

Response to Law Commission consultation on: *Reforming Consumer Redress for Misleading and Aggressive Practices*

Introduction

The Consumer Credit Counselling Service (CCCS) is the UK's largest dedicated debt charity. In 2010, CCC received more than 417,000 phone calls from indebted consumers and helped its clients repay £289 million in unsecured debt.

Some of the charity's clients have been victims of aggressive or misleading practices from financial services firms. For example, in May 2011 the daughter of a CCCS client took out a loan with a payday lender. After his daughter ran into difficulties repaying, the client made a one off payment towards the loan on his debit card. The lender then retained his debit card details and took five payments from it the following month without informing him. The loan was not in joint names and the client was not a guarantor for the debt.

Clients have found that Debt Collection Agencies (DCAs) can be intimidating. One client reported receiving letters from a bailiff demanding full repayment of an account. However, no court or enforcement action had previously taken place. It eventually became apparent that the bailiff was a trading name of a debt collector.

It is for reasons such as this that the charity feels that financial services and DCAs should be covered by any new Act.

As part of its response CCCS would like to draw attention to emerging pressure selling tactics on the telephone. Recently the charity responded to the Office of Fair Trading (OFT) with evidence on cold calling. Examples included:

- firms claiming they could write off credit card debts for a fee and when told by those they contacted that they couldn't afford this, suggesting paying for it by credit card;
- people phoned by fee-charging debt management companies (DMCs) advised not to deal with free debt advice charities, such as CCCS.

We believe any new "a new stand-alone scheme of remedies for consumers" must not add complication and costs. Indebted consumers often have little money available each month to cover unexpected expenses. In 2010, CCCS clients in the lowest income group (earning less than £13,500 gross a year)

had no budget surplus available at the end of each month, once their basic living expenses had been covered.

Throughout this response we have included examples from CCCS Social Policy (a network of our senior debt counsellors keeping track of clients whose cases show consumer detriment) to illustrate issues facing the average indebted consumer.

We have responded to those consultation questions of most relevance to our work and interests.

Responses to relevant questions

S.1 Do you agree that there is a need for statutory reform to:

(1) Simplify and clarify private redress for misleading practices?

(2) Extend private redress for aggressive practices?

1) Yes, greater simplicity and clarity, setting expectations of possible redress, would encourage consumers to seek compensation for misleading practices. Currently, although the Financial Ombudsman Service (FOS) can propose offers for redress, people can be dissuaded from approaching it by the length of time it can take to bring a complaint and receive a response.

CCCS urges that any statutory reforms take account of the increasing number of payday and logbook loan providers, pay weekly retailers and new style lenders whose main presence is online. The number of clients experiencing problems with such lenders has increased in 2011.

The charity has seen cases of pay weekly retailers selling multiple items to households reliant on state benefits, where repayments can amount to two thirds of disposable net income. It is unlikely these households can keep up repayment on such items and the terms of the purchase agreements demand automatic return (hire purchase regulations apply).

CCCS Social Policy example - June 3 2011

One of our clients, a single mother, whose income consists entirely of state benefits, signed seven separate hire purchase agreements at the same retail outlet. The total outstanding was £6,282 with weekly payments of £82 which accounts for 66 percent of the client's net income. The client had been offered new items when visiting the store to make her weekly payments.

CCCS Social Policy example – June 23 2011

Another client sought the advice of CCCS as she had fallen behind with her electricity bill. It became apparent that the underlying cause was an over commitment to credit. Although a single pensioner, she had nine concurrent hire purchase agreements with the same shop.

We are concerned that a few online lenders can hide terms and conditions, including information about additional charges and the consequence of non-payment, in small print. This can be problematic online, where large amounts of money can be easily borrowed, often without credit checks.

We believe terms and conditions online need to be more explicit and presented more obviously. In the charity's experience indebted consumers tend not to spend sufficient time considering terms and conditions, particularly online.

2) Yes, extending private redress would encourage engagement and remove reliance on regulatory engagement. It may be useful in tackling some negative debt collection practices. CCCS clients occasionally experience problems with bailiffs contacting them on behalf of DCAs collecting unpaid loans.

