Evidence

Consumer Redress for Misleading and Aggressive Practices

Response from Citizens Advice and Citizens Advice Scotland to the Law Commission and the Scottish Law Commission

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Summary and general comments

Straightforward rights of redress

We strongly support the objective to gain straightforward private rights of redress for misleading and aggressive practices. We also support the proposed use of simpler language such as 'liabilities of traders' and 'remedies for consumers' in new legislation to enact these rights. In order to achieve this straightforward redress regime, we agree that, existing misrepresentation law needs to made accessible for consumers and that they can obtain redress for aggressive practices.

Inclusion of non-contractual demands

We completely agree that the scope of the CPRs includes non-contractual demands for payment such as civil recovery for shoplifting, copyright illegal download claims and 'penalty' charges for parking on private land.

We do not agree that claims for non-contractual demands should only be possible where money has been paid, as this will limit consumers' ability action to challenge aggressive practices. Other EU Directives which cover markets where pressure selling is commonplace e.g. timeshare, take account of the fact that once money has been paid, it is difficult to secure its return.

The roles for enforcement and redress

We believe that enforcement and redress need to work together to stop unfair trading practices. Enforcement alone will not be sufficient to deter bad practices, because the cost of enforcement and the relatively low level of fines can mean that illegal trading is still profitable. If rogue traders had to compensate those consumers who had experienced a loss as a result of the illegal practice, they would soon realise that fair trading is more profitable. In addition, if consumers are to actively shape markets, the consumer protection regime needs to provide redress as well as stop the wrongdoing.

Proposed tiered remedies

We agree that the proposed tiered remedies are simple to apply and that they would provide adequate redress for most cases of misleading and aggressive practices that come to the attention of the CAB service. In tier one, unwinding is a simple alternative to rescission and the simple percentage approach suggested for a discount on the price in tier one will work well. There should, however, be an additional 75 per cent option. The gap between 50 per cent and 100 per cent is too big and has not been justified. We believe that tier two provides sufficient scope for additional damages claims.

Remedies for aggressive debt collection and mis-sold financial services

Whilst we agree that it is essential for aggressive debt collection to be included in scope, we are concerned that consumers who are subject to aggressive debt collection practices for money that they are legally liable to pay, will face two serious consequences. Firstly it

gives the message that aggressive debt collection is sometimes acceptable and secondly people will face further severe problems paying other commitments if they are pressurised into prioritising payments to one debt as a result of aggressive collection tactics.

We are also concerned about the exclusion of financial services. Where financial services are bundled with other products, such as in the case of warranties and payment protection insurance (PPI), consumers may find they have to take their case through two separate regimes to obtain redress for one bundled purchase. If financial services are included in the scope, consumers will be able to get redress more easily.

Creditor liability

We agree that connected lender liability under section 75 of the Consumer Credit Act 1974 should include liability for a supplier's aggressive practices. We do not agree, however, that the connected lender's liability for the supplier's act should be capped at the amount of the loan plus interest, unless it is clear that existing consumer protection under the Consumer Credit Act 1974 will remain available following proposed reform of financial services regulation. The consultation proposals could otherwise reduce current protection which can help deter unfair commercial practices relating to creditor-debtor-supplier agreements.

Simplification of consumer protection law

We are concerned that consumers may find it confusing to have to decide whether to use the proposed new tiered system or existing goods and services legislation. We believe that this needs to be addressed in the proposed Consumer Rights Act which will contain these proposals and simplification of consumer protection law..

Introduction

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone, about their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims:

- to provide the advice people need for the problems they face; and
- to improve the policies and practices that affect people's lives.

The Citizens Advice service is the largest independent network of free advice centres in Europe, providing advice from over 3,000 outlets, including GPs' surgeries, hospitals, community centres, county courts and magistrates' courts, throughout Wales, England and Northern Ireland.

Citizens Advice Scotland (CAS) is the umbrella organisation for Scotland's network of over 80 Citizens Advice Bureau (CAB) offices. These bureaux deliver frontline advice services through more than 200 service points across the country, from the city centres of Glasgow and Edinburgh to the Highlands, Islands and rural Borders communities.

Citizens Advice Bureaux in England and Wales assisted two million clients with over seven million problems in 2010/11. These included:

- 134,270 problems about consumer goods and services;
- 2,268,031 debt problems
- 132,019 problems about financial services
- 51,345 problems about travel, transport and holidays
- 90,117 utility problems

The Citizens Advice service in Scotland dealt with over 500,000 new issues in 2009/10, representing around 1,500 for every day of the year and a nine per cent increase from the year before.

The need for reform

Q.1 Do consultees agree that there is a need for statutory reform to: (1) Simplify and clarify private redress for misleading practices?

Citizens Advice and Citizens Advice Scotland agree that the current law is complex and inaccessible, and so is rarely used by consumers to tackle unfair misleading practices:

> A CAB in the East Midlands saw a woman on a low wage. She had taken out a particular 3G mobile phone contract because the retailer had promised unlimited data access. She was therefore shocked to receive a demand for £8,000 from the airtime provider. for excess data access use. She found that the small print in the agreement did not confirm what the sales person had told her.

A CAB in North London reported that an elderly man had spent £4,000 over time on products from a group of catalogues. He had made the purchases because he had been receiving letters stating he had been entered into a prize draw and would win £500,000.

A West of Scotland CAB client agreed to a one month trial of a medicine for arthritis for £14.99, following a telesales call. Three days later she received 10 packets and found her credit card had been debited for £150.

The provision of a simple means of accessing redress will reinforce the message that misleading commercial practices can be tackled. We agree that the reform needs to be statutory so that the protection it offers and the proofs required are clear and do not solely rely on obscure case law.

(2) Extend private redress for aggressive practices?

