Department for Digital, Culture, Media and Sport

Tackling nuisance calls and messages – consultation on action against rogue directors

A response by the Association of Personal Injury Lawyers

August 2018

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

APIL welcomes the opportunity to respond to the Department for Digital, Culture, Media and Sport consultation on introducing fines for directors for breaches of cold calling regulations. Cold calling for personal injury claims is a tasteless, intrustive and exploitative practice which generates a perception that claiming compensation is a way to gain "easy money", even if there is no injury. While the proposal to introduce fines for directors for breaches of cold calling regulations is a step in the right direction, APIL firmly believes that the only way to prevent the nuisance of unwanted cold calls is to ban them completely.

We are responding only to those questions that fall within our remit as an organisation representing the rights of injured people.

Q1) Do you think that the current legislative framework regarding the insolvency service's powers of disqualification in regards to PECR breaches are sufficient?

We do not agree that the current legislative framework is sufficient. We also maintain that the only way to ensure that nuisance calls are prevented is for them to be banned. The ministerial foreword to this consultation refers to the need to "truly eradicate this modern day blight [of unwanted calls] on society and its pernicious effect on the most vulnerable members of our communities." The ministerial foreword refers to the provision in the Financial Guidance and Claims Act 2018 that will further restrict marketing calls relating to claims management services. But these provisions do not go far enough.

The Privacy and Electronic Communications Regulations, as amended by the Financial Guidance and Claims Act 2018, focus on whether or not the person receiving the calls has given consent[1]. Claims Management Companies can still, therefore, cold call members of the public if they have "consented" to being cold called.

The rules on consent are misleading and opaque, and the Information Commissioner's Office guidance on when consent is given and when it expires, is far from clear. While consent must be "knowingly" given, the ICO is vague as to whether companies using "opt-out" boxes (where people are invited to tick the box if they do not wish to receive marketing) will fall foul of the regulations. The ICO recommends "that [companies] use unticked opt-in boxes wherever possible", but stops short of saying that opt-out boxes are unlawful.

The issue with the current regulations is that most people would not knowingly consent to being cold called. The ambiguity around the current law means that companies can use techniques to gain the consent of members of the public, perhaps without them realising. Those who are vulnerable or elderly are particularly at risk of giving consent without realising. These groups are also the most likely to be affected by nuisance calls – feeling threatened or scared by calls at all hours from complete strangers. The regulation also focuses on consent being given "for the time being", but again, this is ambiguous. The ICO's guidance does not properly explain when consent, if given, subsequently expires. Instead, the text is littered with caveats, creating further loopholes for claims management companies to exploit.

[1] The Regulations provide that unsolicited calls should not be made except where the called line "is that of a subscriber who has previously notified the caller that for the time being the subscriber consents to such calls being made by, or at the instigation of, the caller on that line"

The only way to truly prevent the distasteful and often menacing practice is for the government to introduce a ban on cold calling. The need for a ban is particularly pressing in light of the imminent reforms to the whiplash claims process and increase in the small claims limit for personal injury cases, which is likely to lead to an increase in claims management companies operating in this area. The House of Commons Justice Select Committee, in its report on the Small Claims Limit for Personal Injury, concluded at paragraph 133 that "the Government's current package of reforms creates a risk of increasing cold calling by, or on behalf of, CMCs; we welcome the restrictions on cold calling in the Financial Guidance and Claims Act, but believe they do not go far enough and that an outright ban should be introduced."[2]

Q2) If no, do you think that the government should amend PECR to give the Information Commissioner a power to impose fines on company directors and those in similar positions who are responsible for breaches of direct marketing rules?

We welcome the proposal to amend PECR to give the Information Commissioner a power to impose fines on company directors and those in similar positions who are responsible for breaches of direct marketing rules. We agree that the ICO should be able to take action against those no longer in senior positions, as long as they were a director at the relevant time. Holding directors liable for breaches of the regulations is a step in the right direction, and would prevent the current practice of "phoenixing", where CMCs are fined but then close down and reopen under a new name, with the fine going unpaid. However, the current rules surrounding cold calling are inadequate, and even if directors were fined for breaches, this will not prevent those who cold call from continuing to do so.

[2] https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/659/659.pdf