



Consumer redress for misleading and aggressive practices: summary of final report



THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION
CONSUMER REDRESS FOR MISLEADING AND
AGGRESSIVE PRACTICES

SUMMARY

- S.1 This Joint Report by the Law Commission and Scottish Law Commission considers the redress available to consumers who have been the victims of misleading or aggressive practices by traders.
- S.2 Sanctions against such practices are set out in the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations).¹ The Regulations concern public enforcement rather than private redress. They do not give consumers the right to start civil actions to obtain compensation or other remedies. Instead, consumers must rely on existing private law doctrines, such as the law of misrepresentation and duress. This is problematic: the law of misrepresentation is complex and uncertain; while the law of duress leaves gaps in protection.
- S.3 Misleading and aggressive trade practices are common and lead to a high level of consumer detriment.² They are a particular problem for vulnerable consumers. In the course of this project, we were given many examples of elderly consumers who had suffered unscrupulous hard-selling on the doorstep, where, for example, salesmen pretended to be from social services or refused to leave when asked.

CALLS FOR REFORM (Part 1)

- S.4 In 2009, Consumer Focus called for a private right of redress for all consumers who suffered loss through a breach of the Regulations. They pointed out that scams are all too common but relatively few prosecutions are brought. They thought that enforcement would be more effective if public authorities and consumers “worked in tandem”, using both private and public enforcement sanctions.³

¹ SI 2008/1277.

² Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2009) p 3.

³ Above.

- S.5 These calls were echoed at European level. In 2009, the European Parliament asked member states “to consider the necessity of giving consumers a direct right of redress” to ensure that they are sufficiently protected against unfair commercial practices.⁴
- S.6 In 2010, the Department for Business, Innovation and Skills (BIS) asked the Law Commission and Scottish Law Commission to conduct this review.⁵ Our aims are:
- (1) to simplify redress for misleading commercial practices;
 - (2) to simplify redress for aggressive commercial practices; and
 - (3) to fill gaps in protection, where a consumer is unable to gain redress for serious breaches of the Regulations.
- S.7 This Report does not include a draft Bill, but we understand that our recommendations will be considered as part of the Government’s proposed new Consumer Bill of Rights.

THE CURRENT LAW

- S.8 At present, misleading and aggressive trade practices are covered by two sets of law. One is concerned with public enforcement and the other with private redress. The two systems are completely different: although they both address the same conduct, they use different terminology and concepts and lead to varied outcomes.

Public law (Part 2)

- S.9 The Regulations were introduced in 2008 to implement the Unfair Commercial Practices Directive 2005.⁶ They replaced 23 previous enactments, including most of the Trade Descriptions Act 1968.
- S.10 Under the Regulations, traders may not engage in misleading or aggressive practices which would be likely to cause “the average consumer to take a transactional decision he would not have taken otherwise”.⁷ The terms “the average consumer” and “a transactional decision” follow the wording of the Directive, and implement European law. These concepts seemed strange at first, but enforcement agencies are now becoming more familiar with them, and gradually finding them easier to use.

⁴ European Parliament Resolution on the Transposition, Implementation and Enforcement of Directive 2005/29/EC and Directive 2006/114/EC OJ C 46 of 13 January 2009, para 12.

⁵ For the full terms of reference please see paras 1.10 – 1.11 of this Report.

⁶ Directive 2005/29/EC (OJ 2005 L 149).

⁷ See for example Regs 5(2)(b) and 7(1)(b).

- S.11 The Regulations are enforced by Trading Standards Services (TSS) and the Office of Fair Trading (OFT) through criminal sanctions and enforcement orders.⁸ Although courts may award compensation following a criminal conviction, this power is little used. The Regulations do not permit consumers to bring civil actions on their own behalf.

Private law (Part 3)

Misleading practices

- S.12 In private law, misleading actions fall within the law of “misrepresentation”, which is a large and varied set of rules. In theory the law provides redress for most misleading trade practices where consumers suffer detriment, but it is fragmented, complex and unclear. It is particularly difficult to apply in a consumer context, because the law primarily evolved to deal with business disputes. Furthermore, there are differences between the law of England and Wales and the law of Scotland, as is illustrated by the two diagrams on page 24 of the Report.
- S.13 In most cases of consumer misrepresentation, the consumer is induced to enter into contracts by misleading statements and seeks a remedy against the retailer or service provider. In these circumstances, their common law remedies for misrepresentation have been supplemented by statute. In England and Wales, the Misrepresentation Act 1967 applies. In Scotland, the issue is addressed by section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.
- S.14 The remedies available under these statutes are uncertain. The most useful remedy is the right to unwind the contract (referred to as “rescission” in England and Wales and “reduction” in Scotland). Unfortunately, it is unclear how quickly the right must be exercised, or how far the consumer must return goods or services. Where the right to unwind has been lost, it is unclear what other remedy the consumer might be entitled to.

