

I refer initially to your "[Submission to DCMS Communications Review - September 2012](#)".

I came upon this when looking for responses to the question posed in the [DCMS Consumer Perspective Seminar Discussion Paper](#) with reference to Unsolicited marketing calls - "*Are the current arrangements adequate and if not, how could they be improved?*".

I understand this "submission" to be the response on behalf only of the network of **Citizens Advice Bureaux**, which you represented at the seminar.

I am keen to engage with **Citizens Advice** on this matter in its wider role. It is currently operating the former **Consumer Direct** advice line and has been found able to take on the role currently being fulfilled by **Consumer Focus**, for which it will now be preparing.

I see **Citizens Advice** as the most suitable of one of a number of possible hosts for a new agency, which I propose as a means of "improving the current arrangements".

In the comments which follow, I will firstly address the relevant remarks in the **CABx** submission to **DCMS**. I will then present a rough outline of my proposals for improvement. I am very keen to discuss the key element of the latter with all interested parties and, having done so, would look to prepare specific and detailed proposals as a further exercise.

It is because of the central position which **Citizens Advice** now holds as the defender of both the consumer and citizen interest, that I present my comments to you in this way. I am very keen to engage with the considerable understanding of the public policy issues and of citizen and consumer experiences which you hold and of the realistic and attainable proposals for improvement which your team will be able to present.

I have also addressed other organisations seen to be keen to be involved in improving the current arrangements directly - see "[Engagement with other Nuisance Calls campaigners](#)".

Table of Contents

CAB submission to DCMS

Scope

Effectiveness of the current regime

Commodification of consumer data

CAB reports

My proposals

The Ofcom "Silent Calls" policy

ICO policy in respect of the PECR

A "nuisance calls" agency

CAB submission to DCMS

Scope

You broaden the scope of the issue raised, by addressing “unwanted” communications. This could be taken to include the telephone call from a beloved friend or relative in the middle of a favourite TV program, or any communication presenting bad news. You also address improper sales activity by reference to the specific content of communications by telephone and further activity, rather than the general nature of the communication in question.

In taking this matter forward we must take care to ensure proper delineation, in these respects and others. Most of us have a telephone so as to be connected to the outside world, receiving incoming calls at the choice of the caller, not only those calls which we explicitly express, or hold, a desire to receive. Consumers may be equally drawn into scams in response to other forms of communication, e.g. post, radio, TV, newspapers and journals, the internet and personal contact. It would be foolish to have a separate scam protection mechanism to do the same job for each form of, otherwise valid, communication.

I would however broaden the scope of the heading given by **DCMS**, to include all “Silent Calls” and other examples of misuse. You rightly point out that the experience of the individual receiving a call they regard as “nuisance” lumps many different categories together. Whilst many Silent Calls are made with a direct marketing purpose, many are not, and the recipient is obviously unable to directly determine the purpose of the call.

I find the term “nuisance calls” to most adequately describe the general category of telephone calls which we are addressing. It is also necessary to confirm that we include marketing text messages, faxes and recorded message calls, none of which are covered by the consent that may otherwise be assumed by a failure to register with the **TPS**.

Effectiveness of the current regime

I totally agree with your statement that *“the existing regime of regulation and enforcement is not working”*, however I believe that it could never work effectively as it is.

Technology and practices

You state that *“it has not kept up with new technology or new practices by marketers and scammers”*; I do not accept this point as valid. I see it as vital that the regulations and policies remain neutral in respect of technology and sufficiently broad to cover all practices.

In the case of Silent Calls, **Ofcom** has chosen to specifically endorse use of an old and failed technology (Answering Machine Detection). A neutral position would have ensured the development and adoption of alternative (Answering Service Detection) technology.

The **ICO**'s stated reason for the prohibition of recorded message calls which include an option to speak to someone is technology specific - pulse dialling may make IVR unusable! This prohibition should not however be removed because its justification is out of date.

With regard to practices by marketers and scammers, the regime was too narrowly defined when it was introduced in 2003, and none of the modest changes made subsequently have helped. This has nothing to do with any changes in practice, which will always continue.

