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Consultation response

Ref 4511

Consumer Redress for Misrepresentation and Aggressive Practices

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This consultation makes proposals to simplify obtaining redress for misleading and aggressive commercial practices and to fill gaps in the existing consumer protection legislation to ensure consumers can get redress for serious breaches of The Consumer Protection from Unfair Trading Regulations 2008.

Key points and recommendations

- We think any attempt to simplify and clarify private redress for consumers is to be warmly welcomed.
- We would like to see any resulting legislation allow for class actions to be taken by third parties such as Which? and Citizens Advice as allowed in the Enterprise Act 2002.
- We strongly agree that private redress for consumers who have been subjected to aggressive practices should be extended.
- Although we have sympathy with the quoted cases with regard to unemployed people, we would prefer the definition of consumer in any new legislation to generally follow the definitions contained in other consumer legislation.
- We think any Act should only protect those who have entered into a contact with the trader.
- We agree that financial services should not be within the scope of the Act, but think that consumers do need enhanced protection in relation to some forms of land transaction
- We think contract law should be the basis of any legislation introduced giving consumers the rights of redress where mis-representation or aggressive selling has occurred.
- We strongly support the proposal that the legal responsibilities of Directors for the behaviour of their employees should be strengthened with regard to aggressive selling practices.
- In the interests of certainty, we would support guidance being given on wider examples of aggressive practices which could include those included in the Law Commission document.
- We welcome proposals to simplify the burden of proof with regard to aggressive selling and agree with the proposal to introduce the concept of 'significant factor' in the consumer's decision to enter the contract.
- We agree there should be provision for consumers to claim compensation as well as a full refund
- We think the right to cancel should be time limited to three months provided that consumers are able to take action once the time has lapsed as proposed in the document
- We think there should be a formal requirement on the methods consumers can use to make their complaint and reject the contract.
- Consumers should not be expected to pay anything towards the use of the product or service they have had before indicating their wish to reject it.
- We strongly disagree that connected lenders should not be liable to pay any legitimate compensation.

1. Introduction

1.1 Age UK is pleased to respond to the Law Commission's consultation on their proposals to improve consumer redress with regard to misrepresentation and aggressive practices. Our expertise relates to aggressive practices and we have restricted our comments to this section of the consultation.

1.2 It was as a result of a number of complaints to their helpline that in 2001 Age Concern undertook research into the selling practices employed by the assistive aids industry¹. Following consultation with disability organisations about their experiences with the industry, mystery shopping exercises were undertaken with the six companies most named in the complaints received by Age Concern and the other disability organisations. The research found that a small number of companies were employing sharp practices in the sales of their products in the home. In particular, older people were being bullied into making a purchase as the result of high pressure selling.

1.3 The report made a number of recommendations. One was that the main trade association, the British Healthcare Trade Association should apply to have an Office of Fair Trading (OFT) Approved Code of Practice. This was achieved in 2009. Another was that the ability to cancel an order made in the home as the result of a solicited visit (which was generally the way the worst assistive aids companies sold their products) should be the same as the cooling off period that contracts made as the result of an unsolicited visit enjoyed.

1.4 We hoped that the ability to cancel would reduce the incidence of high pressure selling. It was our experience that many older people who had been subjected to high pressure selling had signed the contract because they wanted the salesperson to leave their house (some of these had stayed three to four hours trying to close the sale). The next morning they would realise they did not want to buy the product, often because they thought it cost more than they could afford, and were amazed they did not have any legal rights to cancel. However, we also recognise that some people, particularly those living on their own will not take immediate action. As advised in paragraph 10.59 of the document, any delay in taking action is likely to result in them being unable to exercise the right to rescind for duress.

1.5 We welcomed the proposal of the European Commission, subsequently transposed into UK law under the Consumer Protection from Unfair Trading Regulations 2008, which specifically made pressure selling an unfair trading practice. It is disappointing that, due to the number of complaints received by Consumer Direct, the OFT recently announced they were to do a second market study of the assistive aids industry expecting to report later this year.

1.6 It was also depressing to read the examples you gave in Part Seven of the document giving examples of aggressive selling practices. These were all similar to those uncovered and reported in our Sharp Selling Practices report and these came from the research which was conducted in 2001. Clearly more needs to be done to reduce the incidence of this despicable practice.

