

Tackling abandoned and silent calls - response to Ofcom consultation

Introduction

I present below both my direct response to the consultation and a proposal that arises from the situation that is clearly seen to exist by Ofcom's declared position at this time.

My earnest efforts, over many years, to persuade Ofcom to understand its duties and use its statutory powers to eliminate the nuisance of Silent Calls have been met by a failure to do either. Ofcom even refuses to comply with an explicit direction from parliament.

This consultation represents a new low point, in that Ofcom proposes an open declaration of tolerance of Silent Calls (unless repeated within a 24 hour period) and the consultation document contains an explicit statement that Ofcom has never had a policy of zero tolerance of Silent Calls. The latter claim has previously been strongly denied.

I am therefore led to propose, in the spirit of the "Big Society" that the powers which Ofcom chooses to misuse, or simply fails to use, be exercised by a citizen-driven agency, which I would be happy to help set up and operate.

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My response to the consultation

As I have pointed out repeatedly, the policy referred to in this consultation is misconceived. It is based on an improper and inaccurate interpretation of Ofcom's duties and powers.

Ofcom's Powers and Duties

Ofcom's first principal duty is specified in section 3(1) of the Communications Act 2003. This is "**to further the interests of citizens in relation to communications matters**". That is the duty which applies in this case. The powers in question specifically relate to the "(mis-)use" of those services by those who consume them. In the context of persistent misuse, the relevant "consumers" of telecommunications services are the Silent Callers, those who are making the calls. The consumer relationship between the victim and their telephone service provider has no bearing on the matter. Any commercial relationship between the Silent Caller and the victim is not (generally) in a market regulated by Ofcom. (Ofcom could treat cases of a telephone company making Silent Calls to its customers differently, but does not.)

The powers under sections 128 to 130 of the Communications Act 2003 enable Ofcom to deal only with a specific individual case of persistent misuse of a telecommunications network or service. Any case where answering a telephone call is met with Silence is such a misuse. Any habitual practice which causes this effect is "persistent misuse".

I believe that Ofcom would accept this definition, however it distorts and complicates the issue to justify behaviour that fails to address the issue properly. Most significantly, Ofcom specifically acts not to address each particular case of misuse, but attempts to regulate the impact of this nuisance in general, despite having neither the powers nor any proper duty to take so refined an approach. Ofcom's simple duty is to use the specific powers it has in the manner provided for by the relevant legislation. Ofcom has no power to impose general regulation on (mis-)users of telecommunications services, it can and must only act, within the limits of its resources and capabilities, to eliminate the practice of misuse.

Whenever such practice comes to Ofcom's attention, it has a duty to issue a Section 128 Notification. Based on the response to that Notification, Ofcom may issue a Section 129 Enforcement Notification specifying the activity that must be ceased. In the event of any breach of an Enforcement Notification, Ofcom may award a financial penalty of up to £50,000 for each breach, using the powers under Section 130. If breaches continue, Ofcom may ultimately seek for the terms of the Enforcement Notification to be further enforced through an injunction. A financial penalty may also be imposed retrospectively if the case only comes to Ofcom's attention after a significant degree of persistent misuse has already been practiced before Ofcom is able to issue the initial Notification.

Ofcom is itself bound by a requirement to have regard to the terms of a Statement of Policy on use of the powers, which it is required to publish, all under the terms of Section 131 of the Act. This policy cannot itself be used as a means of imposing enforceable requirements; the Section 129 Enforcement Notification is the only means by which this may be achieved in relation to persistent misuse.

(The currently proposed revisions to the Statement of Policy are actually drafted in such a way as to only control the way in which Ofcom itself uses automated diallers!)

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Ofcom's accountability

Ofcom is accountable only to parliament, which clearly stated on 28 March 2006 -

"we expect you to use your powers to eradicate the nuisance of Silent Calls"

(Hansard: last line of Column 14 at [this link](#) / hear [sound clips](#)). (I acknowledge some responsibility for having caused this requirement to be imposed on Ofcom.)

Ofcom is clearly seen neither to be complying with this requirement from parliament, by explicitly tolerating Silent Calls, nor to be using the powers in the way outlined above, as defined in statute.

