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# Reforming Consumer Redress for Misleading and Aggressive Practices: What Do You Think?

## Summary

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Your Money

Debt collector's tactics

**Mobility aid sales scam warning**

Elderly and vulnerable people are being duped into handling over a million pounds worth of overpriced goods and services to rogue traders.

Elderly couple lose life savings in scam

'Buy double glazing or I'll put your head in a vice'

**Cash for gold companies face watchdog enquiry**

'Aggressive' wheelie bins must pay back drivers

**Council granted injunction against mobility company owner**

**INCOMPETENCE AND DISHONESTY OF 'COWBOY' WILL WRITERS**

**Judge attacks credit card firm and axes debt**

**The Law Commission  
and  
The Scottish Law Commission**

**REFORMING CONSUMER REDRESS FOR  
MISLEADING AND AGGRESSIVE PRACTICES:  
WHAT DO YOU THINK?**

**Summary**

This paper is a summary of the full Consultation Paper, Consumer Redress for Misleading and Aggressive Practices, Law Com 199 / Scot Law Com 149, available on our websites at <http://www.lawcom.gov.uk> (See A–Z of projects > Misleading and Aggressive Practices) and [http://www.scotlawcom.gov.uk/download\\_file/view/672/](http://www.scotlawcom.gov.uk/download_file/view/672/).

# THE LAW COMMISSIONS: HOW WE CONSULT

**About the Commissions:** The Law Commission and the Scottish Law Commission were set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

- The Law Commissioners are: The Rt Hon Lord Justice Munby (*Chairman*), Professor Elizabeth Cooke, Mr David Hertzell, Professor David Ormerod and Miss Frances Patterson QC. The Chief Executive is Mark Ormerod CB.
- The Scottish Law Commissioners are: The Honourable Lord Drummond Young (*Chairman*), Laura J Dunlop QC, Professor George L Gretton, Patrick Layden QC TD and Professor Hector L MacQueen. The Chief Executive is Malcolm McMillan.

**Topic:** We ask how far consumers should be given a right to redress when a trader acts in a misleading or aggressive way, in breach of the Consumer Protection from Unfair Trading Regulations 2008. This is a summary of the full Consultation Paper, which is available from our websites.

**Geographical scope:** England and Wales, Scotland.

**An impact assessment** is available on our website, and is summarised in Part 16 of the Consultation Paper.

**Previous engagement:** In March 2010, we published a short paper outlining the issues. We then held a series of meetings with stakeholders, and summarised our findings in October 2010.

**Duration of the consultation:** 12 April 2011 to **12 July 2011**.

## How to respond

Send your responses either –

**By email to:** [commercialandcommon@lawcommission.gsi.gov.uk](mailto:commercialandcommon@lawcommission.gsi.gov.uk) or

**By post to:** Jessica Ugucioni, Law Commission,  
Steel House, 11 Tothill Street, London SW1H 9LJ  
Tel: 020 3334 0282 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, where possible, you also sent them to us electronically (in any commonly used format).

**After the consultation:** We plan to publish final recommendations in early 2012 and present them to Parliament. It will be for Parliament to decide whether to change the law.

**Freedom of information:** We will treat all responses as public documents, in accordance with the Freedom of Information Act. We may attribute comments and publish a list of respondents' names. If you wish to submit a confidential response, you should contact us before sending it.

**Code of Practice:** The Law Commission is a signatory to the Government's Code of Practice.

**Availability:** You can download this summary and the other documents free of charge from our websites at: <http://www.lawcom.gov.uk> (See A–Z of projects > Misleading and Aggressive Practices) and [http://www.scotlawcom.gov.uk/download\\_file/view/672/](http://www.scotlawcom.gov.uk/download_file/view/672/).

THE LAW COMMISSION  
THE SCOTTISH LAW COMMISSION

**REFORMING CONSUMER REDRESS FOR  
MISLEADING AND AGGRESSIVE PRACTICES:  
WHAT DO YOU THINK?**

**Summary**

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# SUMMARY

## INTRODUCTION

- 1.1 The Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) prohibit misleading and aggressive trade practices. The Regulations implemented a European directive, replacing 23 previous UK consumer protection measures, including most of the Trade Descriptions Act 1968. They are enforced mainly by the Office of Fair Trading and by trading standards services.
- 1.2 Under current law, consumers do not have a right to compensation if a trader breaches the Regulations. Instead consumers must rely on a variety of private causes of action, some statutory, some based on case law. These are complex, confusing and leave many gaps.
- 1.3 In 2009, the European Parliament asked Member States to consider giving consumers a right of redress for unfair commercial practices. In 2010, the Department for Business, Innovation and Skills asked the Law Commission and Scottish Law Commission to undertake this project. Our aims are to:
  - (1) simplify redress for misleading commercial practices;
  - (2) simplify redress for aggressive commercial practices; and
  - (3) fill gaps in protection, where a consumer is unable to gain redress for serious breaches of the Regulations.
- 1.4 This paper is a summary of our full consultation. It highlights the problems with the current law and sets out provisional proposals for reform. At the end, we list the main questions on which we are seeking views.
- 1.5 Our consultation closes on **12 July 2011**. The full Consultation Paper (with a longer list of questions) is available on our websites at:  
<http://www.lawcom.gov.uk> (See A–Z of projects > Misleading and Aggressive Practices) and  
[http://www.scotlawcom.gov.uk/download\\_file/view/672/](http://www.scotlawcom.gov.uk/download_file/view/672/).
- 1.6 We are very grateful to the many organisations and individuals who helped us with the project and who gave us examples of current problems. A full list is set out in Appendix 1 of the Consultation Paper.

