Introduction

This initial submission is to the **Culture, Media and Sport Committee** inquiry into Nuisance Telephone Calls and Text Messages, in response to the invitation issued on 11 July 2013.

We will be pleased to provide further material and respond to an invitation to provide oral evidence in support of the points made below, and to cover other points that may be of interest to the Committee.

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Many points below which have not been fully covered, to comply with the request for brevity in this submission. We would welcome some sense of direction from the Committee in respect of which issues it wishes to explore in greater depth and will be very happy to respond accordingly.

David Hickson, for the ***fair telecoms campaign***

Thursday 15 August 2013

Overview of the situation

We have watched the situation closely since the Privacy and Electronic Communications Regulations and the "Persistent Misuse Powers" under the Communications Act, both came into force in 2003. In these ten years, despite modest interventions and adjustments to the respective powers, most would agree that the problem of Nuisance Calls has got worse.

It may be said that neither the **ICO** nor **Ofcom** have dealt with the situation well; however that is not entirely due to failings within those organisations. The number of cases which exist, even the number of cases that are reported, are well beyond their capabilities to react properly. Furthermore, the nature of the action that is required is foreign to the way in which both organisations operate in general.

We will be happy to expand on these points.

Our outline proposal

We believe that responsibility for setting and enforcing proper standards of conduct for businesses in contact with citizens and consumers rests primarily with those who regulate the behaviour of businesses in particular sectors. It is only cases that fall through a general net of regulation and good practice that require use of firstly, the powers held by the **ICO**, and then those of **Ofcom**. These bodies have no general duty of regulation over those responsible for nuisance calls.

DCMS appears to be considering regulation of "call centres" as a sector in its own right, whether contracted to, or directly operated, by businesses. There could be merit in such a proposal; however there are two strong points against this. Firstly, it may be thought disproportionate to set up a whole structure of registration and regulation to address only one aspect of the operation of a sector, unless other aspects are also being considered. Secondly, without a common structure of regulation across the EU and indeed throughout the world, adding additional burdens of regulation to a UK business sector would be seen as driving it offshore. Probably rightly so.

We therefore believe that a network, involving the existing regulatory bodies and structures of regulation, should be deployed to this effect. Such a network would however need to be coordinated so that it may not only be engaged directly with those whom it covers, but also readily accessible to, and serving the interests of, citizens and consumers.

To this end, we propose the establishment of what may be called a "Nuisance Calls Agency", to perform two essential functions.

- To collect and assimilate all reports of "Nuisance Calls", passing prepared cases for action by the respective regulators.
- To press the regulators to codify, promote and enforce relevant regulations.

The natural home for this agency is readily seen to be within Citizens Advice.

Citizens Advice is currently taking the role of the statutory advocate of the consumer interest from **Consumer Focus**. This will give a duty to perform the second of the functions anyway.

Citizens Advice already operates its **Consumer Helpline** - formerly **Consumer Direct**, and so already has a structure for receiving and processing issues that are handled by other bodies.

There are some who advocate joint working between regulatory bodies. There may be some limited benefit to this approach; however it can serve to weaken, rather than strengthen, the performance of duties defined in statute. In particular, it serves only to undermine the public accountability of each body, which is poor enough anyway in respect of a regulator, which must be focussed primarily on those whom it regulates.

Only an agency within a body already holding a duty of accountability to consumers and citizens, as their representative, can be expected to respond to the overwhelming public demand for effective action to address the issue of Nuisance Calls and Text messages.

We will be pleased to present further information and ideas around this outline proposal and contribute to realisation of something in a workable form, with contributions from all interested parties.

The role of Ofcom

Notwithstanding the simple role of being responsible for the maintenance of the register, contracted to **Telephone Preference Service Ltd**, **Ofcom**'s main responsibility in the area is to exercise the "**Persistent Misuse Powers**" held under §§128-131 of the Communications Act, in accordance with its primary principal function "***to further the interests of citizens in relation to communications matters***" [§3(1)(a)]. As these powers relate to the activities of (mis)users of telecommunications services, not the providers thereof, they are unrelated to **Ofcom**'s second principal function - "***to further the interests of consumers in relevant markets***".

These powers provide no capacity for the imposition and enforcement of regulatory requirements in general, only for the enforcement of specific requirements [§129] on those previously subjected to a Notification of Persistent Misuse [s128].