Ofcom's improper policy - the error on the point of principle

Whilst any answered telephone call that results in Silence is clearly an example of "misuse", there are many telephone calls that may cause annoyance, inconvenience or anxiety which cannot be classed in this way:

- a call from a friend during a much loved television programme
- a call from anyone that is likely to be inconveniently lengthy
- an alarm call, when one would rather sleep on
- a nagging reminder about an unpaid bill
- a wrong number
- a call whilst one is in the bathroom, or otherwise not well placed to answer it
- a call presenting worrying news

In addition to the above one may add unwanted calls from marketing, consumer research and credit control companies, which may be made using automated diallers. Whilst all of these calls may be seen as being a "nuisance", they cannot thereby be classed as being a misuse of the telephone network. They therefore should not be addressed by the use of Ofcom's very particular powers, as these must be focussed only on cases of misuse, so that they may be properly applied.

Ofcom wrongly seeks to apply its policy in use of the powers to the wider issue of "abandoned and silent calls". (Attempts to apply a very specific meaning to the term "abandoned" serve only to add further confusion.)

Abandoned calls that do not result in silence for the person answering them are not cases of misuse. Clear examples include:

- an unanswered call
- a call to an engaged line
- a call that is identified as having been answered by an answering service, when no message is to be left

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- an automatically generated call that is answered, but has to be dealt with by the provision of a recorded message to explain that no agent is available to conduct a conversation.

In the latter case, any use of the recorded message to fulfil a direct marketing purpose would be a breach of #17 of the Privacy and Electronic Communications Regulations (2003), enforced by the Office of the Information Commissioner.

Furthermore, any truly negligent use of an automated dialler, like any reckless practice that causes the nuisance referred to in the examples given previously, could be deemed to amount to misuse. It is however necessary to draw a very clear distinction between any such case and the straightforward issue of Silent Calls. In the case of the Silent Call there is no need to give separate consideration to any question of negligence or recklessness, because this is shown directly by the fact that calls result in Silence.

Ofcom specifically fails to draw this distinction, effectively authorising the making of Silent Calls in the absence of further recklessness. **That is its big mistake.**

I address the use of obsolete technology that once was able to automatically identify calls answered by mechanical answering machines below.

The conflation of "abandoned calls", which are not indicative of misuse, and "Silent Calls", which invariably are, is seen to be a way of (perhaps deliberately) obfuscating the issue.

From the beginning of its involvement in the issue, Ofcom failed to lay down a clear marker, that Silent Calls were unacceptable. Because so many Silent Calls are now known to be being made, by so many callers, Ofcom is now faced with the fact that it would perhaps be administratively inconvenient and embarrassing to have to address the issue properly.

It is however unacceptable for the tail to continue to wag the dog in this way. If Ofcom is unable or unwilling to perform the functions assigned to it by legislation and specifically by parliament, then it must now pass on or delegate these functions to another agency willing and able to do so. I make a proposal on this point below.

Ofcom's improper policy - an acceptable percentage of Silent Calls

In 2005, Ofcom reversed its previous formal policy, which had rightly declared that any approach to the issue that was based on consideration of the percentage of Silent Calls made was wholly inappropriate, as this had no bearing on the level of annoyance inconvenience and anxiety caused. Whilst this percentage approach was nominally only applied to non-Silent abandoned calls (effectively extending the definition of misuse), it is in fact understood to apply to "silent and abandoned calls".

(My contemporary comments on this change of policy are [published here](#).)

The general understanding of the percentage limit applying both to "Silent" and "Abandoned" Calls is confirmed by noting the way in which Ofcom has applied its policy in every one of the few cases that it has dealt with. In every case it is the percentage of abandoned/silent calls that is the primary issue addressed in the determination of persistent misuse, never the fact of Silence, nor the actual amount of nuisance caused when measured in absolute terms.

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Ofcom's improper policy - use of "AMD"

The major policy revision proposed in this consultation takes the formal tolerance of Silent Calls to a new level. Ofcom now proposes to formally tolerate one Silent Call per caller per day per recipient as it turns its attention **only** to "repeat Silent Calls", when these are caused by use of so-called "Answering Machine Detection equipment" (AMD).