## THE NEED FOR REFORM

- 1.7 According to research by Consumer Focus almost two-thirds of the population have been affected by a misleading or aggressive commercial practice within the last two years.
- 1.8 Aggressive practices are a particular problem for housebound or vulnerable consumers, especially the elderly. Government statistics suggest that in England and Scotland there are currently 630,000 people aged 85 or over who live alone. This is set to rise to 1.4 million by 2033. The law has not yet come to terms with the needs of an ageing population.
- 1.9 For example, the Office of Fair Trading is currently undertaking a study in the market for mobility aids, such as mobility scooters and adjustable beds. Derbyshire County Council received 603 complaints in 2010, and describes the problems as follows:

### **Doorstep selling of mobility aids**

A significant minority of unscrupulous traders will take advantage of vulnerable residents by implying that they are from or working on behalf of Social Services or the Health Service and will use high-pressure sales techniques to sell products at inflated prices which are of little benefit to the user.

- 1.10 A particular problem was that salespersons would wear down the consumers' resistance by staying for two or three hours, giving the impression that they would only leave if the consumer agreed to buy.
- 1.11 For example, in an investigation by BBC's *Rogue Traders*, an undercover reporter accompanied a salesman to the home of a man in his mid-80's who expressed an interest in a chair to help him stand. After the sale was completed, the salesman commented:

.... a master class in perseverance, do not leave the beach. Do not ever leave the beach and think it's a dead deal... . It was like nicking a Mars bar off a baby. So in two hours we've walked out with £2300. How the \*\*\*\* is that possible? About £500 worth of commission there for two hours work.<sup>1</sup>

<sup>1</sup> See [http://www.bbc.co.uk/blogs/watchdog/2010/06/rogue\\_virgo\\_healthcare.html](http://www.bbc.co.uk/blogs/watchdog/2010/06/rogue_virgo_healthcare.html)

- 1.12 The problems, however, are not confined to the elderly and vulnerable. Misleading and aggressive practices come in all shapes and sizes. The following examples illustrate some common scenarios:

**Misleading broadband speed advertisements**

A consumer takes out an expensive 18 month broadband package advertised with speeds of “up to 24 MB”. In fact, it was never possible for any customer to achieve this and average speeds were less than half.

**Wheel-clamping charges**

A consumer found her car being clamped before she had even left the car park. She was immediately charged £250, which also covered towing away. There were no obvious signs about parking, the clampers did not have any identification, and her receipt did not contain any details of the clampers or private parking company.

**Misleading and aggressive demands for payment**

Utility companies sent invoices to people who had never been customers.

Agents demanded standard fixed sum settlements for alleged shop-lifting or illegal downloads.

- 1.13 Increasingly, competitive markets rely on good quality information, through labelling, customer reviews or publicly endorsed ratings. It is also common for consumers to rely on approved codes of practice. However, this form of consumer empowerment is undermined when traders simply lie. Consumer groups told us that they received many complaints about traders who falsely held themselves out as being members of trade bodies. When the work proved to be inadequate, the consumer could not use the complaints or arbitration scheme and may have been left without a guarantee for the work done.

**Bogus double-glazing firms**

A double-glazing firm held itself out as a member of the Glass and Glazing Federation when it was not. Their work proved to be of inferior quality and the consumer had to get the work re-done by a different firm. The consumer did not have access to the trade body’s free conciliation scheme.