Ofcom however behaves as if the Notification of Persistent Misuse [§128] were equivalent to the Notification of Contravention of Conditions [§94], despite the fact that publication of its Statement of Policy [§131] cannot have the same effect as a condition set under §45.

The purpose of the Persistent Misuse Powers is to trap activity that causes "***unnecessary inconvenience, annoyance or anxiety***", but has fallen through the net of particular regulations enforced by **Ofcom** itself and other bodies. **Ofcom** misuses these powers as the basis for a set of particular pseudo-regulations covering what it calls "***abandoned and silent calls***".

Not only is **Ofcom** impeded in its work by the absence of the true power to exercise regulatory muscle in dealing with cases, but it is distracted from filling other gaps in the regulatory net.

Ofcom's tolerance of Silent Calls

Abandoned calls

Nuisance is caused by a call from a predictive dialler, when no agent is available to handle an answered call but an Informative Message is played, naming the caller and briefly explaining what has happened. Unless that call was illegal anyway (e.g. having a direct marketing purpose but made without consent - breaching the Privacy and Electronic Communications Regulations, enforced by the ICO), the level of nuisance should not be greater than that of a "wrong number".

If the volume of such calls made by a company is excessive, then either this is being done deliberately, for the purpose of direct marketing, or recklessly, making the nuisance clearly unnecessary. **Ofcom**'s policy is to apply a limit of 3% of "live calls" on this relatively harmless activity. **Ofcom** refers to these as "abandoned calls", a term which has a different meaning in the call centre industry, where it also encompasses calls terminated in silence.

The effect of a tolerance of 3% "abandoned calls" is an assumption that 3% of calls may result in silence. The only action taken by **Ofcom** has been in respect of those who have admitted to breaching the 3% limit. There have not been any cases where **Ofcom** has taken action against those who terminate less than 3% of their calls in silence.

Answering Machine Detection

In the absence of "Answering Service Detection" technology, a means by which a calling machine may detect a signal from an automated answering service, callers retain use of technology designed to detect the clicks and whirrs of a tape recorder as the means of determining that a call has not been answered in person. This has been refined to review a sound sample of the person answering the phone; however the accuracy rates delivered are not considered satisfactory.

Ofcom approves of the use of AMD, as being in the interests of "consumers". **Ofcom** acknowledges that "false positive" detections will result in a person receiving a Silent Call, even demanding that some estimate of such cases be added to the calculation of the 3%! **Ofcom** recently revised its policy on the determination of persistent misuse so as to treat a case where a second attempt to call a number within 24 hours of any positive AMD detection (without an agent in attendance) as persistent misuse. Repeated daily AMD-caused Silent Calls are only regarded as persistent misuse if they cause the 3% limit to be breached.

Summary

Despite receiving increasing volumes of reports of Silent Calls, **Ofcom** has not taken any action using the persistent misuse powers in respect of any activity conducted since March 2011. We must therefore assume that all of these recent reports (a majority of which are known to identify the caller) are in respect of those who operate within the 3% limit.

Ofcom clearly does not want these powers and has no intention of using them properly! We can expand on this point.

The role of the Information Commissioner's Office (ICO)

The **ICO** is charged with enforcing the terms of the Privacy and Electronic Communications Regulations, which derive from an EU Directive.

One relevant aspect of the provisions of that Directive was excluded from the PECR, as only automatically generated calls which declare their Direct Marketing purpose through a recorded message are covered by regulation #19. Those which result in silence are not prohibited by general regulation but only by the potential for **Ofcom** to deem such calls to represent "Persistent Misuse" and exercise its power to Notify and perhaps impose an enforceable requirement on the responsible caller.

The application of the principle that "***it cannot be direct marketing unless they say it is***" has been a longstanding bone of contention. This has led to the widespread misunderstanding that a company collecting direct marketing information through what it calls "a survey" is not covered by the relevant PECR provisions. If the **ICO** feels that it can only use specific evidence given in the content of the call as a means of establishing "purpose", then that is an operational decision for the **ICO**, not a redefinition of the terms of the provisions.

We believe that the DCMS has been wrong to refuse to grant the **ICO** some modest revisions to the terms of its powers. These relate to the burden of proof of alleged consent and the degree of damage necessary to warrant a financial penalty. In other respects, however, we believe that the **ICO** and the **TPS** should have a much lesser role in this matter, as outlined above.