¹Sharp Practices. Age Concern 2002

2 Answers to particular questions

2.1 We particularly welcome the statement in paragraph 1.8 of the document that consumer law has yet to adapt to the needs of an ageing population. Research conducted by Age UK on older people as consumers² concluded there was a need for Governments across the UK to review consumer protection legislation to ensure it continued to take into account the increasingly ageing population. As paragraph 10.34 indicates, the fastest growing group of older consumers is those aged 85 and over. People in this age group are more likely to be frail and vulnerable. This is because, despite living longer and healthier lives, we still experience the 'normal impairments' of ageing which affect the senses such as sight and hearing, mobility and cognitive abilities.

2.2 We completely agree with paragraph 10.3 of the document that the existing causes of action do not address the specific problems arising from high pressure selling practices and that, as stated in paragraph 10.31, the current law provides little redress for unscrupulous and often commission-based hard selling. However, while vulnerable older people are particularly likely to be the subject of aggressive selling practices, we think they are the least likely to take remedial action. While we know from our meeting with the Law Commission that this consultation is concerned with rules and not process, we would like to see any resulting legislation allow for action to be taken by a third party. We would welcome the ability of organisations such as Which? and Citizens Advice to be able to take class actions as allowed in the Enterprise Act 2002.

2.3 We appreciate the law needs to provide a general framework to encompass all possibilities. However, given the severe imbalance of power between consumers and traders, we think simplification and clarification of the laws protecting consumers are to be welcomed **(Q1)**. We do not think legal terminology such as 'of merchantable quality' or the need to take action 'within a reasonable time' are concepts easily understood by consumers. We think that having more certainty of their rights will encourage more consumers to take action against poor trading practices.

2.4 We agree that for simplicity, the definition of consumer should follow that in other consumer legislation **(Q3)**. While having sympathy with the example given of unemployed people being sold training courses of doubtful value, we think they should be covered as consumers, whether unemployed or employed if the course is undertaken in a private capacity and therefore have redress under the proposals dealing with misrepresentation proposed in the document. It should not be necessary for the legislation to give special definitions of consumer such as unemployed people who are mis-sold training courses on the promise of a future job **(Q 4)**. Similarly, for consistency, we think the definition of the average consumer given in the European Directive should be the basis of any new UK legislation **(Q 24)**. However we think it is vital that the European Directive definition of vulnerable consumers is also included **(Q 25)**.

² The Golden Economy. Age UK. December 2010

2.5 The oldest civil legislation giving consumer rights, the Sale of Goods Act originally enacted in 1893 is based on contract law giving consumers certain rights against the trader selling them the product. i.e. where payment has been made and a contract has been entered into. We think this should remain to be the basis of any legislation introduced giving consumers the rights of redress. Hence we agree that the law should not extend rights of redress to transactional decisions which do not involve a contract **(Q5)** but do support the proposals to give the right to redress where a contract with the trader or payment to the trader has been made **(Q6 and 9)**.

2.6 We strongly support the proposal that the legal responsibilities of Directors for the behaviour of their employees should be strengthened with regard to aggressive selling practices. **(Q 12)**. As the document states, there is evidence from television undercover programmes that some companies actually train their salespeople in high pressure selling techniques. We find it difficult to believe that Directors and high level management would be unaware of this. In any case, being liable may encourage all Directors to take greater trouble to ensure their employees do not use high pressure selling techniques.

2.7 We agree that financial services should not be within the scope of the new Act as financial services regulation should be strong enough to control misleading and aggressive sales practices **(Q13 [2])**. However, there are some types of transactions in land that share some of the characteristics of financial services yet fall outside the Financial Services and Markets Act, for example buy-to-let sales, life time lease transactions and so-called 'land banking'. BBC Radio has broadcast reports of high-pressure selling of worthless plots of land as an investment – see <http://www.bbc.co.uk/news/business-13462052>. While we are not aware of problems concerning lifetime lease transactions, we raised concerns that these schemes – which involve selling your current property and buying a new one on a lifetime lease – share many of the characteristics of equity release schemes yet are not regulated in the same way. Valuable though redress schemes such as the Property Ombudsman are, the redress they offer is limited and they do not cover transactions in non-residential land. We recommend that the Law Commission should investigate whether these 'non-standard' transactions in land should be brought within the scope of either consumer law or financial services legislation.

2.8 Although the law has realised that pressure selling, often involving vulnerable older people is an unfair trading practice, there is no right of redress for the consumer. Whilst we doubt that older people would take forward any action when they have been subjected to this practice, we strongly support the proposal to give consumers the right to redress **(Q23 [1])**. We recently responded to the European Commission consultation on Collective Redress which explored ways on how consumer mass claims could be solved. We thought that representative organisations taking collective redress would be one mechanism that could deal with this issue.