In cases where a client is particularly vulnerable or elderly, debt advisors and support workers could develop a third party tool kit to enable the financially disadvantaged to claim redress.

Any new process should be simple and without complication, as any complex process will dissuade people from taking the trouble to seek redress.

S.2 Do you agree that the proposed new Act offers a good degree of consumer protection such that there should not be a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008?

We consider that there should be a private right to redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). The CPRs are intended to protect consumers:

"...if a trader misleads, behaves aggressively, or otherwise acts unfairly towards consumers, then the trader is likely to be in breach of the CPRs and may face action by enforcement authorities."

It seems strange that consumers would be protected from these behaviours by enforcement authorities but not given the option of private redress if there is a failure to act by these bodies. In particular, we are concerned that consumers have no rights to private redress in cases where lenders will not deal with debt management plan providers or third parties, preventing consumers seeking help from the free debt advice sector.

CCCS Social Policy example - June 15 2011

After calling a payday lender, a client referred us to the recorded message played prior to any telephone contact with the firm, stating that the lender is not obliged to deal with debt management companies or to stop interest or charges.

S.3 Do consultees agree that the proposed Act should not provide redress for “transactional decisions” such as the decision to visit a shop?

No. It is important that consumers are able to exercise their right to redress in all circumstances following a breakdown in the relationship between them and a trader. The secondary definition of a transactional decision covers,

“...how and on what terms to exercise a contractual right in relation to a product.”

If a contractual specification has not been met consumers can be unsure of their rights in relation to redress. A well-known, well-publicised Act providing redress under transactional circumstances could mean decreased consumer detriment.

S.4 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?**

CCCS believes the proposed Act should provide redress in both these instances. One of our concerns in this area is that fee-charging DMCs sometimes mislead consumers about the nature of their service during the current initial 14 day cooling off period following contact and then do not fulfil any promise made – leaving the consumer in a worse position.

CCCS Social Policy example - June 15 2011

A client who attempted to engage the service of a fee-charging DMC was asked for £1,500 in fees to set up an arrangement. He was then told he would be required to pay 21 further instalments of £241. His debts totalled £26,969. The DMC suggested that they hold onto these funds with a view to making a full and final settlement with the lump sum available in two years time. However, there was no capacity to make any payments directly to the creditors during this time.

In this case default notices as well as late payment records were still being applied to the client’s credit report.

S.5 Do you agree that the proposed new Act should exclude

- (1) Land sales; and**
- (2) Financial services?**

We believe financial services should be included in the Act. It is especially important that fee-charging DMCs are covered. Research by the Office of Fair Trading (OFT) has previously documented examples of bad practice among some DMCs. Following a survey of the sector, the OFT found 129 DMCs in

contravention of statutory rules, resulting in some either surrendering their licences or having them revoked.

We accept that consumers have the existing protection of the Financial Ombudsman Service (FOS). However, redress is not guaranteed by the FOS and does not necessarily reflect any substantial losses incurred by the debtor.

CCCS Social Policy example - June 24 2011

A 65 year old single client paid a fee charging company £4,700 to check if his credit agreements were “unlawful or unenforceable”. Subsequently he did not hear from the company for some months. He has since been advised to declare himself bankrupt by CCCS.

S.6 Do you agree that the proposed new Act should include misleading or aggressive demands for payment?

Yes. CCCS clients sometimes receive aggressive demands for payment, combined with misleading threats that court action is imminent. Occasionally creditors will quote a list of enforcement options, such as an attachment of earnings, a visit by a bailiff or even the seizure of goods for public sale, without acknowledging that a county court judgment would need to be obtained first. These demands are often in writing and can lead to debtors taking on further sub-prime borrowing in an attempt to prevent enforcement.

CCCS Social Policy example - June 21 2011

A client received a statutory demand for a debt of £1,300. The debt had been purchased by a DCA, although there had been no formal collections activity by the principle lender at any time. Following first contact, costs of £500 were added.