We believe that the extension of private redress to aggressive practices is essential. This is a gap in consumer protection that cancellation rights and information provisions cannot always fill. As the consultation explains, it is easy for rogue traders to evade these provisions and to rely on pressure selling and scare tactics to sell products or to secure payments consumers would not otherwise agree to make. Bureaux frequently report a range of situations where aggressive practices are used:

A CAB in the North West of England reported that debt collection agents rang an unemployed man at home about a loan of £2,000. As he was out at the time, they spoke to his mother instead. They were very aggressive, threatening to bankrupt the man if he did not pay within seven days. As a result, the mother, who was frightened of what might happen if she did not make payments, agreed to pay £30 per month off the debt, even though she was not legally liable to pay.

An elderly woman who had been recently widowed sought advice from a CAB in the South West of England when she received a letter from solicitors accusing her of copyright infringement and claiming £495. She had been caused considerable distress by this, completely denied the claim and had no idea on what basis the accusation has been made.

A North of Scotland CAB client sought advice having exhausted the complaints procedures of a company who had cold called his mother, who lived alone and had dementia, and persuaded her to buy broadband even though she had no computer. When the client, who had power of attorney, discovered that direct debits were being taken from his mother's bank account he stopped them, only to find that the company had also taken over as her phone provider and responded by stopping all outgoing calls. This was also dangerous because it made the client's mother more vulnerable as she relied on the outgoing phone line in order to use her care alarm.

Q.2 Do consultees agree that there should not be a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008?

We believe that the law needs to be changed to provide consumer redress for misleading and aggressive practices.

We agree that the banned unfair commercial practices listed in the legislation are either misleading or aggressive. The Unfair Commercial Practices Directive is due to be revisited after five years, at which point the banned practices list may be revised, but we are confident that the definitions for unfair commercial practices in the rest of the Directive should be wide enough to cover any additions. In view of the wide definition in the consultation of what would constitute a misleading practice, we agree that misleading omissions do not need to be included separately.

The consultation believes that a cautious approach is necessary, to reduce traders' costs of dealing with unfounded claims which could be passed on to consumers. We believe this approach is too cautious. If consumers were able to obtain redress for misleading omissions, they must be able to prove the omission and the resulting effect on them. This would stop frivolous and unfounded claims.

In relation to the general duty not to trade unfairly, so far we have not identified any unfair practices not covered by the provisions for misleading or aggressive practices. The general duty is sufficiently broad to capture both current and future unfair practices and acts as a safety net. The professional diligence requirement under the general duty means that businesses still need to deal fairly with consumers to avoid enforcement action.

We strongly believe that the UK Government should accept that redress for consumers is a necessary balance to the more powerful position of the businesses they deal with.

Liability - the scope of the new right to consumer redress

Q.3 Should the definition of consumer generally follow other consumer legislation, in applying to an individual who acts for purposes which are primarily outside their business, trade or profession?

Yes. We agree that it is sensible to use the definition accepted in the latest European consumer protection legislation. The changes proposed in this consultation would be introduced in the same UK Act as the Consumer Rights Directive. It would be confusing to use more than one definition for consumer in a single piece of legislation.

Q.4 Do consultees think there are cases calling for special definition of who should count as a "consumer", such as unemployed persons who might be sold training courses on the promise of a future job (employed or self-employed)?

We believe that the definition for 'consumer' is sufficiently wide to include an unemployed person who buys a training course. We suggest that this is an issue for guidance about the legislation for consumers, business, enforcers and advisers. Examples in such guidance should include where a employee makes a purchase, the cost of which they will claim from their employer and where an individual buys a product for use both as a consumer and in the course of business, such as a travel ticket for a mixed business and leisure trip.

The consultation specifically identifies the issue of training courses in this regard. Our view is that an individual who pays for training themselves is a consumer, even if the training is intended to help them get work. If the employer buys the training for an employee, the purchase is made for a business purpose and is a business to business transaction.

The transactional decisions which should give rise to redress

Q.5 Do consultees agree that the proposed Act should not provide redress for "transactional decisions", such as the decision to visit a shop?

We agree that the proposed rights to redress should only apply to clear and substantial transactional decisions.. However, we would expect that compensation for misleading actions should be available to consumers where it forms part of an enforcement undertaking or restoration order obtained by Trading Standards. This would cover practices such as claims of free entry for a children's attraction and then charging once parents arrive with their children or offers of free parking at a location where no other parking options were available, such as at an airport, and then making a substantial charge for parking. This is important if businesses are to be dissuaded from unfair practices where individual consumers' losses are too small to consider further action, but the cumulative gain for the trader would make the unfair practice attractive. We think that the provisions proposed for misleading actions will cover these examples adequately without further amendment being necessary.

Q.6 Do consultees agree that the proposed Act should provide redress where the consumer has:
(1) entered into a contract with the trader; or
(2) made a payment to the trader?

We agree, but we would also highlight that consumers need to be able to put a stop to aggressive practices where they have not made a payment because they deny liability. Redress might allow them to challenge the aggressive practice using an ADR process or a court. This would follow the proposed code for copyright claims under the Digital Economy Act 2010. This allows consumers accused of copyright infringements the opportunity to

challenge the basis of the claim using an ADR process. If the consumer is successful, the claimed infringement will no longer be kept by their internet service provider as evidence of a copyright infringement. Consequently copyright holders or their agents would no longer be able to use this to take a case. It also stops any aggressive communications the consumer has been receiving, because a decision has been made that the claim was not justified. At present, CAB clients who dispute demands for alleged breach of rules for parking on private land, copyright infringement or shop lifting are enduring very stressful aggressive practices. We believe that access to redress is essential for unfounded or speculative aggressive practices. The following cases show why this is necessary :

A CAB in London reported that a man was accused of fraud when he returned goods to a clothing retailer. The store claimed the product had not originally been bought from them and called the police. He convinced the police of his case and was released but later received a letter claiming £345 in costs and banning him from the shop. When he challenged this, the civil recovery company said they were still considering making a civil recovery claim, leaving him extremely worried by the whole experience.