Direct marketing

You suggest that the activity of the claims management industry in seeking potential clients cannot fall within the definition of "direct marketing" in the PECR. I do not accept this.

The **ICO** already applies a very broad definition of the term in its policy. The problem arises only in its enforcement regime, which requires the precise nature of the call to have been explicitly stated to be direct marketing by the caller before it will accept a report. It is clearly understood that any marketing activity which relates to a **particular person** is "direct marketing", even if the caller would not seek to convert an enquiry itself.

The relevant regulations refer to the "purpose" of the call. If the purpose of the call is not honestly declared by the caller, it may be more difficult to take enforcement action, it does not however mean that a breach has not occurred. This is one of many examples of the enforcement tail improperly wagging the policy dog.

There may be a need to simply clarify the distinction between research into a market and direct marketing to a particular individual.

A new regime

You identify a utopian situation in which there is a single regulator with appropriate powers of enforcement to cover all aspects of concern about unwanted telephone calls. My proposal approaches that situation in a more realistic manner.

I propose that there be a single specialist citizen-focussed agency to deal with the issue of "nuisance calls", irrespective of whether there is a consumer relationship involved in any true sense. Working within the current statutory and regulatory framework, this agency could enable a more effective approach to use of existing powers and identify any true needs for necessary changes to statutory provisions.

Commodification of consumer data

The opening up of markets, for example in legal services, has provided a greater need for market intelligence and more opportunities for it to be used. "Commodification" of consumer data is however nothing new. It has long been an important part of the marketing industry. There is a strong argument that this provides consumer benefit, in that it enables marketing to be focussed on those most likely to have a genuine interest in, or need for, a particular product or service. It is actually a means of avoiding the "**scatter-gun**" approach.

The proposed prohibition of this activity could itself be described as being a "scatter-gun" approach, as it would halt beneficial practice, not to mention damaging the balance sheets of every company with a customer base. The targets for action must be ALL unsolicited marketing calls and breaches of the DPA by improper dissemination of personal data.

CAB reports

The Bureaux cases reported indicate that not only would **CAB** personnel benefit from the guidance that the agency which I propose would be able to provide to them and their clients, but that the agency itself would be able to deal with the reports far more effectively than individual bureaux, or indeed **Ofcom** and the **ICO**.

My proposals

I present these proposals in three parts.

1. Changes to the **Ofcom** Statement of Policy on use of its Persistent Misuse Powers.
2. Changes to the policy followed by the **ICO** in interpretation and enforcement of the PECR.
3. Outline suggestions for a new "nuisance calls" agency.

The Ofcom "Silent Calls" policy

The mistaken and failed attempt by **Ofcom** to regulate, rather than eliminate, the practice of making Silent Calls is a disgrace. Its tolerance of Silent Calls and prohibition of some "abandoned" calls that are not silent is a direct refusal to attempt to meet the expectations of parliament as expressed in 2006 - *"We expect you to use your powers to eradicate the nuisance of Silent Calls"* (see links and further comments in [this media release](#)).

Definition of "misuse"

I have long argued that a habitual ("persistent") failure by a caller to honestly state, by voice, their name (or that of the company they represent, as an employee or agent) and the purpose of a voice telephone call, when it is answered, should be classified as "misuse of a telephone network or service". Such a definition would cover not only Silent Calls but also help to address other examples of nuisance calls.

The nature of the persistent misuse powers ensures that there must be evidence of persistence and the effect of annoyance, inconvenience or anxiety to those called before a specific activity by a particular person may be proscribed by Notification. A wider definition of persistent misuse would not require **Ofcom** to apply its powers inappropriately, as it retains discretion about when they are used. It is not **Ofcom's** duty to provide all telephone users with a set of regulations about how they should conduct themselves. It is however **Ofcom's** duty to intervene appropriately whenever cases of misuse come to its attention.

Persistent Misuse of the Persistent Misuse powers

The persistent misuse powers do not require, or even enable, the imposition of general regulations. It is only by the issuing of an Enforcement Notification (under section 129) that an enforceable requirement may be imposed on a specific "person" covering a specific activity. The power to impose a financial penalty is specifically directed to cover a breach of such a requirement, although it may be used in other cases, as it has - exclusively.