It is widely accepted that the level of inaccuracy of present AMD will inevitably cause a significant number of Silent Calls wherever it is deployed. This is inevitable, because this is obsolete technology retained from the time when automated answering was exclusively performed by mechanical tape recorders, it is not designed to address the network based answering services and digital answering machines, which are what is commonly used today. No improvement in the present method would ever significantly change this situation, even if the incidence of "false positives" is reduced by further innovation.

No policy of zero tolerance

The claim (in section 3.63 of the Consultation Document) that Ofcom does not have a zero tolerance approach to Silent Calls is somewhat revealing. This denies past claims to the contrary which are on record from Ofcom, and further supports the assumption that a percentage of Silent Calls is seen by Ofcom as tolerable. I quote from a paragraph explaining why Ofcom rejects adopting an approach that would treat the habitual making of Silent Calls as persistent misuse:

"This approach would depart from previous policy as set out in the 2006 Statement and 2008 Statement whereby we have sought to balance consumer protection with industry innovation, allowing the industry some margin of error instead of advocating a zero tolerance approach. This is reflected in our policy criteria namely:

- ***the 3% abandoned call rate threshold; and***
- ***the 72 hour limit on contacting consumers without the guaranteed presence of a live operator who have received an abandoned call."***

This is part of the extensive justification offered for a revision to the Statement of Policy to endorse and formalise OFCOM's TOLERANCE OF SILENT CALLS.

The conflation of "abandoned calls" with "Silent Calls" referred to above is seen in this quotation. The calls being addressed by the policy revision would invariably result in Silence, whereas those referred to in the examples from the existing policy would - in theory - invariably result in the delivery of an Informative Message. The fact that Ofcom fails to recognise what would be a most important distinction (if it truly existed) serves to further confirm a tolerance of "Silent" Calls.

Although Ofcom, up to this point, has always sought to pretend in its general declarations that it does not tolerate Silent Calls, this is but a pretence. Even when its formal policy did declare a zero tolerance approach, in 2004, its action in response to the very first investigation into this issue (following a complaint from myself) led to what was described as "informal enforcement action" to limit the caller to making no more than 10,000 Silent Calls per day.

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"Innovation"

It is laughable to describe the use of technology which was once effective in swiftly detecting the clicks and whirrs of a mechanical answering machine, occurring prior to any spoken response to a call, as an "innovation". This approach is clearly and demonstrably obsolete in the context of the type of answering services used today. Attempts are made to adapt it, however nobody would pretend that there is any prospect of this process ever being fully successful.

The innovation which is required, but has never been seriously sought by the call centre industry, is some detectable signal on the line being provided whenever any form of answering service is engaged.

One cannot believe that this would be difficult to achieve in the high proportion of cases where the answering service is delivered by the telephone network operator. Rather than seeking to promote, encourage, or even demand (as it may) such innovation, Ofcom proposes a policy revision that would actively discourage innovation, by supporting and continuing to encourage the use of technology that is obsolete and ineffective, fundamentally flawed, no matter how well refined.

Even if, as at present, agents would sometimes have to identify use of answering services themselves, deployment of a mechanism that was 100% accurate and immediate in the detection of use of network based answering services would provide enormous benefits to the call centre industry and all those with whom it interacts.

I must report that my attempts to get the call centre industry to take up the idea of a move from AMD to ASD (Answering SERVICE Detection) have not been met with any great enthusiasm (as is typical for the industry). The enthusiasm for innovation, which Ofcom claims to be supporting, at the expense of tolerating Silent Calls, is perhaps not so great as Ofcom may have been led to believe.

All use of AMD as misuse - regardless of the likelihood of Silent Calls

It is arguable that the presently used automated method of AMD amounts to misuse in every case, notably "true negatives" as well as "false positives".

Where this technology is deployed, on answering the phone the call recipient is invited to provide a sound sample, which is not heard by the actual caller, so that a piece of equipment may make a determination about whether the sound is live or recorded. The longer the duration of the sample, the greater is the likelihood of the equipment making an accurate determination, although this can never be guaranteed.