A West of Scotland CAB client parked his car at a supermarket car park in the family and child zone as he had his granddaughter with him. When he came back from his shopping he had a parking ticket on his car which said he was being fined for parking in a disabled zone. He confronted the parking company and he asked one of the shop attendants to witness the fact he was not in a disabled zone. Although they admitted their mistake and said they would cancel the ticket, the client then received a £60 parking claim. He contacted the company's ticketer on site who again said that the ticket would be cancelled. The client then received letters from a debt collection agency threatening legal action if he did not pay the £60 charge plus a £10 additional charge.

A London CAB client sought advice when his father received a letter accusing him of illegally downloading a pornographic film. It included a transcript from a High Court case where the internet service provider was required to identify the subscriber. The letter said legal action could be avoided if he admitted the offence and paid a £495 compromise settlement. The client and his father were annoyed by the accusation of improper conduct and wanted to know what action could be taken against what they described as a scam.

A CAB in the East of England saw a man who was being pursued by a phone company for a debt of £214.95. He was adamant that he had had no contract with this company and did not owe them any money, so had not paid. The final demand they sent appeared to include county court papers but, when the bureau scrutinized the forms they discovered they were not from the court and had only been partially completed by the company so that no actual summons had been issued. When they challenged the company the bureau were told this was their normal practice. The client had thought he had been sued.

Q.7 Do consultees agree that the proposed Act should not provide redress for consumers against traders who mislead them as to their legal rights or make their exercise more difficult than necessary?
Q.8 If the proposed Act is to cover traders who mislead consumers about their legal rights, how should the difficulties such as quantifying the losses be overcome?

CAB evidence frequently indicates that traders mislead consumers about their rights. Consequently, CAB clients often fail to pursue the remedies to which they are entitled. The cases bureaux report show a lack of knowledge on by businesses and consumers:

> A CAB in the West Midlands saw a woman who had experienced recurring problems with the warning lights on a second hand car. The garage had been unable to resolve the problem after several attempts. Following an independent report she asked for her money back or a replacement, but was refused any redress on the grounds that the car would now be worth less.
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> A CAB in Yorkshire and Humberside saw a disabled pensioner whose new television she had bought from a high street electrical retailer was faulty. When she ask them to repair it, they insisted she contact the manufacturer. She tried this but found the makers unhelpful and the retailer continued to deny liability.

We believe that consumers who are denied their rights altogether or are persuaded to accept a lesser outcome following unfair misleading information about their rights this should be able to obtain a private right of redress. We believe this would provide two desirable outcomes:

- it would incentivise businesses to ensure that their staff understood and could apply consumer rights
- it could provide a future bargaining tool for consumers should they need to obtain redress from that business for any further problems experienced with that product.

To quantify losses we suggest that:

- Where a consumer has to pay for repairs that were wholly or partly the responsibility of the trader, their value should be claimable as a tier 1 discount, as a claim for the percentage of that repair cost that should have fallen to the trader. In this way the parties unwind the effect of the misleading or aggressive practice.
- Where a repair is accepted because a refund was wrongly refused, we agree that it is too late to remedy the situation. A tier one unwinding, however, should remain available if the fault reoccurs.

The person against whom the redress should be available

Q.9 Do consultees agree that the consumer's rights should lie only against the other party to the contract, or against the party to whom the payment was made?
Q.10 Should there be a secondary right to redress against entities higher up in the supply chain such as producers, if they are proven to be at fault?

We agree that retailers should have responsibility for compensating consumers where there have been misleading or aggressive unfair commercial practices, as is currently the case for the general law on faulty goods and inadequate services. A different approach would add confusion when consumers are deciding whether to use these proposed new rights instead of existing remedies under goods and services legislation.

Q.11 Should consumers be given a limited right to proceed against company directors or other office-holders, where the trading company or limited liability partnership is in liquidation, administration or receivership?
Q.12 If consumers had a limited right to proceed against company office-holders, what factors should apply to allow consumers to claim against a director or officer? In particular:
(1) Should the director or office-holder actually be at fault or should they be liable as an officer of the company?
(2) Should consumers be able to recover only where the misrepresentation of the director or office-holder was fraudulent, or is negligence sufficient?
(3) Should directors and office-holders be liable for aggressive practices and if so what degree of fault is required?

We believe that there is currently an imbalance between consumers and business whereby businesses who trade unfairly can escape liability by hiding behind limited liability or ceasing to trade and then restarting with a new name. In this situation, consumers can find they are dealing with what is, effectively, the same business with no liability for past trading practices. Company law disadvantages the consumers who are providing the financial lifeblood of the business when that business goes into liquidation, generally placing them at the bottom of the creditors' list. Whilst we support the need for employees' financial rights to be protected, we believe that protection of consumer deposits should be improved and that this should be part of the simplification of consumer protection law agenda. We are therefore pleased that the issue of consumer redress where businesses cease to trade has been included in research to inform the BIS simplification agenda.

We believe that consumers should have some rights of redress against company directors of failed businesses that have used unfair misleading and aggressive commercial practices. This would discourage bad practice because it would be more difficult for individuals to divorce themselves from the liabilities of their businesses. We also believe that directors and office holders should monitor the practices of their employees and agents, and should accept liability where the business is trading unfairly.

A CAB client in Wales paid a deposit of £8,000 towards a wind turbine costing £25,000 having been assured that this was a refundable deposit until planning permission was granted. They subsequently discovered that the business had ceased trading and could not be contacted. The client had taken out a mortgage to fund the purchase and was still liable for the repayments.

The products that should be covered

Q.13 (1) Do consultees agree that the proposed new Act should exclude land sales;

We agree that land sales should be excluded, but we strongly believe that letting practices should remain within scope. Citizens Advice lobbied for estate agents' lettings activities to be included in the scope of the compulsory ADR provision in the Consumer, Estate Agents and Redress Act 2007 and through codes seeking OFT approval. Bureaux see misleading claims by lettings agents about the availability of property and about the condition of the property at the beginning and end of the tenancy. Aggressive practices in this market include refusing to provide tenancy agreements and backdating a notice to quit.