S.7 Do you agree that demands for damages against alleged wrongdoers should be covered by the proposed new Act? In particular, should demands for payment following parking offences, alleged copyright infringements, wheel-clamping and “civil recovery” also be covered?

Yes, demands for damages, including those following parking offences, should be covered. Both local authority issued penalty charge notices, which can attract further enforcement action, and parking tickets issued by a private company on private land should be covered.

S.8 Should the Regulations be amended to state that all commercial demands for payment are included with the definition of commercial practices?

It is appropriate that demands for payment are included with the definition of commercial practices to provide additional protection for consumers.

S.9 Do you agree that traders

(3) should not be liable for omissions as such?

(4) 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?

3) No. The consultation document itself recognises that omissions by traders can cause consumers to make detrimental “transactional decisions.” The charity feels that any moves made towards lessening the risk of this happening are positive and should be made.

4) CCCS believes that in addition to traders being liable for omissions they should also be liable for imprecise implied representations. As in our answer to question one, the charity would emphasise that both these practices (omissions and imprecise implied representations) can often occur online.

S.10 Do you 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?

Yes. We believe indebted consumers would benefit from “restoration” under the proposed Act, especially where a creditor has debited a due payment earlier than contractually expected, or debited the sum from an account without explicit authority. In some cases this can lead to priority payments, such as mortgage payments, failing.

If a priority payment fails due to an unauthorised or incorrect debit, a mortgage or second charge lender may decide to commence repossession proceedings. This is especially problematic in cases where arrears exist, because a secured lender may interpret a further breach as refusal to pay on the part of the debtor.

S.11 Do you think the remedies we propose as a whole offer an appropriate balance between certainty and flexibility?

S.12 Do you agree that the right to unwind should last for a fixed period?

Yes.

S.13 Do you think that the right to unwind should last for three months (90 days)? If not, what other period would be preferable?

A 90 day or 120 unwinding period would be preferable as in some cases, the current 14 day cooling off period is too short. For example, in cases of loan brokers offering to secure a lending facility or a fee charging DMCs, failure to deliver a service may not become apparent for at least a month. In terms of the fee charging debt management sector, CCCS has recorded instances of

DMCs holding on to client's funds for several months until "set up" fees have been paid.

S.14 Do you 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?

Yes, in most cases. However, depending on the extent of the return or what the goods are, it may be necessary for court involvement to decide on the right to unwind.

S.15 Do you 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?

We are concerned that not requiring consumers to make an allowance for their use of a product could be open to abuse. However, at this time the charity would like to reserve judgement on this proposal until we have seen more evidence.

S.16 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?

A statutory right to return of a payment made under duress is required. Please refer to the response to question S.10 for the charity's reasoning for this. We would consider a debit from an account without explicit authority to be an aggressive practice.

S.17 Where the payment was owed, should the debt be offset against the payment, permitting the trader to retain the money paid?

No, following any aggressive or misleading practices all money, whether owed or not, should be returned to the consumer.

S.18 Where the right to unwind has been lost, should consumers be compensated by a discount on the price?

Should the right to unwind have expired, a discount on the price of the service offered is a satisfactory alternative in terms of redress.

S.19 If so, should the discounts be in pre-set bands?

We would agree that pre-set bands would set a clear expectation and require less mediation or the need for regulatory bodies to be included in dispute resolution.

S.20 Are the proposed bands (0%, 25%, 50% and 100%) set in the right places?

The proposed bands seem appropriate.

S.21 Do you 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?

Yes to all. Especially in the second instance where, for example, a Debt Management Plan (DMP) is offered as a viable solution, yet fails to deliver the service and peace of mind that was promised.

S.22 Do you agree that damages for indirect economic loss and distress and inconvenience should not be available if the trader can establish a due diligence defence?

Yes.

S.23 Do you agree that:

(1) Where section 75 applies, connected lenders should be liable for the supplier's aggressive acts, in addition to misleading acts?

(2) The connected lender's liability for the supplier's misleading or aggressive acts should be capped at the amount of the loan, plus interest?

1) No.

**Consumer Credit Counselling Service
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