

**Law Commission and Scottish Law Commission
Insurance Contract Law: Third Consultation Paper**

**THE BUSINESS INSURED'S DUTY OF
DISCLOSURE**

RESPONSE TO QUESTIONS

YOUR DETAILS

This document lists the provisional proposals and questions, as set out in Part 18 of the Consultation Paper. It is designed to help you in responding.

Name of respondent: **British Insurance Brokers Association.**

Type **Trade Association**

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Responses are normally treated as public documents and copies may be provided under Freedom of Information legislation. If you want the information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation but cannot give an assurance that confidentiality will be maintained in all circumstances. Should you wish to submit a confidential response we would suggest that you contact us in advance.

I wish to keep this response confidential for the following reasons:

This is response form 1 of 2 for this Consultation Paper. The response form for the law of warranties can be found on the websites of the Law Commission and Scottish Law Commission. Please return this form by **26 September 2012** to commercialandcommon@lawcommission.gsi.gov.uk.

THE DUTY OF DISCLOSURE AND MISREPRESENTATION

The need for reform

- 1.1 Do consultees agree that there is a need to reform sections 18 to 20 of the Marine Insurance Act 1906 to clarify the duty of disclosure in business insurance? (4.83)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
BIBA strongly agrees that it is necessary to maintain London's preeminence in insurance world.					

Small and large businesses

- 1.2 Do consultees agree that the same legal regime should apply to all businesses, both large and small? If consultees think that special protections should apply to smaller businesses, please provide evidence of need. (4.86)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
It becomes unwieldy if we try and segment further.					
Evidence of need:					

Clarify the duty of disclosure

1.3 Do consultees agree that:

- (1) the essential elements of section 18(1) of the Marine Insurance Act 1906 should be retained, so that before entering into an insurance contract, a business policyholder should disclose every material circumstance which it knows or ought to know; but

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- (2) that the concepts of material circumstance and knowledge should be clarified in legislation? (5.78)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

A fair presentation of the risk

1.4 In particular, should legislation specify that:

- (1) A material circumstance is a circumstance required to provide a fair presentation of the risk?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

(2) A fair presentation of the risk should include:

(a) Any unusual or special circumstances which increase the risk;

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
We feel that the question should be more specific. Underwriters should give examples of what might increase the risk. It is important to take into account the trade involved.					

(b) Any particular concerns about the risk which led the policyholder to seek insurance;

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

(c) Standard information which market participants generally understand should be disclosed?

Agree:	<input type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input checked="" type="checkbox"/>
Comment:					
Helpful if protocols could be determined for different classes of insurance. Standard information should be defined and stated whether from market or customer perspective.					

- (3) Where the insurer receives information which would prompt a reasonably careful insurer to make further enquiries, an insurer who fails to make appropriate enquiries should not have a remedy for non-disclosure of any fact which those enquiries would have revealed? (5.79)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- 1.5 Do consultees agree that these principles would encourage insurers and policyholders to work together to improve pre-contract disclosure? (5.80)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- 1.6 Do consultees agree that other aspects of the doctrine of waiver can be left to the courts? (5.81)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

Writing the inducement test into legislation

1.7 Do consultees agree that:

- (1) If sections 18 to 20 of the Marine Insurance Act 1906 are to be amended the opportunity should be taken to include the inducement test within the statute?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
It is existing law already but would be good to have it all in one place.					

- (2) The statute should provide that to obtain a remedy for non-disclosure or misrepresentation, the insurer must show that without the non-disclosure or misrepresentation it would not have entered into the contract at all, or would have done so only on different terms? (5.84)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

The policyholder's knowledge: section 18

1.8 Do consultees agree that:

- (1) For the purposes of deciding what a business policyholder should disclose to an insurer before concluding an insurance contract, the issue of what constitutes knowledge should be clarified in legislation?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
Would assist broker in providing appropriate advice and guidance					

- (2) Where a business policyholder is a corporate entity, "knowledge" should include information known to:

- (a) The directing mind and will of the organisation; and

Agree:	<input type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input checked="" type="checkbox"/>
Comment:					
We feel that "include" should be amended to "be"					

- (b) The persons who arranged the insurance on behalf of the organisation?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

(3) For these purposes “knowledge” should mean:

(a) Actual knowledge; and

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

(b) “Blind eye” knowledge?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

(4) A business policyholder should also be under a duty to disclose information that would have been discovered by reasonable enquiries, which are proportionate to the type of insurance and to the size, nature and complexity of the business? (6.78)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
We would recommend the word “also” is deleted.					