Aggressive practices

- S.15 The current civil law on aggressive practices lacks a coherent framework, and it provides only patchy and inadequate protection.
- S.16 The most important doctrines are “duress” in England and Wales and “force and fear” in Scotland. These doctrines developed through cases which were not brought by consumers, and the law is not readily accessible to non-lawyers. The doctrines are particularly difficult to apply where the trader does not make explicit threats to the consumer’s person or goods. It therefore fails to provide a usable remedy against high-pressure sales tactics, such as doorstep salespersons who refuse to go away.

⁸ In Scotland, all criminal prosecutions are conducted by the Crown Office and the Procurator Fiscal Service on behalf of the Lord Advocate.

- S.17 Doctrines such as undue influence, facility and circumvention, unconscionable bargain and intimidation may apply. Their scope, however, is extremely uncertain. The Protection from Harassment Act 1997 is helpful in some circumstances, but it usually requires “a course of conduct”, rather than a single incident.

THE CASE FOR REFORM (Part 4)

- S.18 In April 2011 we published a Consultation Paper and received 71 responses. Consumer groups and TSS agreed strongly that the current law of misrepresentation was overly complex:

The availability of existing remedies is patchy at best. Furthermore, where protection does exist, the remedies are too complex for consumers to understand and as a consequence, are rarely used. [Which?]

The current position is confused and very challenging for lawyers, advisers and enforcers, and well-nigh impossible for consumers to understand. [Highland Council Trading Standards]

- S.19 Business groups also incur unnecessary costs in having to come to grips with the Regulations and with the different concepts used in private law. Several welcomed reform:

The BRC agrees that reform would be useful provided the outcome leads to something that is simpler to understand for all parties. [British Retail Consortium]

Sky ... supports a clearer system for consumer redress reflecting the principles set out in the Consumer Protection Regulations. [British Sky Broadcasting Group]

- S.20 As far as aggressive practices are concerned, many consultees argued that there was an urgent need to fill a gap in the law:

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. [Citizens Advice]

We completely agree ... that the existing causes of action do not address the specific problems arising from high pressure selling practices and that ... the current law provides little redress for unscrupulous and often commission-based hard selling. [Age UK]

- S.21 We conclude that there is a pressing need to improve consumer redress against aggressive practices. We were told of many cases of consumer detriment, often involving vulnerable elderly consumers in their own homes. With the increase in people aged over 85 living alone this problem is likely to grow.

TARGETED REFORM

- S.22 We recommend new legislation to provide redress to consumers who experience misleading and aggressive practices in their dealings with traders. Our aim is to clarify and simplify the current law on misleading practices, and to improve the law on aggressive practices by filling the gaps in the current law.
- S.23 We recommend targeted reform. We do not propose that consumers should have a right of redress simply because there has been a breach of the Regulations. Instead, we recommend a new right only where there is a clear problem in the marketplace.
- S.24 In particular, we recommend that
- (1) There must be a contract between the parties or a payment made by the consumer. Thus consumers would not, for example, be entitled to compensation if they visited a shop in response to a misleading advertisement but did not buy anything. Nor would consumers have a separate right to compensation for being misled about their rights.⁹
 - (2) The consumer would only have a right against the other party to the contract, usually the retailer or service provider. The legislation would not provide additional rights against others in the supply chain, such as producers or against individual directors.¹⁰
 - (3) The list of banned practices under the Regulations would not give rise to automatic redress; they would only be covered by the new right if they would affect an “average consumer”.¹¹
 - (4) The general prohibition against commercial practices which are “contrary to the requirements of professional diligence” should not give rise to redress. It is too uncertain.¹²
 - (5) Land transactions and financial services should not be covered.¹³ Instead the existing law should remain.
- S.25 Our terms of reference do not extend to reforming court procedures or access to advice. We are aware, however, that our proposed remedies will be enforced in a variety of settings: through compensation orders, ancillary to criminal proceedings; in negotiations between traders and consumers; and through court proceedings.
- S.26 This means that remedies need to be simple and standardised. When facing choices between simplicity on the one hand and flexibility on the other, we have opted for simplicity. The law should be suited to the forum in which it is enforced.

⁹ Paras 6.23 to 6.60.

¹⁰ Paras 6.61 to 6.93.

¹¹ Paras 4.40 to 4.63.