A CAB in London saw a woman who had paid a £250 deposit to secure a tenancy for herself and her five children. The local authority considered her case an emergency and had advised her to find a property which would then be paid for on housing benefit. The estate agents who accepted the deposit subsequently let it to someone else. They retained the deposit claiming another property would be found. No alternative accommodation was found and when she asked for the deposit back the agents were aggressive and intimidating, frightening the client. The bureau helped her get a refund but commented this was money the client had needed to use whilst the agents were holding it.

A CAB client in the South of England received a phone call informing her she was being given notice to quit the property in which she was living with her four year old son. But when she received the written notice, it had been backdated by nearly six weeks, substantially reducing the minimum two months notice she was entitled to.

Bureaux also report scams where upfront fees are required but there is no property available.

A London CAB client found a property to rent on a classified advertisement web site. They visited the property, met the 'Landlord', paid a deposit and were given a receipt, an unsigned contract and keys. When they returned the following week the keys did not work, the Estate Agent responsible for letting the property denies renting to the client and the 'landlord' cannot be contacted. The police were informed but were unable to help.

Q.13 (2) Do consultees agree that the proposed new Act should exclude financial services?

We are not convinced that financial services should be excluded entirely. Whilst the FSA has powers to take action against firms that have mis-sold products and there is a free means of redress for consumers via the Financial Ombudsman Service, we are concerned that the proposals would not cover bundled products which include financial services where these are sold using misleading or aggressive practices. Consumers would benefit from provision for the whole transaction to be resolved in a single straightforward case.

Q.14 Do consultees agree that the proposed new Act should include misleading or aggressive demands for payment?
Q.15 Do consultees agree that demands for damages against alleged wrongdoers should be covered by the proposed new Act?
Q.16 In particular, should demands for payment following parking offences, alleged copyright infringements, wheel-clamping and "civil recovery" also be covered?
Q.17 Should the Regulations be amended to state that all commercial demands for payment are included with the definition of commercial practices?

The Citizens Advice service strongly believes that the proposed Act should include misleading and aggressive demands for payment. This must include demands against alleged wrongdoers. We believe that the CPRs already cover these transactions. If this is not the case, we are concerned that the objective of the Unfair Commercial Practices Directive to be future proof would not be met. Misleading and aggressive demands for payment cause huge consumer detriment. The impact on individuals and their families can be devastating:

> A CAB in the West Midlands reported that a 62 year old man in receipt of means-tested benefits was very distressed when he was accused of shoplifting a £20 item from a toy shop in November 2009. The medication he took for a back problem meant that he experienced memory lapses. Because of this, the police did not prosecute. He denied the claim but in May 2011, he received a letter claiming £150 to be paid within 14 days. The sum claimed took no account of the police decision and appeared to be a standard fee with no relevance to the shop's loss.
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> A woman sought advice from a CAB in the North West of England when she received a civil recovery demand for £104.52 claimed as costs associated with theft from a shop. The letter offered a settlement figure of £83.62 to avoid further action. Her young daughter had eaten chocolate worth 39 pence and she had forgotten to pay for it at the check-out. She told the bureau that she realised she had not paid for a £1 item that had become separated from the rest of the shopping either but had returned it before leaving the shop. On leaving the store, she was accosted by a member of staff of shoplifting. She offered to pay for the goods but was not allowed to do so. The police were called but took no action. The client was asked by the staff member to sign a document. He kept his hand over the text so it could not

be read, however as she was panicking, she agreed to sign. She was deeply concerned about the threat of court action and how she would pay the amount demanded out of her benefits.

An East London CAB client backed into a nearby car park to turn round and before he could drive out he had been clamped, even though he was still in the car with the engine running. He was forced to pay a £375 release fee, but when he checked afterwards there was a small sign stating that the release fee was £125.

A CAB in Yorkshire and Humberside saw a man who had taken his family on holiday to a local seaside resort for three days. Each day they ate at the same high street fast food outlet. On their return he was alarmed to find a parking enforcement notice from the fast food car park. He phoned to query this and was told that while there was no ticket machine, there was a 'blackboard' which stated that customers could not stay for more than 1 hour. The client had no recollection of ever seeing such a sign. He was faced with a potential civil charge of £100, if he failed to pay a reduced sum of £50 within 14 days. He was very worried as the family was on a very low income and could not afford to pay these charges.

A CAB in the South East of England saw a man whose wife had received a letter from a law firm acting on behalf of a media company accusing her of downloading and sharing an explicit film on a peer-to-peer network. The letter threatened legal action and went on to state that the matter could be settled without legal proceedings if a payment of £495 was made. The client felt shocked by the letter and categorically denied the allegations. He told the CAB that the tone of the letter was unnecessarily intimidating by threatening immediate legal action, and that by referring to an explicit film, he would feel shamed into paying up.

The charges being claimed often appear to be hugely disproportionate to the losses suffered, so that people do not understand how the business making the claim decided on that figure. The claims are also very aggressive in nature and threaten court action as a matter of course, but often no court claim is made.

The guidance on the CPRs should be amended to clarify that these practices are within scope. If the matter is thought to be in any doubt, an amendment to clarify this should be added to definitions in the Regulations.

The definition of misleading commercial practices

Q.18 Do consultees agree that traders:
(1) should not be liable for omissions as such?
(2) but should be liable for implied representations, where the overall presentation means that a consumer would expect the product, contract or the trader to have certain characteristics, and the trader fails to contradict that reasonable expectation?

We agree that there is no need for liability to extend to pure omissions, provided the scope of misleading actions that attract the new rights of redress extend to the quasi omissions

described at (2) above. In essence, if the overall impression the consumer is left with in that particular context is misleading, the case would be covered.

The latest cases bureaux report in relation to claims management involve challenges to council tax banding, which consumers can do free by approaching their local authority direct. The legislation that defines the claims management regime does not include this type of claim. In discussing this problem with the Ministry of Justice we have suggested this type of claims management constitutes an unfair commercial practice. We suggest that the failure to tell consumers that the service offered is free via the local authority would be a misleading action under the redress proposed.

