under review all the law with which [it is] ... concerned with a view to its systematic development and reform." The Commission produces reports following consultation with the public on areas of the law which are considered to be in need of reform. Our programme of work is approved in advance by the Lord Chancellor every three years or so, although we may take on additional projects at the request of a government department.

We will be consulting on our next programme of work later this year and will consider the issue of private prosecutions raised in your email, along with any other information you might wish to provide. The issue will be considered alongside all other proposals for review that we receive. The Commission's decision to review an area of law reform is based on the following criteria:

Importance - the extent to which the law is unsatisfactory, and the potential benefits from reform
Suitability - whether the independent non-political Commission is the most suitable body to conduct the review

Resources - valid experience of Commissioners and staff, funding available, and whether the project meets the requirements of the programme.

Further information about the work we do including our current projects can be found on our website: www.lawcom.gov.uk.