The essential flaw in this approach is that the invitation to provide a sound sample is never announced. A determination that the sound is recorded is also not announced, nor is any opportunity offered to correct cases where a positive determination is made in error.

There could potentially be a question of whether the unannounced monitoring of one's response to a call falls within the terms of a "Lawful Business Practice", as it would be illegal if this were not so. Deceiving someone into providing a sample of their voice to a machine, when they assume that they are speaking to a person, is not readily understood as being a proper business practice.

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Any unattended call with a direct marketing purpose is a breach of the terms of the EU Directive underlying PECR regulation 17. This would apply to such calls where AMD is used. In fact this breach is not specifically covered by PECR 17 because this regulation addresses only a particular type of unattended marketing call. Full implementation of the terms of the Directive is said to have been achieved by the way in which Ofcom applies its persistent misuse powers, to cover all relevant activities not specifically covered by the PECR.

Ofcom is therefore bound to give serious consideration to treating any unattended Direct Marketing call as an example of misuse. This could only be achieved by treating use of AMD as persistent misuse.

Aside from these legalistic considerations it is unquestionably discourteous, at best, for a caller to deliberately fail to be "on the line" when one commences a conversation. It is also immensely rude to be ready to terminate a conversation without stating the reason for having done so.

An option not explored by those who undertook a study into this matter was that of making the invitation to provide a sound sample explicit, through a recorded message (which would also have to announce the name of the caller). The result of the determination should also be announced. The speed with which the process is conducted (Ofcom has been persuaded that a sample of less than 2 seconds is adequate) would ensure that neither of these messages would be likely to be collected by an answering service. Furthermore, there would be no impact on call centre agent productivity. The immediate announcement of the identity of the caller, a common courtesy in use of the telephone that is commonly disregarded, would also provide the recipient with the same opportunity as the caller to abandon the call before a dialogue had commenced.

In truth I would think it likely that very few, if any, current AMD users (i.e. Silent Callers) would choose to follow such an approach. It is however the only properly courteous way in which the presently used, although obsolete, method of AMD could be deployed. I would commend Ofcom to state that in the absence of such announcements all use of AMD would be treated as persistent misuse. I believe that not only would this address the unacceptable nuisance of Silent Calls, the unacceptability of making an announcement would also encourage serious efforts at innovation to ensure that a proper and effective means of "Answering SERVICE detection" were made available.

(As a side issue, it is worth noting that my original proposal for the adoption of the Informative Message was on the assumption that many callers would not be happy to have their name given as being responsible for a wasted call and would therefore refuse to allow call centres to make calls using diallers on their behalf. I also saw that where they were prepared for this to happen, they would apply the maximum pressure to ensure that the number of instances was kept as low as possible.

In this case also, measures to ensure proper behaviour in an unusual situation may lead to it ceasing to exist.)

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Revision to the policy - the "acceptable Silent Calls" formula

Ofcom wastes further energy and causes further obfuscation by continuing to muck about with issues related to the mathematics of dialler statistics. THESE ARE TOTALLY IRRELEVANT TO THE ISSUE. The only numbers that matter are the number of people who are likely to be subjected to nuisance as a result of persistent misuse (hanging up in Silence) and the number of times an enforceable requirement to cease the practice is breached.

If the first number is likely to be significant, then a Notification of Persistent Misuse must be issued and the misuse caused to be halted (not reduced). Whenever the terms of an Enforcement Notification are breached then a proportionate penalty must be imposed. The current penalty limit of £50,000 is effectively multiplied by the number of occasions on which a breach is detected, up to the point where it is necessary to seek an injunction.

All of the material issues addressed by section 4 of the Consultation Document are about how to count the number of Silent Calls being made.

This however has nothing to do with Ofcom performing its duty to address the interests of citizens, because this number is only applied in proportion to the overall level of activity by the caller. To citizens, a thousand Silent Calls are a thousand cases of unacceptable nuisance. Whether the caller makes no other calls or a million other calls makes no difference to citizens, nor thereby to the scale of the misuse which Ofcom is required to eliminate.