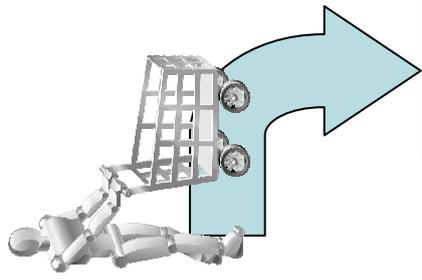
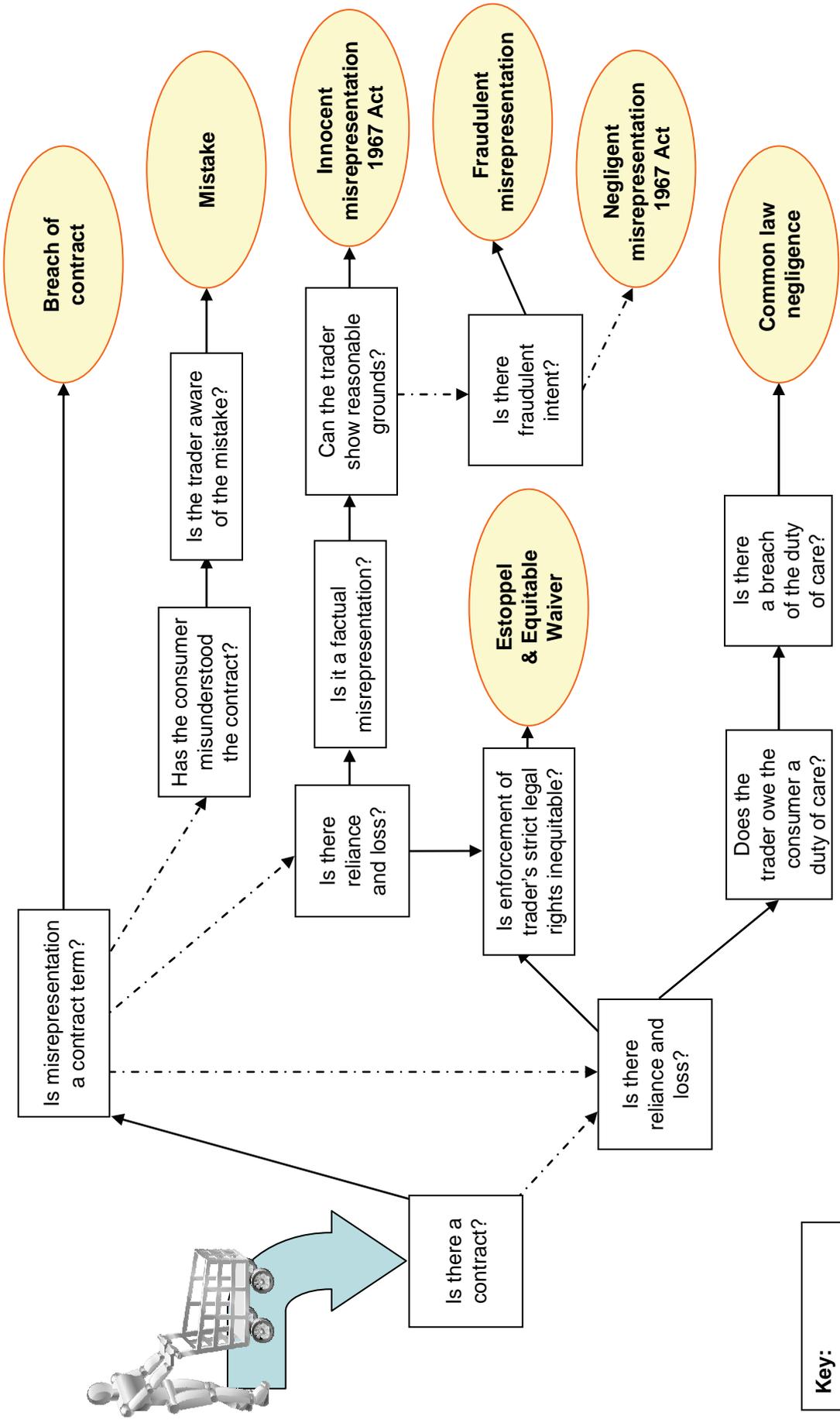
**Misleading practices**

- 1.14 The current law of misrepresentation provides redress in most cases of consumer detriment, but the law is fragmented, complex and unclear. We have considered over seven separate routes to a remedy that may apply where a trader has misled a consumer. These are:
- (1) fraudulent misrepresentation;
  - (2) negligent misrepresentation at common law;
  - (3) negligent misrepresentation under statute;
  - (4) innocent misrepresentation and, in Scotland, error;