> A CAB in the North West of England reported a client was asked for upfront fees of £185 to arrange the re-banding of their council tax. The bureau commented that this was something the client could do for free.

But traders would not have to expressly tell consumers that, for example, a new model of that product is being designed or that there will be a sale next month and stocks are such that the product the consumer is interested in purchasing seems likely to get reduced in that future sale. We agree that this would be unreasonable in cases where this would not constitute a misleading action as defined in the consultation.

We do, however, have a concern that has arisen in relation to digital switchover both for the current programme of TV switchover and a possible switchover for FM radio. We are a member of the Consumer Expert Group that advises relevant DCMS and BIS ministers on consumer needs in relation to switchover and e-accessibility. The group has recommended that retailers and manufacturers use a digital tick which would inform consumers that the TV they were buying would function fully post switchover. This was because in the lead-up to the TV switchover consumers needed to know how long the product they were thinking of buying could be used. The omission of information about the switchover could easily be a misleading commercial practice and would certainly have an effect on the consumers' transactional decisions. We believe that this is a relevant test for the proposals on misleading omissions to check that the implied representation and overall expectation model proposed works. This could be included in guidance.

Q.19 Regulation 5(2) of the Consumer Protection Regulations 2008 defined a misleading practice as either containing false information or likely to deceive the average consumer in its overall presentation. Do consultees agree that the new Act should follow the substance of this definition?

Yes. It is a wide definition that could have facilitated redress in the following case:

> CAB clients in the East Midlands were misled by a solar panel salesman. He offered the clients free solar panels telling them the only cost would be a £500 payment for a preliminary survey, which they paid. They were told the company installing the panels would do their own full survey and some of the electricity generated would be free for the clients. He looked in the loft and also asked if the property was detailed on the land registry, but the clients did not know. The following day the clients received a letter stating the company needed to put a charge on the property and that the householder would have to pay the £200 needed for land registry registration. They was not prepared to pay and told the

> bureau they had no idea why a charge was required on their property. As the salesman claimed to have carried out the initial survey, the cancellation rights available following the doorstep sale would not guarantee a refund.

Q.20 Should the new Act reproduce the lists of matters about which misleading representations may be made in Regulation 5(4) to (6) of the Consumer Protection from Unfair Trading Regulations 2008?

We believe that the detailed list should be added to guidance about the new provisions rather than listing them in the new Act. This is because they could be viewed as a substantive list and so new and emerging practices would not be covered by the law.

Q.21 Do consultees think that it would be helpful for the legislation to include examples of practices which are misleading (unless the contrary is shown)? Q.5 Do consultees agree that the proposed Act should not provide redress for "transactional decisions", such as the decision to visit a shop?

Citizens Advice and Citizens Advice Scotland agree that the banned practices are either misleading or aggressive practices so that the list makes a useful list of examples. We do not think these 31 practices need to be included in the proposed new Act. Instead, we believe that reference should be made to the annex in the CPRs and that the specific practices would be very useful for guidance on the new Act.

In addition, we note that the CPRs banned practice list will be revisited five years after the Directive originally came into force in 2006. This presents an opportunity for the annex list to be amended and updated to include new and emerging unfair practices. If the list is included in the new Act, there will need to be a provision to allow it to be updated. This may be costly in terms of parliamentary time.

The definition of aggressive commercial practices

Q.23 Do consultees think that:
(1) The proposed new Act should provide redress for aggressive practices?
(2) The definitions of coercion, abuse of power and harassment collectively cover the appropriate situations?
(3) Is it helpful to have a list of examples of aggressive practices? If so, are these examples appropriate?

The lack of redress for aggressive practice has been, in our view, the single most important gap in the scope of the CPRs. CAB clients seek advice about their experiences of aggressive practices because they expect that consumer protection rights will be available. It is vital that this gap is filled if redress is to be available in the following cases:

> An East of Scotland CAB client received a letter from her telecoms provider asking her to top up her account as she was near her credit limit. The letter was intimidating and worried the client. Her monthly bills were £39, she was nowhere near her credit limit and up to date with the payments. When the bureau spoke to

the provider they were concerned to be told the letters were standard procedure and that the client should not worry.

An 80 year old woman sought advice from a CAB in South East England after she had bought an adjustable bed costing £3,990. She had been outside with her dog when the salesman approached her. He had told her the bed would help her arthritis and left a receipt for the £1,000 deposit cheque. She realised she did not want the bed but had found it difficult to say no to the salesman. She could not read the terms on the receipt as she was partially blind and sought advice. Despite doorstep selling regulations, no cancellation rights had been provided with the receipt.

A CAB in the East of England saw a woman with four children, one of whom was disabled. She wanted advice following an aggressive visit from a bailiff. He had made rude and derogatory comments and caused a huge amount of distress. The client wanted to pay £100 off the council tax arrears he was collecting but he had insisted he could only accept the full £500. He had told her to go and borrow the money from family or friends, saying, "that's what people like you do". Notes were also put through her door threatening bankruptcy and imprisonment, neither of which were considered likely by the adviser given the level of debt and her ability to make £100 payments to settle it. When the bureau phoned the bailiffs to negotiate, they left them on hold and failed to return to the phone as soon as they were told who calling.

We believe that the availability of this redress will help address the imbalance of power between the parties that is being abused when a consumer is subjected to an aggressive practice. Redress also makes such practices potentially less profitable and thus less attractive to rogue traders.

The common elements of aggressive practices often seen in CAB cases are:

- persistence, warring down objections;
- threatening or abusive language;
- abusing vulnerability in terms of circumstances such as age, infirmity, health;
- causing fear and anxiety; and
- pursuing consumers in their homes where they can readily be targeted.

These are captured within the scope of the proposed definitions.