The use of automated diallers is a matter that Ofcom is neither required, nor empowered, to regulate. There are many aspects of the operations of the call centre industry that generate public concern and cause nuisance, one example being "identity theft". Whilst Ofcom may feel that it could be in the public interest for measures to be taken to reduce that nuisance, this is not Ofcom's proper duty.

In this regard, Ofcom only has a duty to eliminate Silent Calls and other nuisances that may properly fall within the terms of the persistent misuse powers. Because these powers do not provide for measures to regulate the scale of a particular activity, but only to proscribe it, they cannot be used to achieve limitation of the scale of a nuisance.

The distinction between what is and is not "persistent misuse" cannot hinge on so refined a matter as the fine detail of this formula.

Revision to the policy - wrong-headed arguments

Paragraph 2.10 of the consultation clearly presents Ofcom's wrong-headed approach to this issue. It is argued that the detrimental effects of Silent Calls have to be balanced against the benefits that may be derived by consumers of companies who save money as a result of making them. This argument is fatuous, wrong-headed and totally inappropriate to any consideration of the use of the persistent misuse powers.

A benefit derived particularly by the victim of a Silent Call, to diminish the annoyance, inconvenience and anxiety, could be considered to perhaps mitigate when considering whether or not persistent misuse had occurred. That is not however the point being made.

The thinking advanced here derives directly from the environment of the market for telecommunications services where Ofcom regulates to further the interests of consumers in that market with reference to the actions of providers.

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In this "closed loop" there could be a common interest, whereby the cost of compliance with measures to benefit consumers would be expected to be passed on to them.

This cannot be said in the much wider, more open, context of Silent Calls, where any financial benefit from the practice of misuse surely cannot ever be treated as being worthy of positive consideration, even if it may, perhaps sometimes, trickle down to the victim.

One may readily extend this absurd argument to present a very clear case for why (in the "interests of consumers") Ofcom should never impose a financial penalty on a company. I will ensure that the House of Commons committee which will consider the proposal to meet Ofcom's request for an absurd increase to the maximum penalty for persistent misuse, so that penalties could no longer be used, is fully aware of Ofcom's thinking on this issue.

I wonder if the committee will be ready to accept that because consumers benefit from the cost savings achieved through making Silent Calls, they will also benefit if Ofcom's ability to impose financial penalties on Silent Callers were never used. (I can see Ofcom's logic, although I also see both arguments as being seriously flawed.)

Use of "complaints" to Ofcom (reports of Silent Calls)

In using its powers, Ofcom is only able to deal with those cases that come to its attention. It has no power of general regulation that may be used to impose specific requirements on all those likely to make Silent Calls. It cannot therefore police and enforce compliance with such requirements.

The Consultation document indicates that in 2009 Ofcom received complaints containing evidence of the source of 100,000 Silent Calls. Not one of those responsible has been served with a Notification of Persistent Misuse. (No Section 128 Notification has been issued since October 2008).

Whatever the actual level of Ofcom's tolerance above zero, it is certainly seen to amount to over 100,000 per year and 100% of the cases where consumer complaints provided Ofcom with the opportunity to use its powers in the last 18 months.

Regardless of the impact of any change in policy, this response to consumer complaints is well configured to produce the intended effect declared in the Consultation Document. This is said to be to cause the number of complaints to diminish. If complaints do not lead to action, there is little point in making them. Inaction is a most effective way of causing the number of complaints to fall, and that is Ofcom's declared objective.

Complaints received by Ofcom cannot provide any meaningful indication of the degree of nuisance being caused as they will only ever represent a very tiny proportion of what is actually happening. Sadly none of the many surveys quoted addressed the question of how many victims of Silent Calls report them to Ofcom, and how often they would repeat such a complaint as the problem continues. It seems that Ofcom requires a monthly report from every victim as it monitors the situation from monthly figures.

Not only is the number unrepresentatively small, the cases will also be atypical as they can only reflect the experience of those able to collect some meaningful information so as to make a coherent report and who are either severely affected or naturally inclined to complain.

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Most significantly, the reports received by Ofcom are atypical in that they only represent the public-spirited efforts of those who are prepared to go to the trouble of making a report despite the fact that they would expect to achieve no benefit as a consequence. It is made very clear that complaining to Ofcom will do nothing to cause the nuisance one is experiencing to stop.