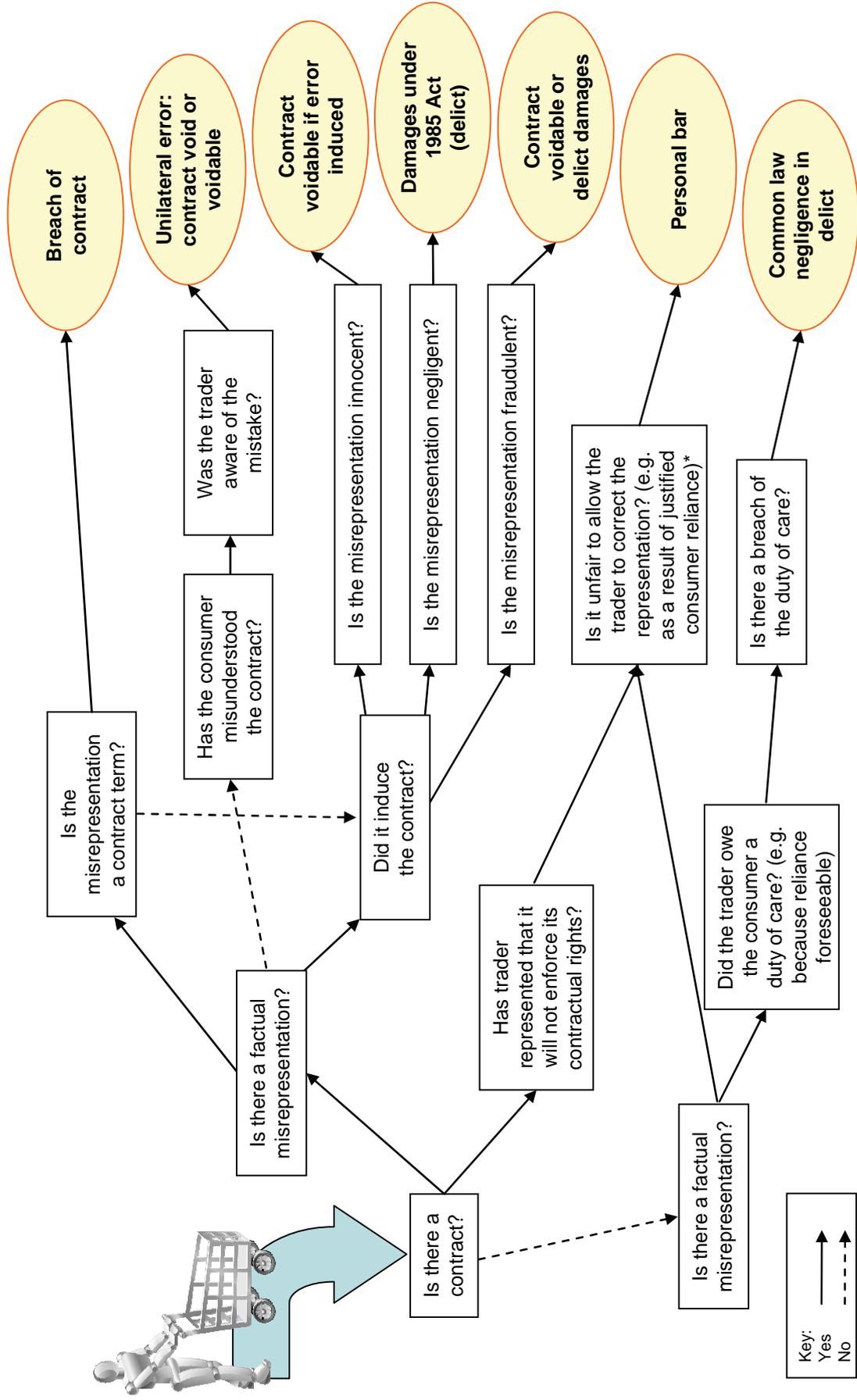
- (5) mistake (in England and Wales);
  - (6) breach of contract; and
  - (7) estoppel, equitable waiver and personal bar.
- 1.15 The first problem is working out what counts as a misrepresentation. It is said that for a statement to amount to a misrepresentation it must be false, factual and positive. However, there are many exceptions, so that in some circumstances statements of opinion or half-truths may qualify as misrepresentations.
- 1.16 Secondly, to claim for fraud or a negligent misrepresentation at common law, the consumer must prove that the trader was at fault. This is particularly difficult in consumer cases: the consumer typically knows that the trader has said something which was not true, but does not know why.
- 1.17 The most important protection is that provided by statute: by the Misrepresentation Act 1967 in England and Wales, and by section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 in Scotland. However, both statutes are perceived as lacking in clarity.
- 1.18 Whereas, in Scots law, the consumer is required to prove the trader was negligent, the advantage of the 1967 Act is that the burden of proof is on the trader to show that they had a reasonable ground to believe that the statement was true. However, the 1967 Act is drafted in a dense and confusing style. It contains ambiguities, such as whether negligence should be treated in exactly the same way as fraud (the “fiction of fraud”). As we explain below, the remedies are particularly uncertain.
- 1.19 Overall the current law confuses traders, consumers and their advisers and hinders “private ordering”.<sup>2</sup> The diagrams overleaf illustrate the complexities of these doctrines. The first diagram sets out the key concepts in the law of misrepresentation in England and Wales, the second illustrates the approach in Scotland.

<sup>2</sup> There is considerable literature about “private ordering” and promoting people’s ability to resolve their disputes themselves; without recourse to the legal system. See for example, O E Williamson, “The Lens of Contract: Private Ordering”, *American Economic Review*, 92 (May 2002) 438.

# KEY CONCEPTS IN THE LAW OF MISREPRESENTATION IN ENGLAND & WALES



# KEY CONCEPTS IN THE LAW OF MISREPRESENTATION IN SCOTLAND



\* See Reid & Blackie, para 2.11, which states that "Direct verbal representations are found relatively seldom as the basis of bar, perhaps because in many cases they are more readily analysed under the law of promise or misrepresentation."