2.9 We think the definitions of coercion, abuse of power and harassment should cover the incidence of high pressure selling in the home **(Q 23 [2])**. Whilst coercion as defined in the document is rarely used in these circumstances, high pressure selling clearly causes 'distress', as included in the definition of harassment.

2.10 There has been considerable research into the effect on older consumers of being a victim of distraction burglary. This has found that older people in particular suffer severe psychological and physical effects. They are prone to experiencing trauma, depression and illness following an occurrence of distraction burglary. We suspect there will be similar adverse psychological consequences for people who are subjected to scams and pressure selling.

2.11 We have some difficulty about the second example given in paragraph 13.94 of the document. We do not think older people subjected to pressure selling in their home would necessarily ask the salesperson to leave. In any event whether or not the salesperson was asked to leave might be a difficult point to prove. In the interests of certainty, we would support guidance being given on wider examples of aggressive practices which could include those included in this document **(Q 23 [3])**

2.12 We welcome proposals to simplify the onus of proof with regard to aggressive selling. Clearly actively inviting a company to visit their home to explain more about their product indicates a desire to buy it. Indeed we think this is what makes people in pain looking for a product to alleviate it vulnerable. We think in these circumstances it could be possible for lawyers to defend the trader on the basis of arguing the consumer might have been happy to buy the product. We therefore agree with the proposal to introduce the concept of a 'significant factor' in the consumer's decision to enter the contract **(Q 26 [1])**.

2.13 We 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 **(Q 28)** which in many instances would be a full refund of money paid. However we also think there should be provision for damages in certain circumstances. As we have outlined in paragraph 2.10 above, older people suffer significant distress when subjected to bad selling practices. In addition in many cases, they have disposed of goods such as a bed to accommodate the new purchase. We think the proposed Tier 1 and Tier 2 remedies should cover legitimate claims for consequential loss, distress and inconvenience.

2.14 While we accept that the 'right to unwind' should be time limited **(Q30)** with regard to older people, it is often only when a child or friend discovers the situation that any action is likely to occur and this may take longer than thirty days. We therefore support the proposal the unwinding period should last for three months **(Q31)**. However, if as the result of the responses to the consultation it is decided to reduce the unwinding period to thirty days, we would support the proposal to have discretion to extend the fixed period in some circumstances such as involving vulnerable consumers **(Q 32)**.

2.15 However, there will always be cases where the fault cannot be discovered until after the time limit has expired. The example of double glazing given on page 222 of the document is such a case. We agree with the proposals that consumers who only discover the malpractice after the time limit has expired should be entitled to compensation **(Q41)**. We agree on the grounds of simplification, the price discount available under this remedy should be set in pre-set bands **(Q 42)** and that the proposal these should be set at 0%, 25%, 50% and 100% are reasonable **(Q43)**.

2.16 We think the fixed time period should start from the time the goods are delivered or the service has started (**Q33**) although of course the contract can be cancelled before this time. We agree that the notice to unwind the contract would be generated by the consumer giving notice of their desire to reject the goods or services (**Q34**). However, we disagree there should not be some formal requirement on how this should be done. In our experience, industry can discourage complaints by insisting they be made in writing and without clearer guidance on how a consumer can indicate rejection, they may insist on this being given in writing. Apart from being discriminatory for people with literacy problems, there are more modern methods of contacting companies such as email and telephony which we think are reasonable for consumers to use.. We think it should not be left to industry to determine the method consumers must use to indicate rejection.

2.17 We do not think consumers giving notice within the fixed time period should be required to pay for any use they have had from the product/service in the meantime (**Q 36**).. Apart from the difficulties in being able to put a value on this, the sale was the result of a mis-practice. On this basis we do not think it is unreasonable for the trader responsible to bear this cost.

2.18 We agree that where section 75 of the Consumer Credit Act 1974 applies, connected lenders should be liable for the misleading or aggressive acts of a supplier. However we do not agree that these should be limited to the amount of the loan. We think they should also be responsible for compensation where relevant. We do not see why the consumer should lose out.

2.19 We do not think this would be over onerous on the finance companies. While we agree they may feel this requirement is onerous with regard to the ability to identify companies that may go into liquidation, we do not think compensating for misleading and aggressive practices is a similar situation. Our research found that it was only a minority of companies that practised sharp selling practices in the selling of assistive aids and we have no reason to believe it would be any different in other industries. The benefit would be that the finance companies would quickly identify 'problem' companies and withdraw their services, making it harder for such companies to trade.