Any attempt to draw any significant conclusions from this small and selective sample of data must be suspect in its reasoning. Much is made of supposed historical trends, when it is clearly seen that the major factor affecting the level of reports is the amount of publicity given to the issue. I would contend that the level of complaints is essentially unrelated to the amount of nuisance being experienced. It has far more to do with the perceived effectiveness of Ofcom's action and as such has a relationship that is the inverse of that which is being presented as a measure of Ofcom's achievement.

Perhaps Ofcom forgets that it exists to serve all citizens, not just those who assist it by providing reports of Silent Calls. It is very easy for a body such as Ofcom to think of those who contact it as its "consumers", and therefore to seek to reduce the number who do so to present complaints. This is a wholly wrong and mistaken understanding of its role.

My first report, in 2003, detailed 2 Silent Calls by one organisation. Ofcom's investigation found 1.5 Million being made in a three month period. The ratio may have changed since then, but the same principles apply. **It is the 1.5 million that matters, not the 2.**

The unasked first Consultation Question

Ofcom is expected by parliament to "use its powers to eradicate the nuisance of Silent Calls". To perhaps achieve the relief from that obligation which it clearly seeks, Ofcom should invite Consultation respondents to firstly confirm their agreement with the principle that calls which result in Silence need not be regarded as examples of misuse, and the habitual practice of making such calls not be classed invariably as "persistent misuse".

A positive response to many of the other questions assumes such agreement.

In explicitly addressing the issue of AMD by reference only to "repeat Silent Calls", Ofcom, for the first time, is formally declaring that some practice of making Silent Calls is not to be regarded as persistent misuse. Notwithstanding the implicit tolerance that has been shown in the past and is cited in support of the new policy, this explicit change of policy should have been openly declared and made subject to public endorsement.

As the questions address matters at a level of detail which will be unintelligible to most possible respondents it would nonetheless have been possible to formulate the point in a manner that fits the style of the other questions, e.g.

Question 0: Do you agree with Ofcom's decision to reject Option 2 in relation to AMD - a policy of proscribing on all Silent Calls - in favour of proscribing only repeat Silent Calls?

I have indicated that my response to such a question would be a resounding "NO".

I suspect that many other respondents would have replied similarly and must therefore express no surprise that Ofcom did not present so direct a question, in the hope of retaining some measure of support for the policy it has chosen to follow.

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My responses to the numbered questions

1. Ofcom has no powers to impose such a limit on others in general. Calling answering machines, with or without a live operator, is not persistent misuse, so this question has no relevance to use of the persistent misuse powers.

The idea of someone setting out to call an answering machine rather than a live person does not appear to make a great deal of sense.

Furthermore, not only is the drafting of the question a little suspect, the way in which the relevant portion of the proposed revised Statement of Policy is drafted makes this requirement apply only to the number of times that Ofcom may call an answering machine.

2. Only those subjected to section 129 Enforcement Notifications are obliged to comply with specific enforceable requirements imposed by Ofcom in implementation of its policy on persistent misuse. There is no indication of when any such Notification would be issued to cover the matter referred to, so the timetable for compliance is not an issue at this time.

If, as is implied by the reference to the imminent imposition of enforceable requirements, Ofcom has been negligent in failing to issue the Section 128 Notifications that must precede these, then it should address this failing immediately.

One would expect Ofcom to be able to make a proper decision about the timetable for compliance with the terms of an Enforcement Notification in consultation with the individual party involved. It is for that party to make the necessary representations regarding its ability to cease its misuse in a timely manner through its response to the Section 128 Notification.

One would expect these discussions to be confidential, rather than a matter to be addressed through a public consultation.

3. No. The confusion between abandoned calls and Silent Calls will continue.
4. (also 5). Such matters only become relevant when Ofcom is determining the degree of nuisance caused and recklessness shown, so as to establish the scale of a financial penalty. The "abandoned call rate" in general is a matter for consideration only in the context of self regulation by representative bodies within the call centre industry promoting "best practice"; Ofcom should not misuse its resources by assisting the industry in this way. Ofcom's duty is to use its powers to eradicate the nuisance of Silent Calls.