### **Aggressive practices**

- 1.20 Aggressive practices pose more intractable problems because the current law is ill-suited to address pressure selling tactics, such as doorstep salespersons who ignore requests to leave.
- 1.21 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 inaccessible 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.
- 1.22 Doctrines such as undue influence, facility and circumvention, unconscionable bargains and intimidation may also apply. However, the scope of these doctrines is extremely uncertain, and they do not provide a firm foundation for consumers to claim redress.
- 1.23 Damages are available under the Protection from Harassment Act 1997. That Act, however, applies only to a “course of conduct” by a trader so that a single incident cannot give rise to a claim, even if it is very serious.
- 1.24 Many high-pressure sales tactics are criminal offences under the Regulations, such as giving consumers the impression that they cannot leave the premises without making a purchase. But it is unclear whether individual consumers have any rights to compensation under the current law.

### **Misleading and aggressive debt collection**

- 1.25 If debt collection follows a sale to a consumer and is conducted in an aggressive or misleading way, the trader can be prosecuted under the Regulations. However, if a trader engages in the same conduct in pursuing a *non-contractual* debt it is less clear whether the Regulations apply.
- 1.26 For example, consumers accused of parking offences, copyright infringement or shoplifting might be misled or pressured into paying significant sums of money. This process is sometimes referred to as “civil recovery”. On other occasions, a trader may send an invoice demanding payment from the wrong person: someone who was never a customer.
- 1.27 If the demands persist and become aggressive it is unclear whether the consumer is protected by the Regulations. It is perhaps even less clear whether any of the existing legal doctrines give consumers private rights of redress in these situations.
- 1.28 In our consultation, we suggest that misleading and aggressive debt collection should be covered by our reforms, and we seek views on this.

## **Remedies**

- 1.29 Most consumers want their money back. They want to be able to unwind the contract, returning any goods they still have, receiving the price paid and terminating any further obligations. This remedy is usually referred to as “rescission” in England and Wales and “reduction” in Scotland. Under existing law, it is available for all misrepresentations (whether innocent, negligent or fraudulent) and for duress. However, it may easily be lost:
- (1) The existing law requires both parties to be restored to their original positions. But this is not possible if the goods or services have been consumed. Where the goods have been used, it is not clear whether the consumer must make an allowance for use.
  - (2) It lasts for a “reasonable” time, so it is unclear how quickly a consumer must complain. Delay may prove fatal to the case. This is a particular problem for isolated or housebound consumers who have been sold goods through duress, and who may not take action until a relative discovers what has happened.
- 1.30 In some cases, the misleading or aggressive practice will cause further loss, in the form of indirect economic loss. An example of this might be where a consumer is sold a new bed in an aggressive way and then throws away an existing bed to make room for it. The indirect economic loss would be the value of the bed which has been discarded. It is unclear whether damages for such losses are available for aggressive practices.
- 1.31 Consumers may also suffer distress and inconvenience. Again, it is uncertain whether this head of damages is available for misrepresentation or duress.

## **OUR PROPOSALS**

- 1.32 The feedback we received from stakeholders has guided our work since the start of the project. Accordingly, when facing choices between simplicity on the one hand, and flexibility on the other, we have opted for simplicity.
- 1.33 We need to ensure that the law is suited to the forum in which it is enforced. Our terms of reference do not extend to reforming court procedures or access to advice. But we are aware that our proposed remedies will be enforced in a variety of settings: through compensation orders, ancillary to criminal proceedings; through civil sanctions, applied in pilot schemes; and through small claims proceedings, without lawyers present. This suggests a need for simple, standardised remedies.
- 1.34 We propose a limited and cautious reform. We do not suggest that consumers should have a right of redress for all breaches of the Regulations. Some elements of the Regulations are too uncertain for such a right – particularly the prohibitions on misleading omissions, and the general prohibition against commercial practices which are “contrary to the requirements of professional diligence”.

## **A NEW ACT**

- 1.35 Our aim is to clarify and simplify the current law on misleading practices, and to improve the law on aggressive practices by filling the existing gaps, and providing better protection to vulnerable consumers. We propose to do so by recommending a new consumer Act.
- 1.36 The new Act would not replace the Regulations. The Regulations will continue to govern criminal liability for aggressive and misleading practices. But the new Act would cover the private law consequences of traders who are found to act in ways that are aggressive or misleading. It would only apply to dealings between businesses and consumers, so-called “B2C” transactions. It would not affect transactions that are solely between businesses, or between consumers.
- 1.37 The new Act would cover:
- (1) The liability of traders. Our proposals largely adopt the existing legal tests under the Regulations, but with some important exceptions.
  - (2) A new stand-alone scheme of remedies for consumers.

## **LIABILITY FOR MISLEADING AND AGGRESSIVE PRACTICES**

- 1.38 We have followed the definitions of liability used in the Regulations as much as possible. This means that if a trader acts in a way that would lead to criminal liability, it may also lead to civil redress. Under our proposals, however, not all breaches of the Regulations would lead to civil redress.
- 1.39 In particular we suggest that under the new Act:
- (1) Land sales and financial services should not be covered. The existing law would continue to apply.
  - (2) 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.
  - (3) There should be no liability for omissions or for the general prohibition on unfair trading under the Regulations.
  - (4) The list of banned practices under the Regulations would not give rise to automatic redress; they would only be covered if they would affect an “average consumer” (described below).
- 1.40 We ask consultees whether they agree that the new Act should cover cases where a consumer pays money in response to a demand for compensation for alleged wrongdoing. In particular, should demands for payment following parking offences, alleged copyright infringements, wheel-clamping and “civil recovery” also be covered?