We agree that the aggressive practices listed in the 31 banned CPR practices should form part of a comprehensive guidance document. In addition, the Citizens Advice service is happy to allow access to our case database to provide real examples for use in guidance.

The causation test

Q.24 Do consultees agree that a trader should only be liable for a misleading or aggressive practice if it would have affected an "average consumer"?

Yes. If the average consumer was likely to make a contract, make a payment or find it difficult to resist high pressure selling practices, they should then only need to show that that practice was a significant factor in their own case. This differs slightly from the proposal on page 195. We believe that it is vital that cases where consumers are subject to aggressive practices but deny liability included. Without this, aggressive practices such as parking claims, copyright download claims, unfair or incorrect debt collection claims and unproven shop lifting civil recovery claims would not be covered. These practices and future practices of this type must be covered by rights of consumer redress.

Q.25 Do consultees agree that the definition of "average consumer" should include provision for vulnerable consumers mirroring the Regulations?

Yes, definitely. This is an important feature of the CPRs that needs to be reflected in the proposed provisions for redress. Without this provision, the "average consumer test" would be too high a benchmark for vulnerable consumers seeking redress.

Q.26 Do consultees agree that traders should only be liable if the misleading or aggressive practice:
(1) would be likely to cause the average consumer to make a decision that they would not have made otherwise to enter a contract or make a payment? and
(2) was a significant factor in this consumer's decision to enter the contract or make the payment?

Yes. CAB evidence often shows clearly that unfair misleading and aggressive practices would have influenced most consumers and was a significant factor in the particular case:

> A CAB in the South of Scotland saw a housebound 87 year old woman who had memory loss and was undergoing psychiatric treatment for depression. She had been sold a new mobility scooter although she already had one. She was contacted by the company who had sold the scooter she already had. They explained that the guarantee had run out and arranged a visit to her home. During the appointment the salesperson persuaded her to buy a new scooter for £2,769, by cheque. The company manager refused the request for a refund and she was too late to use cancellation rights. The bureau contacted Trading Standards but they confirmed that as the second scooter was not faulty she had no available redress.
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> A CAB in Wales saw a retired man who had been cold called by a company claiming he had problems on his computer. They asked him to continue the conversation online so they could scan his computer to sort these problems out. He was told the scan revealed major viruses and persuaded him to agree a two year

computer protection package which he paid for on-line. He had since researched the company on the Internet and had come to the conclusion that was a scam.

A West of Scotland CAB client sought advice for her elderly friend who had arthritis and was using a walking aid. The friend had invited a salesperson to demonstrate a hammock style bath aid. When she told the salesperson the £1,600 price was too much, he called his boss and offered a special offer on a demonstration model. The client said her friend wanted to think about it but the salesperson said the offer was only available if the friend decided there and then.

A CAB client in the North West of England agreed to a sales visit, having received a mail shot claiming he could win a bed. A salesman called and persuaded him to buy a bed for £3,870 on a credit agreement that added a further £2,500 to the cost. The bed was delivered within the next few days. When he tried to cancel, the company claimed he was outside the cancellation period. When he challenged this, they offered to reduce the price to £1,100 and then claimed he had accepted the new offer. He was adamant he had refused.

The impact on existing law

Q.27 Should the Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 continue to apply to consumers in transactions covered by the new Act?

Yes. However, as the consultation points out, consumers and their advisers seldom use misrepresentation legislation because it is difficult to access. The issue of a choice of remedy may also come under debate during proposals for the simplification of consumer protection law. We believe that the new proposals are more user friendly and so will be more likely to be used.

Remedies – the underlying policy choices

Q.28 Do consultees agree that remedies under the proposed new Act should aim to restore consumers to the position they were in before the misleading or aggressive action took place?

We agree that this model is preferable to the expectation model where the consumer would be claiming what they were misled or coerced into expecting was claimable. Furthermore, the reliance model is a useful example of how restorative justice might be delivered, for example during the expected civil sanctions pilot to try out Regulation, Enforcement and Sanctions (RES) Act powers.

Q.29 Are there any examples where an expectation measure of loss would be more appropriate?

Where a deliverable outcome is possible, the consultation suggests that a breach of contract claim could be made. This may be valuable if a case can be made for specific performance, for example of after sales services and warranty offers.

Tier 1 remedies - the "right to unwind"

Q.30 Do consultees agree that the right to unwind should last for a fixed period?
Q.31 Do consultees think that the unwinding period should last for three months (90 days)? If not, what other period would be preferable?
Q.32 Should there be a discretion to extend the fixed period in some circumstances, such as those involving vulnerable consumers?

We agree with the consultation's argument for certainty and that the right to unwind should last for a fixed period. We also agree that the period when consumers can access the right to unwind should be three months. This is the same period often allowed where cancellation rights have not been provided. The proposed Consumer Right Directive retains this as the relevant extension period in both doorstep and distance selling regulations. The 30 day option is too short for consumers to realise what is wrong in many transactions for services and six months may be too long in terms of using the product.

Q.33 Do consultees agree that the period for the right to unwind should start from the later of the following dates: when the contract is formed; the goods are delivered; the service is started?

We believe that the latest of these dates is fair because it will allow the consumer to have sufficient time to experience and examine the product.

Q.34 Do consultees agree that consumers should be able to assert their right to unwind the contract by making a complaint, indicating a desire to reject the remaining goods or services?

We are very pleased that the consultation suggests that asserting the right to unwind can be started by making either a written or verbal complaint. When CAB clients have contacted their provider by phone to complain, they do not realise that cancellation rights have to be triggered by a written notice.

> A CAB in the North West of England saw disabled woman who had asked a company to send her a mobility aids catalogue. The company told her that a salesman was in the area and would call in person. During the visit she purchased a chair but later realised it was not suitable and phoned to cancel. Despite this the chair was delivered. She had not realised that she had to cancel in writing.