One hopes that the experience gained in the issue of "false positives" will be helpful when assessing the level of penalty appropriate in the event of a breach of an Enforcement Notification requiring cessation of the use of AMD equipment.

6. The "abandoned call rate" in general is a matter for consideration only in the context of self regulation by representative bodies within the call centre industry promoting "best practice"; Ofcom should not misuse its resources by assisting the industry in this way. Ofcom's duty is to use its powers to eradicate the nuisance of Silent Calls.

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7. No. Ofcom should seriously consider treating all use of what is known as "AMD" - without an announcement requesting provision of a sound sample of whatever duration is required - as persistent misuse, even regardless of the inevitability of it causing Silent Calls.
8. No. The Informative Message, as I originally proposed in 2005, should simply and clearly identify the caller so as to relieve anxiety and enable the recipient to take whatever action they may wish, but without the content of the message actually causing any further inconvenience.

It should not be used as a specific opportunity to solicit return telephone calls, thereby creating further inconvenience. Failure to take advantage of a clear opportunity to request no further calls may be wrongly taken as an invitation to call again; this is why I have always opposed the suggestion that providing this opportunity should be thought of in any sense as being a requirement. It can also serve to undermine the integrity of the TPS and the related regulations and as it cannot relate to all dialler generated calls, it cannot be applied universally anyway.

What is wrongly alleged to be a "requirement" to provide a telephone number should be removed altogether.

9. Ofcom has no business whatsoever getting involved in the intricacies of whatever self-regulation the call centre industry may wish to adopt with reference to "campaigns". This is well outside the scope of Ofcom's duties.

Any Silent Call is an example of misuse - the unfulfilled intended purpose of the call is of no particular relevance. Introducing other spurious factors to relevant considerations is serving to undermine the proper achievement of Ofcom's simple duty to "eradicate the nuisance of Silent Calls".

An excessive number of calls that result in Informative Messages may warrant attention by the ICO, if it is seen that these relate to a "campaign" to promote the caller.

Furthermore, it may be that the number of such calls made by a particular caller is so excessive that the activity could be deemed to represent persistent misuse, because it involved reckless use of a dialler, rather than the inevitable consequence of well managed efforts to connect agents. Any such determination would not however need to consider the relationship of the calls to a particular campaign as a primary factor. Each case would have to be judged on its particular merits. I suspect that any lack of concern or proper control by those named as the callers would swiftly lead to a determination that some Direct Marketing purpose was being achieved.

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My proposal

Background

Over the seven years that I have been involved in campaigning on this issue it has become clear to me that Ofcom is unwilling to use the persistent misuse powers in the way that is intended, and explicitly demanded, by parliament.

Ofcom is by nature a regulator. Its normal mode of behaviour is to impose well considered sensitive regulations and then enforce them. For the vast majority of its areas of responsibility this is the proper way to proceed, notwithstanding concerns that enforcement is not always carried out with the necessary vigour.

The persistent misuse powers were added to the Communications Act 2003 as something of an afterthought, due to the belated recognition that removal of the ability to require telecoms providers to impose conditions on their customers would leave open the potential for misuse to be practiced without the possibility of action being taken.

Although the form of the powers is not dissimilar to those associated with the enforcement of General Conditions imposed on telecommunications providers - sections 128 to 130 closely reflect sections 94 to 96 in their structure - there is a vital difference, which Ofcom perhaps fails to recognise and/or seeks to disguise. The enforcement powers in sections 94 to 96 are in relation to enforceable conditions properly imposed on a number of specific registered companies under the terms of sections 45 to 77.

Ofcom is not able to impose "conditions" on those who use diallers or are in any other way likely to be involved in the practice of persistent misuse. This denies Ofcom the opportunity to address Silent Calls by means of general regulation. Notwithstanding the requirement to publish and have regard to a Statement of Policy, under the terms of Section 131, Ofcom cannot use this Statement, which bears only on itself, as a means of imposing regulation.