### **Defining a misleading practice**

- 1.41 Under the new Act, a trader's misrepresentations would be actionable whether they are express or implied. The focus is on the "overall presentation" as perceived by the average consumer. This follows the definition of misleading actions under the Regulations and, in substance, covers much the same ground as the current law.
- 1.42 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 in either category.

### **Defining an aggressive practice**

- 1.43 The definition of aggressive practices under the new Act would mirror the Regulations and move away from domestic doctrines such as duress and intimidation. The new Act would refer to "coercion" and "harassment". "Undue influence" has a specific meaning under current law, so we have avoided adopting that terminology, and refer instead to "abuse of power".
- 1.44 We suggest that some of the blacklisted aggressive practices may provide helpful examples illustrating the coverage of the new Act. Pressure selling and doorstep salespersons overstaying their welcome could, for example, be expressly covered as examples of aggressive practices.

### **The "average consumer"**

- 1.45 The Regulations use the concept of the "average consumer" who is "reasonably well informed, reasonably observant and circumspect". 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. This means that the issue is judged by an objective (and fairly demanding) standard.
- 1.46 However, in some cases, the average consumer test is replaced with the test of an average vulnerable consumer. This occurs where the practice is directed at a particular group, or where the trader should foresee that an identifiable group is particularly vulnerable "because of their mental or physical infirmity, age or credulity".
- 1.47 At first, considerable doubt was expressed about these two tests. However, traders, trading standards officers and advisers now appear to be becoming used to the Regulations. It is accepted that they apply pragmatically, in accordance with common sense notions of justice.<sup>3</sup>
- 1.48 We provisionally propose to adopt the same tests within the new Act, tracking the language of the Regulations. Thus the practice must be likely to cause the average consumer (or average vulnerable consumer) to take a different decision. To obtain redress, the individual consumer must also show that the commercial practice was a significant factor in their own choice.

<sup>3</sup> J Williams & C Hare, "Early Experiences of the Enforcement of the Unfair Commercial Practices Directive in Scotland", (2010) 33(4) *Journal of Consumer Policy* 377-401.

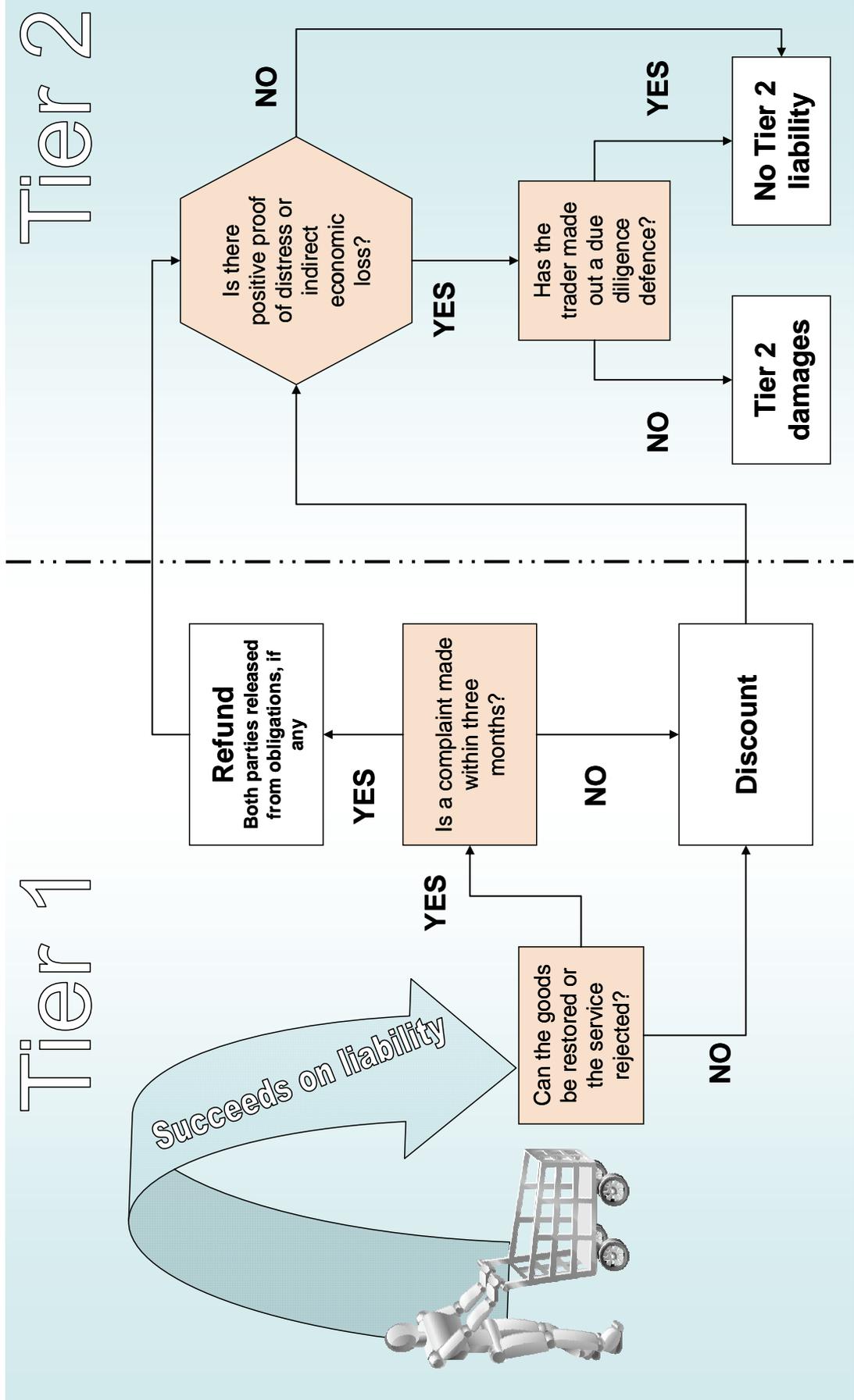
## **A NEW SCHEME OF CONSUMER REMEDIES**