¹² Above.

¹³ Paras 6.94 to 6.120.

THE ELEMENTS OF LIABILITY

S.27 We recommend a new statutory right of redress for a consumer against a trader. The consumer would need to show that:

- (1) The trader carried out a misleading or aggressive practice;
- (2) this was likely to cause the average consumer to take a decision to enter into a contract or make a payment they would not have taken otherwise;¹⁴ and
- (3) the misleading or aggressive practice was a significant factor in the consumer's own decision to enter into the contract or make the payment.¹⁵

S.28 Where the consumer has entered into a contract, the consumer's right would lie against the other party to the contract. Where the consumer had made a payment, their right would lie against the party to whom the payment was made.¹⁶

Defining a misleading practice¹⁷

S.29 The new right would follow the substance of the definition of misleading practice in Regulation 5(2)(a) by stating that a commercial practice is misleading if it contains false information, or if it is likely to mislead the average consumer in its overall presentation.

S.30 This approach moves away from the distinctions drawn under current law based on whether the misrepresentation is "false" or "factual". It also moves away from the traditional language of acts or omissions, which is unhelpful, as much conduct does not fall clearly into either category.¹⁸

No liability for "pure omissions"¹⁹

S.31 Under Regulation 6 it is a criminal offence for a trader to omit or hide material information. The most controversial issue was whether consumers should have a right of redress for a "pure" omission, where the overall presentation was not misleading but material information was omitted. Views were mixed. Many consumer groups argued that the new legislation should mirror the Regulations. The OFT also said that it "may confuse consumers as well as the courts" if Regulation 6 were not followed.

S.32 By contrast, business groups argued that it would be too uncertain to introduce a private right of redress specifically for all material omissions; the scope would be difficult to define; and it would represent a departure from the current approach of UK law.

¹⁴ Paras 7.85 to 7.116.

¹⁵ Paras 7.107 to 7.116.

¹⁶ Paras 6.61 to 6.93.

¹⁷ Paras 7.38 to 7.61.

¹⁸ Paras 7.3 to 7.37.

¹⁹ Paras 7.3 to 7.37.

- S.33 We have concluded that there should not be a private right of redress for “pure” omissions. We would, however, welcome a review by BIS of the effect of the Regulations in five years time. If the test has proved too narrow, this decision could be reconsidered.

Defining an aggressive practice²⁰

- S.34 The definition of aggressive practices would follow the substance of Regulation 7. We think that some of the blacklisted aggressive practices would provide helpful examples illustrating the coverage of the new Act. Pressure selling and doorstep salespersons overstaying their welcome should be expressly included as examples of aggressive practices.

Defining the “average consumer”²¹

- S.35 The Regulations use the concept of the “average consumer”. This hypothetical person is “reasonably well informed, reasonably observant and circumspect”.²² We recommend that the new right should mirror this test. Practices are only misleading or aggressive if they would be likely to cause this hypothetical consumer to take a decision they would not have taken otherwise.
- S.36 As with the Regulations, in some cases the test of the average consumer would be replaced with a test of the average vulnerable consumer. This would apply where:
- (1) the commercial practice is directed to a particular group of consumers; or
 - (2) a clearly identifiable group of consumers is particularly vulnerable to the practice because of “their mental or physical infirmity, age or credulity” in a way which the trader could reasonably be expected to foresee.²³

A REPLACEMENT STATUTE²⁴

- S.37 The recommended new right covers substantially the same ground as the Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (in Scotland). We think the new legislation should replace these provisions in so far as they cover business to consumer transactions within the ambit of the new Act.
- S.38 Other common law and contractual remedies would remain. In particular, consumers would continue to be able to make claims under the Sale of Goods Act 1979 where goods are of unsatisfactory quality, though consumers would not be entitled to double recovery.

²⁰ Paras 7.62 to 7.84.

²¹ Paras 7.87 to 7.106.

²² Reg 2(2).

²³ Reg 2(5).

²⁴ Paras 7.117 to 7.137.

REMEDIES (Part 8)

- S.39 Stakeholders told us that there was a need for certain, standardised remedies, even if these were sometimes “rough and ready”. The most important remedy is the right to unwind the contract and obtain a refund. This fits with the primary aim of current private law, which is to restore the consumer to the position they were in before the misleading or aggressive practice took place.
- S.40 Under the new legislation consumers would have two tiers of remedies. Tier 1 remedies would be the standard remedies and would apply on a strict liability basis. The amount would be based on the price paid and would not require evidence of loss. This means they could be used in both the civil courts and alongside enforcement action, for example in criminal compensation orders. By contrast, Tier 2 remedies would apply only if the consumer proved additional loss; they would also be subject to the trader’s due diligence defence.