There is another important difference between the telecoms providers and the call centre industry. Ofcom has a duty to regulate the market for telecommunications services in the interests of its consumers. This requires extensive involvement with the providers in that market to ensure that the market operates and develops to ultimately meet the needs of consumers, through good practice and fair and effective competition.

Ofcom has no such duty with reference to the call centre industry, nor its clients and their consumers in the many markets that are covered. Attempting to adopt the market regulation and consumer interest model with reference to the activities of call centres produces all manner of perverse anomalies, not least because the victims of Silent Calls are commonly not in any sense a consumer of the person who called them.

Perhaps the most extreme of many possible absurd examples is seen in the fact that HMRC was, for a period, an admitted Silent Caller. Ofcom has no duty to promote competition in the tax collection market to further the interests of consumers of that service.

These points are made to demonstrate how Ofcom is perhaps simply not capable of discharging its duties in relation to Silent Calls properly.

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The Big Society and Quangos

The coalition government has indicated extreme distaste for the way in which Quangos, such as Ofcom, operate. This applies particularly where they fail to serve the interests of citizens and engage in excessive regulation. That is certainly true of the way in which Ofcom addresses the issue of Silent Calls, especially as its attempts at imposing general regulations involve grossly unnecessary levels of detail and are not even valid, because they lack statutory force.

I propose that the time is now right for Ofcom to admit that in its role as a regulator of the telecoms industry in the interest of its consumers, use of the persistent misuse powers, in the interests of citizens with no power of general regulation, does not fit well into its methods and approaches. The officers it is able to assign to the tasks of formulating the relevant policy and implementing it are simply unable to undertake the work. One must assume that general methods, approaches and understandings cannot accommodate the differences in approach demanded by this unusual aspect of Ofcom's role.

The principles of "the Big Society" celebrate citizens stepping forward to take on duties that are not being discharged by agencies of the state (albeit independent from government).

The proposal

To this end, I am happy to put myself forward to lead the formation of, and play a role in, a citizen's agency to take responsibility for the use of the Persistent Misuse powers, independently from officers of Ofcom. Such an agency would apply a more direct citizen-focussed approach to use of the powers as they were intended to be used, abandoning the improper pseudo-regulatory approach which Ofcom has adopted which facilitates it showing wholly inappropriate consideration of the interests of those who make Silent Calls.

I propose that relevant industry bodies would be encouraged and supported in creating and enforcing their own self-regulatory structures with the opportunity to invoke use of the statutory powers as a valuable backup to their own self-regulatory work. Working with representatives of the various sections of the call centre industry would be vital part of such an agency and they would be likely to make a sizeable contribution to it. An effective approach to the issue of Silent Calls would do much to help the general reputation of the domestic Call Centre Industry.

It is however vital that representative industry bodies take responsibility for their own self-regulation. They should not engage a public body like Ofcom in partnership to undertake their work for them and to attempt to extend their scope, as has clearly happened with this issue. A proper jointly supportive relationship is necessary, Ofcom has on many occasions been seen to be "in the pocket" of those who make Silent Calls.

Ideally I would see the agency working under Ofcom, in the same way that TPS Ltd and Phonepay Plus use statutory powers retained by Ofcom, effectively on a sub-contract basis. The difference being that this agency would represent citizens, rather than an industry. Such an arrangement would enable the full deployment of the existing Statutory Powers, although properly applied, without the need for any change in legislation.

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I will be generous in suggesting why Ofcom has clearly failed in its efforts to deal with Silent Calls. I believe that this is because its style and the relevant powers are not well suited to one other. Ofcom is well used to balancing the interests of providers and consumers in a market and mistakenly gets drawn into applying a similar approach here, when it is totally inappropriate.

I will be modest in suggesting that I have many skills to offer in pressing for the establishment of this agency, taking a strong role in getting it established and in serving on it in operation, however I will need to draw on the skills and experience of many others in making it a reality.

By this submission I commend this loosely formulated proposal to Ofcom, to the Secretary of State for Business, Innovation and Skills, to potentially interested parties and for public consideration. I see this as a most useful way in which the spirit of the "Big Society" may be put into effect, and look for support from all quarters as the idea is developed.

David Hickson

Tuesday, 27 July 2010