- 1.49 We propose a new scheme of remedies that would apply if a consumer could prove that:
- (1) an aggressive or misleading practice had taken place;
  - (2) it was likely to cause an “average consumer” to take a decision to enter a contract or make a payment they would not have taken otherwise; and
  - (3) it was a significant factor in the individual consumer’s decision.
- 1.50 The scheme tries to replace legal terminology with every-day language. But the change in language is not only about labels: the legal implications of traditional remedies are also left behind.
- 1.51 The new scheme of remedies places a premium on clarity and simplicity so that many grey areas have been swept aside in favour of bright-line rules. Our proposed remedies aim to restore the consumer to the position they would have been in had the aggressive or misleading practice not happened.

### **Two tiers of remedies**

- 1.52 We are proposing two tiers of remedies. The standard Tier 1 remedies would be provided in all cases, with no additional proof of loss. The Tier 2 remedies would permit additional, specifically proven losses, and are similar to traditional damages.
- 1.53 Below we consider the typical case, in which a consumer has bought goods or services as a result of misleading or aggressive trade practices. We then consider the remedies where the consumer sells goods, or pays debt collectors.
- 1.54 Where a consumer buys goods or services, the remedies under the new Act are set out in the diagram overleaf.

# REMEDIES FOR CONSUMERS UNDER THE NEW ACT



## **Tier 1**

1.55 The Tier 1 remedies would be of two types:

### ***The right to unwind***

1.56 This is the primary and most important remedy. The consumer would receive a refund and the parties' obligations under the contract would be brought to an end. Consumers would be entitled to unwind if:

- (1) They return some of the goods or reject some element of the service. To minimise difficult questions of degree, returning or rejecting any part of the goods or service would be enough.
- (2) They act sufficiently quickly. We propose a fixed time period to promote certainty. We suggest a period of three months, and seek views on whether this is appropriate.

### ***The right to a discount***

1.57 If unwinding is no longer possible because the goods or services have been fully consumed, or because there is delay, the consumer can nonetheless request a discount on the price.

1.58 We provisionally propose that the discount would be one of four broad bands. The judge or magistrate would simply choose the most appropriate band. This would minimise difficult questions about how the loss should be valued, which may involve greater costs than any increased accuracy is worth.

1.59 We suggest four bands: 0%, 25%, 50% and 100%. The amount of discount would depend on all the circumstances, including:

- (1) The impact on the value of the product;
- (2) The trader's behaviour; and
- (3) The amount of time that has passed between the commercial practice and the consumer's complaint.

1.60 In Part 14 of the Consultation Paper we provide illustrations of how bands would be selected. In one example, where a consumer suffered negligible loss through a false "closing down" sale, and delayed taking action for more than three months, we suggest no discount. We think the proposed legislation will need to be accompanied by guidance and examples of this sort.

## **Tier 2**

1.61 Tier 2 remedies resemble traditional damages. They would apply only if a consumer could prove they had suffered actual loss over and above their Tier 1 recovery.

1.62 Tier 2 remedies would cover losses in two categories:

- (1) **Indirect economic loss:** consumers may have suffered additional losses because of an unfair practice, such as throwing away an old, perfectly adequate product to make space for the new one. If the consumer can prove this type of loss, it should be recoverable.
- (2) **Distress and inconvenience:** we think that damages for distress and inconvenience should be available for misleading and aggressive practices. We suggest an approach similar to that adopted by the Financial Ombudsman Service, which uses three bands of damages: (1) nominal, for example, making an apology, sending flowers or vouchers; (2) significant, £300 - £900; and (3) exceptional, £1,000 plus.