The policyholder's knowledge: section 20

1.9 Do consultees agree that:

- (1) Rather than distinguish between “matters of fact” and “matters of expectation or belief”, section 20 of the 1906 Act should be amended to distinguish between matters which the policyholder knew or ought to know about (as previously defined) and other matters?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
Simplifies matters					

- (2) Where the representation is one which the policyholder knew or ought to know about, it must be true?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- (3) Where the representation is not one which the policyholder knew or ought to know about, it must be made in good faith? (6.95)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

The broker's knowledge: section 19

1.10 Do consultees agree that:

- (1) There is a need to clarify the scope and nature of section 19(a) of the Marine Insurance Act 1906?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
Our preference would be to delete 19(a) in entirety as this disadvantages the broker. For example a broker undertaking a pre cover survey could increase the burden of disclosure for the insured over which he may not have any control.					

- (2) The amended section 19(a) should:

- (a) apply to producing, placing and intermediate brokers?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- (b) be confined to information received or held by that agent in its capacity as agent for the policyholder?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- (c) include information which the broker actually received in its capacity as agent for the policyholder, together with information which the broker deliberately avoided acquiring?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- (3) Where the broker is involved in carrying out reasonable enquiries on behalf of the business policyholder, the insurer should have a remedy against a policyholder if the broker fails to disclose information which it would have discovered by those reasonable enquiries?

Agree:	<input type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input checked="" type="checkbox"/>
Comment:					
Brokers should carry out these enquiries at the discretion of the Principal. We do not wish to increase the obligations of the broker over that which applies to the insured.					

- (4) Section 19(b) should be repealed? We welcome views on whether there are any reasons to preserve this section. (7.78)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

The insurer's knowledge: section 18(3)(b)

1.11 Do consultees agree that, in the absence of inquiry, a business policyholder need not disclose:

(1) Matters of common knowledge?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

(2) Information relating to the practices and risks of the trade which a well-informed insurer writing that particular class of business ought to know?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

(3) Information which is already known to:

(a) The directing mind and will of the insurers; or to

Agree:	<input type="checkbox"/>	Disagree:	<input checked="" type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
If this refers to the main board, they would not normally be involved in these decisions.					

(b) The persons who make the underwriting decision?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- (4) Information held by the insurer's agent or employee which ought to have been communicated to the person making the underwriting decision? (8.50)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
By way of example					
If an insurer survey is carried out or doctors report fails to detect a condition then the insurer should not be able to repudiate, detected by a reasonably competent person.					

Proportionate remedies

- 1.12 Do consultees agree that, where the policyholder's conduct is not dishonest, proportionate remedies should be the default regime for non-disclosure and misrepresentation in business insurance? (9.39)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- 1.13 Do consultees agree that the remedy should focus on the contract that the insurer would have entered into with the policyholder if the policyholder had fully complied with its duty of disclosure? In particular:

- (1) If the insurer would not have entered into the insurance contract at all, the insurer may avoid the contract?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- (2) If the insurer would have entered into the contract on different terms (excluding the premium), the contract is to be treated as if it included those terms?

Agree:	<input type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input checked="" type="checkbox"/>
Comment:					
We broadly support this.					
If both 2 or 3 are available to the Insurer, then the policyholder can elect to pay a higher premium or pay a deductible.					

- (3) If the insurer would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim (which may be additional to the inclusion of other terms)? (9.40)

Agree:	<input type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input checked="" type="checkbox"/>
Comment:					
See comments above					
The proportion of claims is magnified in business contracts, e.g. a £500 premium for a £5m loss limit is excess of £5m. If disclosure increases premium to £1,000, the claim reduction is disproportionate.					

The effect on reinsurance

- 1.14 Do consultees agree that the effect of a proportionate remedy on reinsurance can be left to freedom of contract between insurers and reinsurers? (9.53)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

A right to cancel on reasonable notice

1.15 Where an insurer is entitled to apply a proportionate remedy to a claim, should the statute provide that:

(1) the insurer has the right to cancel on reasonable notice; and

Agree:	<input type="checkbox"/>	Disagree:	<input checked="" type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
Reliance on policy already negotiated and its cancellation conditions.					