> Less than an hour after buying a new mobile phone contract by phone, a CAB client in Wales realised the deal would be too expensive and phoned to cancel. The cancellation was refused. She had not realised that this was wrong but that the cancelation had to be in writing. She was eventually contacted by a debt collection agency.

We suggest that guidance for the proposed new redress should encourage consumers to note the date they complained in case this is called into question by traders.

Q.35 Do consultees agree that the right to unwind should be available where the consumer can return some element of the goods, or rejects some element of the goods or service?
Q.36 Do consultees agree that a consumer who exercises the right to unwind a contract within three months should not be required to make an allowance for their use of the product?

Yes. We believe that this remedy should be available when the goods or service has been partly used and the consumer can only return some element of the purchase. We agree that consumers in this position should not be required to make an allowance for any use. Any loss suffered by the trader as a result of the contract being unwound would reflect that they had breached legislation. If the facility to unwind a contract required detailed analysis of losses for the parties, it would lose its simplicity as a means of redress.

It is not an entirely new concept. The Consumer Credit Act 1974 states that where lenders have not supplied information required to be given to consumers, such as cancellation rights, the contract was deemed unenforceable. Even a court claim by the trader could not change this because the information was considered implicit to the contract.

Q.37 Do consultees agree that consumers who have sold goods as a result of misleading or aggressive practices should be entitled to the return of the goods within three months, in exchange for the price paid?
Q.38 Do consultees agree that where this is not possible, the trader should provide a monetary equivalent?

Yes, goods sold by a consumer following a misleading or an aggressive practice should be returned to the consumer as redress and where the goods sold are not available, the claim should be for the monetary equivalent.

Q.39 Where a consumer makes a payment which was not owed as a result of a misleading or aggressive practice, would it be helpful to provide a new statutory right to the return of the payment?
Q.40 Where the payment was owed, should the debt be offset against the payment, permitting the trader to retain the money paid?

Citizens Advice and Citizens Advice Scotland agree that consumers should have a new right for redress for money they have paid but which was not owed. However, we are very concerned about the proposal that payment should be offset against the debt.

If an unfair misleading or aggressive practice results in a consumer diverting money intended for essential household commitments to other creditors, they will need to have the right to a refund. If the money was needed for ongoing costs such as food or pre-payment of fuel it will be needed quickly. For example:

> A London CAB helped a woman negotiate payments to all her creditors. Payments were offered pro-rata to the amount of debt she owed each creditor. A financial statement showing her income, outgoings and payments made to each creditor accompanied the offer. A debt collector refused to accept the pro-rata offer of £2.04 per week on the basis that it was "too low". They sent the client payment slips for £25 per month. The client, who felt very upset by this action, called the debt collector herself to sort out the problem. Under pressure from the company, she agreed to pay £130 on a card. This left her with no money to pay for essential living expenses.

If the proposals fail to provide for this situation they will also appear to tacitly approve the unfair practice and will run counter to existing requirements such as the OFT's debt collection guidance which sets out unfair debt collection practices, evidence of which could led to enforcement action. In these situations, we suggest that consumers should have the right to unwind payment made as a result of unfair misleading or aggressive practices.

Tier 1 remedies - a discount on the price

Q.41 Where the right to unwind has been lost, should consumers be compensated by a discount on the price?
Q.42 If so, should the discounts be in pre-set bands?
Q.43 Are the proposed bands (0%, 25%, 50% and 100%) set in the right place?

We agree that compensation should be available when the right to unwind is no longer available. We agree that pre-set bands will be easy to understand and use, particularly if consumers do not have to produce evidence of their loss. There will be cases where evidencing losses that follow an unfair misleading or aggressive practice would be too difficult, and so consumers would be disinclined to seek redress.

The bands will be useful in a wide variety of dispute resolution settings, but we suggest that the addition of a 75 per cent band would increase the scope of awards.

Tier 2 remedies

Q.44 Do consultees agree that:
(1) Damages for indirect economic loss should be available, provided that the consumer proves that they would not have incurred the loss but for the misleading or aggressive practice?
(2) Damages for distress and inconvenience should be available, provided the consumer could show that an important object of the contract was to give pleasure, relaxation or peace of mind, or that the practice caused them alarm, distress, physical inconvenience or discomfort?
(3) Damages for distress and inconvenience should be modest, and in defined bands?
(4) Damages for indirect economic loss and distress and inconvenience should not be available if the trader can establish a due diligence defence?
(5) The due diligence defence within the proposed new Act should mirror the due diligence defence in the Consumer Protection from Unfair Trading Regulations 2008?

Yes, the tier 2 remedies should apply to the situations outlined in the question.

We agree that damages for indirect economic loss should be available. This would mean that losses that do not fit the proposed tier one remedies adequately cover those losses resulting from unfair misleading or aggressive practices. We agree that damages should also be available for distress and inconvenience where the trader has not shown due diligence. Bureaux often report that clients who are subjected to misleading and aggressive practices experience alarm, distress, physical inconvenience or discomfort. The availability of the tier two option may provide a valuable tool in negotiating settlements and stopping unfair practices in these cases.

> A CAB client in the South East of England responded to an advertisement offering to arrange loans. Instead of a loan the client found her bank details had been circulated to other businesses, all of whom made charges of £67.70. She had not authorised these payments and their deduction from her account left her with insufficient funds to pay the rent, causing her both distress and financial hardship.
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> A CAB in London saw a woman who was unable to keep up repayments on a loan following a relationship breakdown. After she had fallen behind with payments, she started to receive numerous letters and phone calls, including calls to her new partner and a neighbour. She told the bureau she felt threatened and humiliated by the collection agents who had put her family under immense pressure.

We agree the due diligence defence should mirror that in the CPRs.

Q.45 Do consultees think the remedies we propose as a whole offer an appropriate balance between certainty and flexibility?

We support the proposals for remedies but we are concerned that two issues need to be addressed if redress for unfair misleading and aggressive practices is to work.