### **The due diligence defence**

1.63 The Regulations permit traders to escape criminal liability if they can show that they took all reasonable precautions to avoid committing an offence. We propose that a trader could rely on a due diligence defence to avoid Tier 2 remedies. However, the defence would not apply to Tier 1 remedies.

1.64 This reflects the current law, which provides the right to unwind for purely innocent misrepresentations, but not damages. Overall under our proposals, if a trader had acted with all due diligence, their liability would be capped at the price of the goods or services.

### **Remedies where the consumer has sold goods**

1.65 Where the consumer has sold goods, the primary remedy would be the right to unwind. An example would be where the trader misled the consumer into selling gold at a fraction of its value. If possible, the trader should return the item and the consumer should return the price paid. If this is no longer possible, the trader should make a money payment equivalent to its value, offsetting any payment already made.

### **Remedies for misleading and aggressive debt collection**

1.66 Here the remedies would depend on whether the money was or was not owed. Where the money was not owed, the consumer would be entitled to a full refund. This is already the law, but we think a statutory remedy under the new Act would make the position clearer. The three-month time limit would not apply.

1.67 If the money was owed, it would not be returned. The debt the consumer owed to the trader would be offset against any right to a refund.

1.68 In both cases, the new Act would provide the possibility of damages for distress and inconvenience under Tier 2. As discussed above, these would be modest, and consumers would need to provide evidence of distress or inconvenience.

## **Section 75 of the Consumer Credit Act 1974**

- 1.69 Under section 75 of the Consumer Credit Act 1974, a consumer who has a claim for *misrepresentation* or breach of contract against the supplier may sue either the creditor or the supplier. Both are liable to the same extent, and there is no limit on potential liability. The consumer's purchase must be more than £100 and not more than £30,000. However, section 75 does not cover aggressive practices, and a creditor's liability for a trader's aggressive practices is uncertain.
- 1.70 We provisionally propose that the protection given to consumers under section 75 should be amended in two ways:
- (1) Connected lenders should be liable for the supplier's *aggressive* acts as well as misleading acts; and
  - (2) Connected lenders' liability for suppliers' misleading or aggressive acts should be capped at the amount of the loan, plus interest.
- 1.71 Our proposals would not affect creditors' liability for breach of contract.

## **SUMMARY OF QUESTIONS**

- 1.72 We are interested in views on whether our proposals for reform are fit for purpose, and can help in addressing the practical problems which aggressive and misleading practices can cause.
- 1.73 A full list of questions is set out in Part 17 of the Consultation Paper. Here we list the most important questions on which we are seeking views.

### **Is there a need for reform?**

- 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?
- 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?

### **What transactional decisions should be covered?**

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

### **What products should be covered?**

- S.5 Do you agree that the proposed new Act should exclude
- (1) Land sales; and
  - (2) Financial services?
- S.6 Do you agree that the proposed new Act should include misleading or aggressive demands for payment?
- 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?
- S.8 Should the Regulations be amended to state that all commercial demands for payment are included with the definition of commercial practices?

### **Redress for misleading omissions?**

- 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?

### **A new scheme of consumer remedies**

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

### **Tier 1 remedy: the “right to unwind”**

#### ***How long should the right to unwind last?***

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

#### ***Restoring benefits to the trader***

- 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?

***An allowance for use?***

- 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?

***Misleading or aggressive debt collection: the right to unwind a payment***

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

***The alternative Tier 1 remedy: the right to a discount***

- S.18 Where the right to unwind has been lost, should consumers be compensated by a discount on the price?
- S.19 If so, should the discounts be in pre-set bands?
- S.20 Are the proposed bands (0%, 25%, 50% and 100%) set in the right places?

***Tier 2 remedies***

- 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?
- 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?

***Section 75 of the Consumer Credit Act 1974***

- 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?

## **CONCLUSION**

- 1.74 It is not possible in a summary of this length to introduce all of our proposals. Consultees are therefore encouraged to refer to the full Consultation Paper available on our websites.

## **HOW TO RESPOND**

- 1.75 We have created responses forms to assist consultees in submitting their views on the Consultation Paper (although we welcome responses in other formats). Two forms are available, if you wish to use them:
- (1) A summary responses form, with a shorter set of questions for consultees who have only read this summary; and
  - (2) A full responses form. This is for consultees who have read the Consultation Paper as a whole and wish to comment on our full set of provisional proposals.

**Please send responses by 12 July 2011 either –**

**By email to:** commercialandcommon@lawcommission.gsi.gov.uk or

**By post to:** Jessica Uguccioni, Law Commission, Steel House, 11 Tothill Street,  
London, SW1H 9LJ  
Tel: 020 3334 0282 / Fax: 020 3334 0201

**Responses forms and the full Consultation Paper are available at:**

<http://www.lawcom.gov.uk> (See A–Z of projects > Misleading and Aggressive Practices) and  
[http://www.scotlawcom.gov.uk/download\\_file/view/672/](http://www.scotlawcom.gov.uk/download_file/view/672/).