(2) the policyholder has the right to cancel on reasonable notice? (9.62)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
Policyholder should be provided with opportunity to cancel with return of premium.					

Dishonest conduct

- 1.16 Do consultees think that the statute should provide a specific definition of “deliberate or reckless” non-disclosure and misrepresentation? Alternatively, should the statute refer to fraudulent conduct and leave this to the courts to define in accordance with the existing law? (9.74)

Yes – use specific definition:	<input type="checkbox"/>
No – refer to fraudulent conduct:	<input checked="" type="checkbox"/>
Other:	<input type="checkbox"/>
Comment:	
This maintains existing status.	

- 1.17 If deliberate or reckless conduct should be defined, should it be defined as conduct where the proposer:

- (1) had actual knowledge of the relevant facts (or shut its eyes to the relevant facts), and

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

(2) (in the case of omissions) knew that the facts were relevant to the insurer, or did not care whether or not they were relevant to the insurer?
(9.75)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

1.18 Where the proposer has behaved deliberately or recklessly, do consultees agree that the insurer should be entitled to:

(1) avoid the policy and refuse all claims; and

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
Only if behaviour is fraudulent.					

(2) keep any premium paid? (9.76)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
As above.					

Contracting out

1.19 Do consultees agree that:

- (1) The parties to a business insurance contract should be entitled to contract out of the proportionate remedies for non-disclosure and misrepresentation in favour of the insurer through a contract term; but

Agree:	<input type="checkbox"/>	Disagree:	<input checked="" type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
Due to uneven bargaining position of each party.					

- (2) That such a term is only effective if it is written in clear, unambiguous language and specifically brought to the attention of the other party before the contract is formed? (9.85)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

The duty of good faith

1.20 Do consultees agree that the duty of good faith should continue as an interpretative principle, but should not in itself give either party a cause of action? (10.22)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

1.21 Should section 17 refer to “utmost good faith” or simply “good faith”? (10.27)

Utmost good faith:	<input type="checkbox"/>	Good faith:	<input checked="" type="checkbox"/>
Other:	<input type="checkbox"/>		
Comment:			

ASSESSING THE IMPACT OF REFORM

Disclosure: quantifying the effects

1.22 We invite comments on the view that legal fees on non-disclosure disputes cost the UK economy up to £50 million a year. (17.20)

Agree:	<input type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
No comment					

1.23 We welcome information on the scale of legal fees associated with disputes over non-disclosure in commercial insurance in the Scottish courts. (17.21)

Comment:	No comment.
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- 1.24 What additional costs are associated with each dispute, in terms of staff time and disruption to both policyholders and insurers? (17.22)

Comment: **No comment**

The administrative costs of exchanging information

- 1.25 Have consultees encountered instances of “data dumping”, whereby businesses disclose large quantities of irrelevant information? If so, what costs are wasted by this practice? (17.27)

Yes: No: Other:

Comment: **No comment**

- 1.26 Would the costs of presenting a risk be reduced by greater clarification of what information should be included? (17.28)

Yes: No: Other:

Comment:

- 1.27 Would insurers incur additional costs by considering presentations and asking appropriate questions before entering into contracts? (17.29)

Agree:	<input type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:	No comment				

Claims payments

- 1.28 In commercial property insurance, how many claims are rejected for nondisclosure? (17.35)

Comment:	No comment
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- 1.29 We welcome views on the tentative estimate that non-disclosure issues are raised in 4% of claims by value, of which 1% lead to outright rejection and 3% are settled. (17.35)

Agree:	<input type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:	No comment				

Transitional costs

- 1.30 We seek views from insurers and businesses about how much it might cost to review processes, develop protocols and train staff to adjust to the proposed reforms. (17.44)

Comment:

We do not consider this to be unmanageable. Important to achieve the reforms.