The initial Notification of Persistent Misuse (under section 128) is a much lighter means of intervention than is generally understood, as it cannot impose requirements and need not be supported by the weight of evidence necessary to sustain imposition of a financial penalty. A significant reason for the failure of the **Ofcom** approach is its unwillingness to use the Section 128 powers in the way that they may be used, to publicly notify all those found to be engaged in the habitual practice of hanging up in silence that this represents misuse.

Ofcom's preference for the role of a general regulator causes it to habitually ("persistently") set aside the option of using the section 129 powers and to misuse the section 128 powers, as if they applied only to a breach of enforceable regulations. This misuse must cease.

The "percentage approach"

The applied definition of misuse in terms of a percentage of daily activity is perverse and improper. The effect of any degree of inconvenience, annoyance or anxiety is not changed by other activity carried out by the caller on the same day. There is no necessity for any caller to habitually hang up in silence, so there is no need for there to be some form of allowance for an inevitable unhappy consequence of otherwise legitimate activity.

It is indeed undesirable for there to be an exceptional number of cases where an informative message is played to cover the "no agent available" situation that arises with use of predictive diallers. There is however no need to muddy the situation regarding persistent misuse by attempting to cover this quite separate issue by the persistent misuse powers. If **Ofcom** were to seek to make a case that the degree of inconvenience, annoyance and anxiety caused by calls from a mass calling operation that were simply ineffective warranted percentage limits, then it would need to address this activity in general.

Approval of Silent Calls caused by AMD

Despite a recognition that use of AMD is quite possibly no less a cause of Silent Calls than the "no agent available" scenario, **Ofcom** has so far refused to classify its use as potentially "persistent misuse". **Ofcom** specifically advises those who are likely to have made a "false positive" Silent Call in this way to wait until the next day before calling again, so it is likely that the call will be answered in the same way and therefore produce the same effect.

Present AMD technology represents a failed attempt to modify a technique which was effective when tape recorders were generally used to provide answering services. Support for this has prevented the worthwhile development of a means of the now widespread network based answering services providing the caller with a clear indication of their use.

Not only is this **Ofcom** policy a clear tolerance of Silent Calls, it impedes the development and adoption of a wholly effective alternative - Answering Service Detection.

Summary

Changes must be made to the way in which the **Ofcom** persistent misuse powers are utilised in effect, and (as necessary) to the published policy, to take account of the above points. In particular, application of the powers has to move away from the regulatory approach which (rightly) underpins most of **Ofcom**'s work, but is unsuited to this aspect of its duties.

ICO policy in respect of the PECR

Unlike the situation with persistent misuse, where **Ofcom** has discretion about what activities are covered, the PECR are specific statutory regulations. They are however subject to interpretation and discretion in enforcement by the **ICO**.

"Direct marketing purpose"

The **ICO** guidance states that not only should this purpose exist, but that it must be evident in the content of the communication. Whilst it is understandable that clear evidence makes enforcement easier, it is unnecessary and improper to effectively enable the regulations to be breached without fear of action, by withholding or misrepresenting the purpose of a call.

"Direct marketing" does not require an attempt to secure a sale, or even to register interest that will be followed up by the same organisation. Concerns regarding the distribution of marketing intelligence should be separated from the detail of the means by which the information is obtained.

If the marketing activity is "particular" to the person called, even if it is nothing more than an invitation to press a button if interested in a particular product or service, then it is "direct marketing". Only market research activity that demonstrably is unconcerned with the particular identity of the respondent can escape this definition.

Whether or not **Ofcom** treats a failure to state the purpose of a call, or the misrepresentation of it, as misuse, the **ICO** cannot permit such failure or misrepresentation to be used as a means of evading action against a breach of the relevant regulations.

Enforcement policy

There is a general assumption amongst regulators that their objective is to maintain compliance by a defined cohort of organisations that they regulate. This may be done with a light touch and through informal engagement, although with the threat of serious penalties in the case of serious breaches. When there is such a defined cohort with a sense of shared responsibility, then this can be effective.