Tier 1 remedies²⁵

- S.41 The type of Tier 1 remedy would depend on how soon after the event the consumer complains and whether the consumer has fully consumed the product:
- (1) **The right to unwind.** If the consumer raises a complaint within three months, and is able to reject some element of the goods or service, then the standard remedy is to unwind the contract. This means that the consumer can get a refund.
 - (2) **Discount.** If the consumer waits more than three months to make a complaint or if the goods or services are fully consumed, then the consumer can claim a discount on the price.

Tier 2 remedies²⁶

- S.42 Tier 2 remedies provide damages to compensate for indirect losses, including economic damage and distress and inconvenience. They are provided only if the consumer can prove that the unfair practice caused actual loss, meeting a “but for” test of causation. Furthermore, the trader can avoid this consequential liability if it can establish a due diligence defence.
- S.43 The basic structure of the consumer’s remedies would be as follows:

²⁵ Paras 8.27 to 8.143.

²⁶ Paras 8.144 to 8.175.

CONSUMER REMEDIES		
When available	Standard (Tier 1)	Optional (Tier 2)
Up to 3 months, provided some element of the product is either returned or rejected	Refund Unwind - both parties are released from their obligations (if any)	Indirect economic losses Damages for distress and inconvenience
After 3 months, or if product fully consumed	% discount on price	

UNFAIR PAYMENT COLLECTION (Part 9)

- S.44 There is uncertainty about how far the Regulations cover misleading or aggressive demands for payment. They clearly include demands made following a sale but problems arise in other contexts. For example, consumers accused of copyright infringement or shoplifting, or those who have had their car towed, might be misled or pressured into paying significant sums of money.
- S.45 We recommend that the Regulations should be amended to clarify that all commercial demands for payment are included within the definition of commercial practices. There was strong support for this, to protect consumers and to ensure consistency and clarity.
- S.46 We also recommend that the new right to redress should include misleading or aggressive demands for payment. The many examples submitted by consumer groups illustrate that consumers would benefit from clearer and more certain rights to redress in these cases.
- S.47 Where there has been an unfair demand for money and the money was not owed, the consumer would be entitled to a refund. Where it was owed, the consumer would not be entitled to a refund but would be able to claim for proven consequential losses, together with limited damages for proven distress and inconvenience.

CREDITOR LIABILITY (Part 10)

- S.48 In Part 10 we consider the creditor's liability when a consumer has entered into a credit agreement to buy goods and services which have been sold in a misleading or aggressive way.
- S.49 In the Consultation Paper we proposed that section 75 of the Consumer Credit Act 1974 should be amended. This section applies to credit card and other connected credit purchases worth more than £100 and not more than £30,000. It makes a creditor liable for the supplier's misrepresentation and breach of contract, but not for the supplier's aggressive practices. There was significant opposition to this proposal and we do not recommend it.

S.50 We conclude that consumers already have adequate redress under section 56(2) and section 140A of the Consumer Credit Act 1974.

IMPACT ASSESSMENT (Part 11)

S.51 An impact assessment is published alongside this Report, and summarised in Part 11. We anticipate three benefits from the proposals:

- (1) Easier complaint handling. Legitimate traders would find it easier to deal with complaints of misleading practices. TSS and advice agencies would also benefit from simpler, easier ways of valuing consumer loss. This saving is estimated at around £5 million.
- (2) Consumers who have suffered a misleading or aggressive practice would receive more compensation, estimated at between £2 million and £5 million.
- (3) Combating aggressive practices more effectively would increase consumer confidence, and therefore lead to increased sales. On a conservative estimate, improved protection might boost the market for doorstep sales by around £5 million.

S.52 We do not include costs that would fall on rogue traders. We do not consider any additional compensation paid by rogue traders to be a true cost, as it is compensating consumers for actions which are already criminal offences. Better enforcement will bring some rogue traders into compliance, while others may no longer be able to continue trading. Again, this cost to rogue traders would be a gain to legitimate traders.

S.53 There would be one-off familiarisation costs as traders, TSS officers and consumer advisers need to become familiar with the new law. These are estimated at between £3.75 million and £7.5 million.

S.54 There may also be a few more court cases each year, including some which are ill-founded. We estimate that an additional 550 to 1,100 new cases may result, of which up to 330 may be ill-founded, at a cost to traders of up to £330,000.

FURTHER INFORMATION

S.55 The full Report and impact assessment may be downloaded from our websites at www.lawcom.gov.uk and www.scotlawcom.gov.uk (from the project page).

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