Firstly, consumers must be able to challenge misleading and aggressive practices to stop communications from business claiming money where the consumer disputes liability. Whilst we appreciate that the procedure needs to be simple, consumers in this situation often receive a number of aggressive communications about alleged money claims over a long period of time, which they find distressing. Where these claims are disputed, consumers often want to be able to stop the practice and find ignoring the communications uncomfortable and difficult. Furthermore, where a payment has been made in these circumstances, we think it is unlikely that the consumer will later consider making a claim for the sum paid or for damages. In the worked example on page 221 the payment was made not because Donna agreed she was liable, but because she was misled about the rights of the firm demanding the money and feared the threatened court action.

Secondly, it is vital that situations where consumers owe money to debt collectors using unfair misleading and aggressive collection practices are covered by the tier 2 remedies. This would not stop the money being owed but would challenge unfair collection practices.

Creditor liability

Q.46 Do consultees agree that section 56 provides sufficient protection for consumers when goods have been supplied under hire purchase or conditional sales agreements in a misleading or aggressive way?
Q.47 Is legislation needed to clarify that the supplier acts as agent for the creditor even if the sale from supplier to creditor takes place through an intermediary?
Q.48 Do consultees agree that:
(1) Where section 75 applies, connected lenders should be liable for the supplier's misleading or aggressive acts?
(2) The connected lender's liability for the supplier's act should be capped at the amount of the loan, plus interest?

Citizens Advice and Citizens Advice Scotland believe that it was the policy intention of the Consumer Credit Act 1974 that joint liability would extend to aggressive practices. The consultation acknowledges this at paragraph 15.52. The concept of joint liability between the supplier and the creditor recognises that both businesses are transacting with the consumer in a closely linked deal and that both derive profit from the transaction as a whole. This supports the idea that the creditor can choose which credit brokers and suppliers they trust and are prepared to deal with. Equally, where the creditor uses another business to interact with the supplier, that creditor can decide which acquirers they trust. We do not accept that the creditor is any less culpable in a four party transaction. For the consumer the liability to pay the creditor is exactly the same, whether the creditor is also

the supplier, there is a debtor-creditor- supplier agreement or a forth party such as either a merchant acquirer or an additional credit broker is involved.

We agree that section 56 supplies the right degree of protection in hire purchase and conditional sales agreements where the creditor is also the owner who sells to the consumer. The challenge that has been made to the concept of joint liability under section 75 on the grounds that the trader selling the product used on intermediary credit broker is an unintended loophole that, if allowed to persist, makes a mockery of the consumer protection intentions of the Act, including the credit licensing system for ensuring businesses in the sector are fit and proper. It is illegal for a supplier to act as a credit broker without a consumer credit licence, whether they introduce consumers to the creditor direct or through a further credit broker. The loophole should be closed.

We agree that both misleading and aggressive practices should be covered under section 75 and believe this was the original policy intention.

We strongly disagree with the proposed cap on connected lender liability at the amount of the loan plus interest. As the OFT's 1995 consultation on this issue concluded, such a move would severely reduce the level of consumer protection provided by the 1974 Consumer Credit Act. If the equal liability were to be capped in this way ,we believe it would be confusing. It would seem to consumers that the law was not concerned about the misleading or aggressive practice and about dissuading business from such practices.

> A woman sought advice from a CAB in the East Midlands when she realised that the credit agreement she had signed to fund double glazing was very different from what the sales person had agreed. She told the bureau that he spent so long in her home that she could no longer think straight when it came to signing the agreement. He had promised a contract where she would pay a total of £3,500 with nothing to pay for two years and a cash-back payment of £1,600 plus a 10 year guarantee. She agreed because, whilst she was then training and in receipt of benefits ,she expected to have sold the house before the two year payment delay ended, so that she could pay off the lump sum. Instead, the agreement required her to begin payments of £116.89 a month at the end of the month and to continue for 96 months. She would then have paid £11,221.44. Neither the cash-back nor the 10 year guarantee had materialised either and both the credit company and the supplier claimed there was nothing they could do.
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> A CAB in the West Midlands reported that a man was cold called by a salesman who pressure sold a kitchen, lied about the paperwork and refused to cancel. Although the client thought the quote for the kitchen was high, he had eventually been persuaded to go ahead, on the strict understanding that this was subject to him being able to obtain a remortgage to pay for it. The sales person convinced the client to sign for the kitchen so that there would be no need for another sales visit. They also stated the paperwork would not be processed until the remortgage was confirmed. But before the client had had time to see his mortgage providers, the kitchen was delivered. When the client contacted the kitchen company they were verbally abusive and threatened to take his house if he failed to pay. When he cancelled the finance agreement set up by the sales person they said he still owed the money. The client told the bureau he was unable to pay and had become ill with the stress.

Impact assessment

Q.49 How many complaints about aggressive practices do traders receive? What is the cost of handling these complaints, and what savings might be anticipated?
Q.50 How many complaints are received by trading standards services and other advice agencies? Will the proposals reduce the work involved in handling these complaints? If so, by how much?
Q.51 How many additional claims might be anticipated as a result of the reforms? What additional compensation may be generated as a result?
Q.52 How far do aggressive practices by rogue traders undermine consumer confidence and reduce sales?
Q.53 How long would businesses need to spend to become familiar with the new law?
Q.54 What costs would be involved in training judges and consumer advisers about the changes?
Q.55 How many more court cases may be generated by the reforms?
Q.56 If the consumer loses in the small claims court, what costs would this impose on the trader?

We do not keep statistics on the number of misleading and aggressive practices seen by Citizens Advice Bureaux. We agree that it is not possible to reliably estimate the savings resulting from the proposals to consumers, advisers, enforcers or traders. However, we strongly support the need for redress for misleading and aggressive commercial practices and would expect that consumer confidence would be enhanced as a result.

We believe that the proposed tier remedies will be more easily understood by consumers. Consumers and their advisers can also use the proposed reforms to challenge unfair practices without the need for costly court action. To reduce training costs, it will be vital to produce clear guidance to inform traders, advisers, enforcers and business.