Even the representative industry bodies would accept that this does not truly apply in the case of the matters addressed here. Claims that their membership is largely compliant may be subject to question, but are rendered meaningless by the fact that, as they themselves would claim, widespread breaches are practised by those who fall outside their control.

Potential offenders will measure the risk of being caught and the likelihood of their activities being deemed to warrant attention. Somewhat perversely, the administrative processes involved mean that the risk of being subject to action diminishes as the potential scale of the penalty increases.

The "regulatory" approach has been clearly seen to fail, as it must, in cases where specific activities are, in effect, proscribed. In this particular area therefore, a different approach has to be taken.

A "nuisance calls" agency

I need to engage in serious discussion with involved parties to firm up on the rough ideas set out below. At this stage, I do not seek to be completely precise in my definitions or explicit in all respects. I intend to develop this proposal following discussion with interested parties.

A summary of my current proposal is published at: ["Nuisance Calls - Outline proposal"](#).

Why the agency is necessary

- It is widely accepted that there needs to be a single citizen-facing point of contact for all reports about "nuisance calls". This point is made most eloquently by [this 22-page guide](#).
- Because the bodies primarily involved (**Ofcom** and the **ICO**) are mostly concerned with "regulation", acting to simply prevent and halt widespread improper activity by an undefined community is ill-suited to the mechanisms which they have in place.
- The powers and essential regulations that exist should be adequate to address the issue far more effectively than has been seen, through many revisions of policy and adjustments to the powers. A new approach to handling the powers is clearly required.
- There needs to be greater transparency in the relationship between reports of cases of breaches of regulation and other nuisance, and the action taken in response.

What the agency would do

- It would take on the responsibility for all public facing aspects of the action taken to deal with all "nuisance calls", whether or not any "consumer" relationship is involved.
- It would receive reports from the public and other sources, e.g. telephone companies.
- It would either hold powers assigned by the respective bodies or cause them to be applied on demand, to obtain information and conduct enquiries.
- Having regard only to the public interest, it would determine the appropriate action to be taken in respect of any case.
- Where sufficient clear evidence was held, it would issue public reports of action taken.
- It would work wholly in concert with the respective statutory bodies, but enabling approaches to be taken that would not be possible for those bodies themselves.

Relationships with other bodies

As well as the respective statutory bodies, it would foster and take advantage of close working relationships with other bodies, e.g.

- Government Departments (local and national)
- Telecommunications service providers
- Trade associations for the relevant industries
- Consumer groups
- Providers of relevant commercial products and services

Organisation - placement

There are a number of possibilities regarding where this agency could sit.

My primary suggestion is that it sits within **Citizens Advice**, which also covers:

- Statutory advocacy of the consumer interest, replacing **Consumer Focus** from April 2013.
- The statutory Consumer Advice service, formerly **Consumer Direct**.
- The **CAB** network.

Citizens Advice already has many connections with statutory bodies and government departments, extensive engagement with citizens and consumers and the necessary specific knowledge and skills. It therefore seems to be a very natural place for such an agency.

In performing these wide-ranging roles **Citizens Advice** has the detailed knowledge and understanding of the relevant policy and technical issues necessary to carry out its many functions effectively. It must also continue to hold and maintain confidence in its capacity to undertake its duties, and to deliver, from government and statutory bodies, as well as from citizens and consumers and their representative groups.

One could also consider (and perhaps swiftly dismiss) the following alternatives:

- An agency of DCMS
- A "semi-detached" specialist body within either Ofcom or the ICO
- A further offshoot of the DMA
- A body established and funded by the telecoms industry
- A wholly independent body

Organisation - Structure and Funding

This point is inevitably linked to that of placement.

The key points are the need to secure the widest possible involvement of interested parties (reflected in representation and funding) and the redeployment of resources currently committed to the ineffective activity related to the issue.

A full proposal will have to address these matters in detail.

Other issues

There are many other issues that need to be addressed, e.g. covering the nations of the UK.

I propose to address all of these in taking this matter forward.

The key point about this proposal is that it is NOT for a new regulator, but simply for a new mechanism to sit inside existing structures, so as to enable existing powers to be deployed more effectively.