Annual benefits

Fewer disputes

- 1.31 We invite comments on the estimate that the reforms would reduce legal costs for both insurers and businesses by between £10 million and £20 million a year. (17.51)

Agree: Disagree: Other:

Comment: **No comment**

More effective insurance

- 1.32 We welcome views on the effect of the delay or rejection of an insurance claim for reasons of non-disclosure for the business, employees, creditors and the wider economy. (17.55)

Comment: **No comment.**

Part B

Law Commission and Scottish Law Commission Insurance Contract Law: Third Consultation Paper

THE LAW OF WARRANTIES RESPONSE TO QUESTIONS

YOUR DETAILS

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Type	Trade Association
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WARRANTIES

The need for reform

- 1.33 Do consultees agree that there is a need to reform the law of warranties as set out in sections 33 to 34 of the Marine Insurance Act 1906? (14.1)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					
Conditions precedent to liability is a concern, as are statements of fact. Proposals should also relate to these areas as well as warranties.					

Abolishing basis of the contract clauses

- 1.34 Do consultees agree that, in business insurance, a term in a proposal form, contract or accompanying document which states that the policyholder warrants the accuracy of the answers given or that the answers form the basis of the contract should be of no effect? (15.13)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

Warranties and the suspension of liability

1.35 Do consultees agree that where a warranty is not complied with:

(1) the insurer's liability should be suspended? and

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

(2) liability should be restored where the policyholder remedies the breach?
(15.25)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

Excused non-compliance and waiver

1.36 Do consultees agree that sections 34(1) and 34(3) of the Marine Insurance Act should be retained? (15.30)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

Should insurers be given a statutory right to cancel?

- 1.37 Do consultees agree that where the policyholder breaches a warranty, the insurer's right to cancel the contract should be contractual rather than statutory, and therefore governed by the terms of the contract? (15.34)

Agree: Disagree: Other:

Comment:

Terms to reduce particular risks

- 1.38 Do consultees agree that:

- (1) Where a term is included to reduce the risk of a particular type of loss, then in the event of a breach of the term, the insurer's liability should be suspended only in respect of that type of loss?

Agree: Disagree: Other:

Comment:

- (2) Where a term is included to reduce the risk of a loss at a particular time or in a particular location, then in the event of breach of the term, liability would be suspended only in relation to losses at that time or at that location? (15.53)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

Contracting out

1.39 Do consultees agree that:

- (1) In consumer insurance, a term which purports to put the consumer into a worse position as regards breach of warranty than that set out in the proposed reform should be of no effect?

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- (2) In business insurance, a term which permits an insurer to refuse a claim
- (a) for a breach of warranty which was remedied before the loss; or
 - (b) for breach of a term designed to reduce the risk of another type of loss (or loss at a different time or place)

is only effective if it is written in clear, unambiguous language and specifically brought to the attention of the other party before the contract is formed? (15.59)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

The requirement for writing

- 1.40 Do consultees agree that an express requirement that, in order to take effect, a warranty must be in writing is not necessary? (15.67)

Agree:	<input type="checkbox"/>	Disagree:	<input checked="" type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

Marine insurance

- 1.41 Do consultees agree that the rules outlined above should apply to express warranties in marine insurance? (16.5)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- 1.42 Do consultees agree that the implied marine warranties should be retained? (16.10)

Agree:	<input checked="" type="checkbox"/>	Disagree:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Comment:					

- 1.43 Do consultees agree that where an implied marine warranty has been breached, the insurer's liability should be suspended, and resume once the breach has been remedied? (16.18)

Agree: Disagree: Other:

Comment: We think that in marine insurance the parties should be free to contract out of the default regime as regards specific marine warranties.

- 1.44 Do consultees agree that the voyage conditions set out in sections 42 to 49 of the Marine Insurance Act 1906 should be retained? (16.25)

Agree: Disagree: Other:

Comment: We think that, like implied warranties, the voyage conditions should be retained in the statute, especially as in our experience they do not in practice cause any problems and as the parties are free to contract out of them.

Reinsurance

- 1.45 Do consultees agree that the default regime for breach of warranty should apply to reinsurance in the same way as it applies to direct business insurance? (16.31)

Agree: Disagree: Other:

Comment:

ASSESSING THE IMPACT OF REFORMS

1.46 Do consultees agree that the proposed reform of the law of warranties will result in:

(1) Small savings in legal costs; and

Agree: Disagree: Other:

Comment: **No comment**

(2) Increased confidence in UK law? (17.66)

Agree: Disagree: Other:

Comment: