

Ofcom Consultation on Silent Calls - guide for respondents

Executive Summary

- This guidance is provided by David Hickson - Stop Silent Calls Campaigner.
- The new Statement of Policy came into force on 31 October 2005.
- It was immediately applied in the determinations made on a number of companies found to be making Silent Calls - none of them were required to cease this misuse.
- The clearest understanding of the policy is seen in its application in practice. This would be seen by those responding to the consultation as well as those likely to be subject to its provisions.
- I see the Silent Call as an example of persistent misuse.
- I see an Abandoned Call leading to an Informative Message as not being an example of persistent misuse.
- I understand the Act to define persistent misuse as absolute.
- I understand the powers under the Act to require that once a specific case of persistent misuse has been found, it must be ceased.
- I see a Statement of Policy on Persistent Misuse being about "Worst Practice". Those seeking guidance on "Best Practice" should be required to look elsewhere.
- The previous version of this Statement referred to the powers as a "consumer protection measure". This revision removes such references and states its purpose as "companies using predictive diallers need guidance".
- Ofcom has no general duty to act as an industry regulator for call centres or any other group of users of telecommunications services. If it seeks such a role, it should not attempt to adopt it by redefining the purpose of the persistent misuse powers as granted by parliament.

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14 November 2005

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Introduction

Those wishing to participate in the consultation on the revisions applied in the current Ofcom Statement of Policy on Persistent Misuse may wish to note the changes that have been made from the Statement that was in force prior to the determinations implementing the new policy on 31 October 2005.

The [Statement under consultation](#) has been in force from 31 October 2005 (see "The status of the Statement covered by the Consultation" below).

To assist those participating in the consultation, who may have wished to refer to the previous Statement, I asked Ofcom to restore it to its website, where it had been mistakenly classified as totally obsolete. This was done on 7 November. The [Statement dated 13 May 2004](#) may now be retrieved.

I refer to these versions as the "current" and "previous" Statements.

These notes address only the significant differences between the versions and highlight points of concern. I also include some additional background information, note some possible omissions from the Statement, and differences between this Statement and the way in which this policy has been implemented.

The facts are objective, but the material strongly reflects my own position, which is summarised at the start.

References to sections in the Statement are contained in square brackets. The sequence of these notes reflects the development of ideas, not that of the document.

I will update these notes if new information comes to light. I have already sought reassurance on my points of concern from Ofcom.

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My own position

It is fair to state how I see this.

A more complete story about how I have been involved in this matter may be found by linking through my [bulletin home page](#).

Until its replacement by the current Statement, which is the subject of the consultation, I had been pressing Ofcom to implement the previous Statement of Policy. This was [originally published by Oftel on 28 August 2003](#), was adopted by Ofcom when it took on its duties and then updated to reflect this change in May 2004.

It was never properly implemented. I understand that the primary reason for this is a reluctance on the part of Ofcom to render the automated dialler illegal.

After I discovered, in June 2005, that a message without a direct marketing purpose could be transmitted when there was no agent available to complete an answered call made by an automatic dialler, I immediately informed Ofcom and others with an interest in this matter. I had confirmed that an "Informative Message" giving only the identity of the caller and the general intended purpose of the call could be used to avoid silence in the context of an "Abandoned Call".

Despite the clear wording of the relevant regulation, it had been previously misunderstood by Ofcom and many others that the Information Commissioner would regard transmission of such a message as a breach of regulation 19 of the Privacy and Electronic Communications Regulations 2003. No one has owned-up to this "schoolboy error".

I saw this as providing the answer to Ofcom's dilemma. It could now implement its policy and stop Silent Calls whilst allowing responsible use of automated diallers to continue without causing persistent misuse.

I have made representations to Ofcom indicating that an abandoned call with an Informative Message, although potentially annoying and inconvenient, should represent, for example, no greater nuisance than any other intended direct marketing call that resulted in no benefit to either party. I suggested that unless all unsuccessful or unwelcome calls were to be explicitly identified as potential examples of persistent misuse, then this category of call should not be identified as such in the Statement. The powers under Sections 128-131 do not provide an effective means to deal with nuisance at this relatively low level. The demands of Ofcom's "administrative priority" means that the powers must be reserved for use against activity that may clearly be seen to represent persistent misuse of the telephone network.

Exclusion of any specific activity from the list of examples in the Statement does not constrict Ofcom's capacity to take action in a case where it determines that the conditions stated in the Act have been met.

I am not against new regulatory measures being proposed to deal effectively with the lesser types of telephone nuisance, but I have no specific proposal on how this may be achieved under existing legislation. I focus my attention on ensuring that existing powers to deal with serious matters, i.e. Silent Calls, are used properly. It is for others to suggest to the DTI that a new layer of statutory regulation be introduced.

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A pattern of behaviour that includes making Silent Calls, regardless of factors that may be considered as mitigating in the positive or exacerbating in the negative, is an obvious example of persistent misuse. That is the position clearly stated in the now previous Statement of Policy.

The position reflected in the new current Statement is simply a move away from the intended purpose of the powers (references to which have been removed) towards proposing a Code of Practice for users of automated diallers. I am happy for Ofcom to propose and promote such a Code if it may do so without undermining the fundamental principle that a pattern of behaviour that includes making Silent Calls is clearly persistent misuse. Where Ofcom determines that persistent misuse is being practised in a particular case, it must require that it is ceased.

The first implementation of the new Statement announced on 31 October applied all other provisions of this "Code of Practice" to the determinations made, except that which requires that no abandoned call results in silence. The fundamental principle is not thereby simply undermined, it is wholly discarded.

Barring any developments in the position during the consultation period, my response to the consultation will include a proposal that the previous Statement of Policy be re-adopted and implemented immediately, following a two-year delay. If I have to make such a proposal, it would become the first occasion on which I have asked Ofcom to change its policy.

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The status of the Statement covered by the Consultation

Although it is said that "Ofcom is now proposing to make significant changes to the statement" [1.3] these changes have already been made.

To comply with Section 131(4) of the Communications Act 2003 when using its powers Ofcom must "have regard to the statement for the time being in force". All of the determinations announced on 31 October were made having regard to this revised version of the Statement.

This is seen most clearly in the [Notification issued to Ant Marketing](#) which quotes extensively from revised portions of the statement and even includes a link to the consultation document on the Ofcom website, as the statement which applied to the determination of persistent misuse that was made.

Reports of the other determinations are seen to have been made having regard to this statement also. The [case covering 7 companies](#), including Ant was concluded and the [case of Kitchens Direct](#) was updated.

Ofcom's duty

Sub-section 3(1) of the Communications Act 2003 defines Ofcom's principal duty as:

"(a) to further the interests of citizens in relation to communications matters; and

"(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition"

Sub-section 3(8) refers to "a conflict in an important case between their duties under paragraphs (a) and (b) of subsection (1)". This indicates that these are multiple duties, which are distinct and may conflict. The procedures to be followed in such a case are then defined.

The powers and duties under Sections 128-131 clearly relate to paragraph (a). These sections make reference only to the effect of persistent misuse on citizens. If it were thought necessary to consider, for example in an impact assessment, how use of the powers could affect markets to the possible disadvantage of consumers (especially those who were not the victims of misuse) then the procedure covering resolution of a conflict should be followed. In this case the affected consumers are mostly the customers of call centres, i.e. businesses who use them to conduct telemarketing activities, or perhaps their end customers.

Ofcom has no general duty to regulate the activities of call centres, or any other users (rather than providers) of telecommunications services. It is therefore difficult to understand what are the "relevant" markets and who are the consumers that should be considered by Ofcom in the performance of its principal duty.

It may however be seen that any case in which the new policy is applied causes such a conflict.

There are many references to industry considerations in the "Impact Analysis" as if this Statement covered regulation of the identified industries.

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The purpose of the powers

The "Introduction" to the previous Statement, which has been totally rewritten, explained that the persistent misuse powers were introduced to cover "the behaviour of corporate and residential end-users who do not provide communications services to third parties". This had previously been controlled through license conditions imposed through the providers.

This "Introduction" also stated that the "powers are a consumer protection measure that enables Ofcom to take action against persons whose use of networks or services has a detrimental effect on the public interest by their imposition of various types of nuisance on other users".

Given its revised purpose of industry regulation rather than consumer protection, no equivalent text is to be found in the now current Statement.

Procedure for issuing Notifications

It is important to understand the general principles covering the various stages of action by Ofcom in the Act. The first, covered by section 128, is the Notification.

One of the features of a Notification is said to be "a specification of the use that Ofcom considers persistent misuse". As this had been omitted from the [previous Notification](#) and was also omitted from those issued on 31 October under the new policy, one could have assumed that this requirement would be removed from the Statement. It has not. [6.2, 6.9]

The importance of the specification is that it provides clear visibility to all of exactly how Ofcom applies its policy in determining misuse. It also provides the legal basis for the imposition of penalties and any necessary enforcement action.

The new Statement has introduced a new factor to be applied to a decision to issue a Notification - Administrative Priority. There remains some doubt as to how this is applied at the various stages of the procedure. Parts of the Statement however appear to reflect a policy position whereby all stages of the procedure covered by the Act may be combined into one, known as "enforcement action". This idea is also borne out by noting what has been done in practice.

This makes the Statement difficult to follow, as the original structure, reflecting the distinct stages, is retained.

It is acknowledged [6.3] that "persistent misuse is [now] defined in very broad terms". This was not so in the previous Statement which aimed only to provide a limited definition where clear and narrow examples could be given. It is only by apparently attempting to extend Ofcom's regulatory scope that this problem has been caused.

The successive sections [6.4 - 6.6] therefore set about describing how Ofcom may apply priorities not to a determination of whether persistent misuse has occurred that would lead to the issuing of a Notification, but to a decision about whether to take "enforcement action". Although supposedly related to something called "administrative priority" there is no clear indication of how one may expect Ofcom to act and how such considerations are applied to each proper stage of the process.

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Use of Enforcement Notifications

It is said [7.3] that it is the Enforcement Notification that will "impose a requirement on the misuser to take the necessary steps ... to end the misuse and not repeat it ... It will impose clear and enforceable obligations on a misuser and allow a reasonable period for compliance with them." This properly reflects the provisions of Section 129 of the Act.

In practice these requirements had been imposed in the terms of what was identified as a Section 128 Notification. On seeing this, one would have assumed that the new Statement would have been changed to reflect the actual approach being followed. It has not.

The reason for this separation is clearly seen in the Act. The Section 128 Notification is intended to provide a simple definition of the persistent misuse, which must be ceased. The Notified "person" then has a period during which to make representations. Given an implicit requirement in the Notification to end all of the misuse immediately, the representations may include a specific proposed plan or suggestions of factors to be considered if Ofcom were to look to impose an Enforcement Notification.

The provisions of the Act thereby enable Ofcom to be clear and unqualified in specifying the persistent misuse, yet appropriately sensitive to business issues for the misuser, the public interest and its own administrative priority in carrying out enforcement. This important separation has been lost in practice and is perhaps being confused to allow qualifications to be drawn back into the determination of persistent misuse.

It is even conceivable that Ofcom has held back from issuing Section 128 Notifications because it does not recognise the flexibility in enforcement that is available under the provisions of the Act.

As referred to elsewhere, although not referenced in Section 7 of the new Statement, Ofcom appears to be following a unified procedure known as "enforcement action" rather than the discrete stages outlined in the Act.

Silent Calls vs. Abandoned Calls

The description of the Abandoned Call given in the Statement is reasonably accurate [5.13].

Up to the point when Ofcom and others accepted my discovery that the Informative Message was lawful, it was generally misunderstood that the abandoned call had to result in silence to comply with the law. Whilst this misunderstanding was in force, it could be said that an Abandoned Call was a Silent Call.

Although this discovery was made and announced in June 2005, there has been very little done in reaction to it. It appears that users of predictive diallers, led by their trade associations, continued to believe (or perhaps preferred to continue to claim) that it was a more serious offence to use a recording to say who was calling, than to hang up in silence.

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All of the research on reactions to Abandoned Calls [5.14] covers only Silent Calls. There has been no research inviting the following three calls to be ranked in terms of the nature and degree of nuisance caused:

- A silent call
- A call consisting of a brief message identifying the caller and the intended purpose of the call with an apology for the fact that no agent was available to complete it, with no attempt at direct marketing.
- A call conducted by an agent identifying the caller and the intended purpose of the call, attempting direct marketing, but resulting in no benefit for either party.

Such research would be difficult, as there is little public experience of the second and reactions may be readily confused with those to recorded marketing messages.

If such research were possible, I would be surprised to find the results leading to the conclusion that the first and the second were together seen as serious nuisance that should be regarded as misuse of the telephone network, whereas the third was not.

I see the first standing alone as misuse, with the second and third broadly falling into the same category of nuisance with opinions differing on the relative gravity of the two. As always, it would depend how the questions were asked.

Although the previous Statement clearly identified making Silent Calls as an example of persistent misuse, this was never properly implemented due to (potentially improper) concerns about the impact this would have on the Call Centre industry. (The only previous action taken with regard to the Statement of Policy, [in April 2004](#) and [April 2005](#), effectively applied the now current policy.)

The Informative Message is the vital means by which Abandoned Calls are separated from Silent Calls. The degree of nuisance likely to be caused by the Abandoned Call with an Informative Message is of the same degree as many other telephone calls that are unwelcome, but do not warrant classification as examples of persistent misuse.

Rather than accepting this point. Ofcom takes a different approach, effectively extending the definition of the Silent Call to include all abandoned calls. This enables it to achieve another objective - "we concluded that companies using predictive diallers need guidance" [1.7]. By noting the removal of references to use of the powers being intended as a "consumer protection measure" in the previous Statement, one may gain an understanding of what lies behind the revisions to the Statement.

There is no doubt that those engaged in volume telephone contact need guidance on how to improve the way they deal with those they call. This does not mean that all of their failings amount to persistent misuse. Neither does it mean that the Persistent Misuse Statement provides an appropriate means for delivering this guidance.

Improvements in practice should not be limited to those that may lessen the scale of persistent misuse, or avoid the threshold of a determination of persistent misuse from being crossed. Measures that are to the public benefit should simply be commended to all regardless of whether a determination of persistent misuse may be involved.

If it is seen as necessary for there to be any regulation of the practice of making abandoned calls, given that they are not silent, the persistent misuse powers do not provide an effective way for this to be achieved.

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The mitigating factors

The confusion between the Abandoned Call and the Silent Call is seen most clearly in the list of procedures which it is said should be adopted by call centres - the "Code of Practice". [5.16]

With the exception of the second listed item, which separates the Silent Call from the Abandoned Call, this is a repetition of the list of requirements published in the [Direct Marketing Association Code of Practice](#) (paragraphs 21.22 to 21.33). These are measures that were designed and intended to make the Silent Call acceptable. The DMA and its members have long been arguing that there is nothing wrong with Silent Calls made by those who adhere to the provisions of this Code. It could be seen that Ofcom has now finally agreed to formally adopt the DMA policy, having followed it in practice for some time.

The clearest specific illustration of how these mitigating factors are intended to apply to the making of Silent Calls (not Abandoned Calls with an Informative Message) is the requirements in relation to CLI. These demand that the number provided must only enable a return call to hear an announcement of the identity of the original caller. If an Informative Message was being used, this would actually represent a misuse of CLI as the recipient of either a completed or an abandoned call would be invited, by the provision of this CLI, to make a totally useless call, wasting their time and possibly their money also.

If Silent Calls were not being made, this provision would be worse than irrelevant. It would deny the caller the opportunity to use a recognised published sales number as the CLI, so that those with a caller display unit may recognise the caller, and for the convenience of those who wished to call back after a completed call with further enquiries.

As this provision serves no other purpose, it will be seen by many as an alternative to use of the Informative Message that would be seen as acceptable by Ofcom. This is exactly what has happened in the cases where determinations were made under the new current policy.

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The determination of persistent misuse

This is covered specifically in Section 5.15 of the Statement.

The first two paragraphs are repeated from the previous statement (section 4.5.3) with minor (if highly significant) revisions to the wording. The implication is that all those repeatedly responsible for abandoned calls (whether silent or not) are practising persistent misuse. After this odd suggestion, the meaning starts to get a little fuzzy.

It is suggested that in some cases the discovery of activities which are determined to constitute an act of persistent misuse will not lead to the issuing of a Notification under Section 128. This does not make sense. The only reason for making a determination of persistent misuse is when deciding whether or not to issue a Section 128 Notification (the first stage of the procedure outlined in the Act). There can be no other reason for making such a determination.

One may struggle to understand how Ofcom may be aware that a specific identified activity of sufficient detriment to citizens to warrant a determination of persistent misuse is occurring and not even require that it be ceased. The nature and severity of whatever action may later be deemed appropriate, following the Notification, are separate matters.

We are still in the section of the document that describes how determinations of persistent misuse are made. We have already encountered reference to the next stage, issuing of a Notification, when we come upon a reference to "enforcement action", two steps further on in the process!

We then find a reference to "administrative priority" based on two factors: customer detriment and consideration of the steps taken that were insufficient to prevent a determination of persistent misuse.

I have covered these points with reference to the appropriate sections of the document. Although not defined as such, the term "enforcement action" may have a particular meaning not specifically related to the Enforcement Notification. From its use in the Statement, and from noting the way in which this policy has been implemented, it may reflect a new unified approach to the various stages of activity. The powers in the Act and the retained structure of the Statement cover distinct phases of action by Ofcom where different considerations will apply.

Consistency between the phases demands that nothing be included in a determination of persistent misuse that would not demand that all appropriate and necessary action be taken to cause it to be ceased.

Consideration of the action that may be required to achieve compliance with the requirement to cease the misuse may not be applied to the determination of whether misuse has occurred. Similarly any action taken that was insufficient to prevent a determination of persistent misuse cannot be relevant.

This may be understood by considering an example.

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For example, two companies have been responsible for exactly the same significant scale and degree of detriment to citizens by making the same number of Silent Calls. It is determined that this behaviour could be persistent misuse, however other factors are brought into the consideration.

In one case this represented 8% of the live calls made, in the other 2%. One company indicates a willingness to cease its misuse whereas the other indicates a determination to fight any action in the courts. If protection of the interests of citizens were the priority then both must receive Notifications, regardless of these spurious factors. Application of the policy outlined in the Statement would lead to different results. (Perhaps Ofcom could offer a prize for the first correct set of four answers.)

A further example of the application of the principle of administrative priority may be seen from the way in which the policy has been applied in practice. The one company covered by the first determinations under the new policy which was declared not to have practised persistent misuse, despite admitting to making Silent Calls, was that which did so mostly from overseas.

In the final sentence of this section we find a reference to procedures (in the plural) which will act as mitigating factors (in the plural), not in determining whether or not a determination of persistent misuse should be made, but in establishing the gravity thereof. Although these are expressed in the plural, the following section identifies only one of these procedures, a list of specific conditions all of which are mandatory.

The wording of this sentence defies comprehension in the wider context, as the Act defines persistent misuse in the absolute. It would be generally understood however that the list given at section 5.16, was a list of mitigating factors, use of which would be weighed individually when making a determination of persistent misuse.

This is exactly how the policy has been applied in the cases where determinations have already been made in applying it. In these cases, one of these factors was omitted from the consideration altogether - the requirement that abandoned calls must not be silent.

Not only does Ofcom now have a policy that declares a tolerance of persistent misuse after it has made such a determination, it is also seen, when the policy is applied in practice, to tolerate the making of Silent Calls.

This sub-section is key to understanding how Ofcom is now proceeding on the matter. I can only understand this by looking at the way in which the new current policy has been applied in practise in relation to the formal complaint that I have submitted. This names four of the companies covered by determinations under the new policy, although it was the previous policy which I asked to be implemented. I know that these four companies are engaged in a pattern of behaviour or practice that includes making Silent Calls. On implementation of this Statement of Policy, they have been allowed to continue doing so. This can only mean that making Silent Calls is not seen to be persistent misuse under the new policy.

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Consideration of other factors in a determination of persistent misuse

The previous Statement of Policy was clear in its declaration that a determination of persistent misuse should only consider the annoyance, inconvenience and anxiety likely to be caused by the persistent misuse covered by the specification in a possible Notification. This determination could not be influenced by other factors, such as the possibility that even greater degrees of persistence or misuse could have occurred were it not for measures taken to keep them to the levels found.

The current Statement is summarised [1.4 - 1.7] as adopting this very approach by applying such irrelevant mitigating factors to a determination of misuse, as covered by section 5 and as seen in the application of the policy to cases. Such considerations may only be relevant to the level of penalty or may affect the steps necessary to bring the misuse to an end.

The important point is that if these are applied in the determination itself this affects what it is that must be ceased.

It is this convoluted approach that has led to determinations that making Silent Calls is not persistent misuse.

Applicability of the percentage approach

Throughout my exchanges in requesting Ofcom to implement its previous policy, I commonly quoted an important section from the previous Statement. This was found in the context of assessing a penalty at paragraph 7.6. If the principles outlined were valid, they would apply equally to the determination of misuse and persistence.

The following text has been removed from the current Statement:

"because the 'persistent misuse' powers are framed with a view to the protection of individual consumers, it would be inappropriate to apply a 'percentage' approach. Where a large call centre generates, say, 200 [abandoned] calls a day, it will not be a mitigating factor that these calls represent only 3 per cent of the call centre's output. From the standpoint of an individual who has received such a call, there is little comfort to be drawn from the knowledge that 97 other people did not."

This removal of a further reference to the purpose of the powers may give one cause to wonder how parliament has expressed a revised view of the purpose of the powers since they were first granted.

I have always seen this argument from Ofcom as a convincing reason for dismissing any percentage approach in this context.

Although holding only a minor place in the wording of the current Statement, the percentage approach has been the key feature of Ofcom's actual policy in practice for some time and is seen in practice to continue as such.

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Answerphone detection as a cause of Silent Calls

This important factor is totally omitted from the explanation of the causes of the Silent Call and the list of steps that may be taken to prevent use of Automated Dialling Systems from causing misuse to be practised. (This was not identified in the previous Statement that did not attempt to get into this type of detail.)

Many call centres use equipment in an attempt to avoid agents being connected to calls answered by machines or answering services. There is however no reliable method of ensuring that this equipment may be accurate in its determinations and it is known that this frequently leads to calls being "dropped" when in fact they have been answered by a live person.

Use of this equipment leads to Silent Calls in two ways:

- The long pause between a call being answered and being connected to an agent is partly caused by the time needed for the answerphone detection process to collect and analyse a sample of what is heard. During this pause, many recipients assume that no agent will come on the line and treat it as a Silent Call. If that is their reasonable conclusion, then that is what it is. It would not however be recorded as an "abandoned call" by the caller.
- Many calls which are actually "dropped", I cannot say "abandoned" because this term is assigned to a different circumstance, are actually caused by "false positive" answerphone detection. To the recipient this is a Silent Call, the caller would not record this as an "abandoned call".

For the latter reason, some operators would not contemplate use of this equipment. The extensive research carried out by Ofcom with assistance from the DTI and industry representatives appears not to have recognised this point.

The nature of the two situations noted above means that there can be no records of how often this happens. There are however some who believe that this could be the explanation for a significant part of the gap between the number of Abandoned Calls that are thought to be made and the number of Silent Calls that are reported as being received.

The Statement does not identify use of unreliable answerphone detection equipment as a cause of Silent Calls, nor is its avoidance seen as a measure that may be used to prevent the nuisance caused by use of automated diallers.

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Dealing with complaints from citizens

Paragraph 5.3 of the previous statement began "Because Ofcom views the 'persistent misuse' legislation as being principally directed at consumer protection". Clearly Ofcom no longer holds this view, as this phrase has been simply clipped out from the sentence in the equivalent section. [6.7]

When describing how Ofcom is able to "ascertain whether there is sufficient evidence to provide reasonable grounds for believing that persistent misuse has occurred" it previously indicated that "it will need to investigate them", it now indicates that the complaints themselves "will be assessed".

It is extremely unlikely that any number of citizen complaints would themselves provide the necessary evidence. Placing this burden on the complainant is likely to be very effective in keeping the number of cases of persistent misuse low as the necessary information is unavailable to those without investigative powers, such as those held by Ofcom.

I offer a simple example. In December 2003 my complaint to Ofcom included a report of 2 Silent Calls from Kitchens Direct - it had taken a little ingenuity and external help to discover the source of the calls. When Ofcom conducted its investigation, it discovered that this company had made 1.5 million Silent Calls in a three-month period.

Let us assume a similar situation in December 2005. I make my complaint in the same way.

If one assumes that the recipients of the other 1,499,998 Silent Calls are able to show the same ingenuity and gain the same help in identifying the source and also take the trouble to report this to Ofcom, we would still have not provided adequate evidence. We would yet have to somehow prove that this company had not made a total of 48.5 million completed calls, distributed over time in line with the Silent Calls, so that it could be seen that the 3% limit had been breached. Such evidence would be required before an assessment could lead to a determination of persistent misuse under the current Statement of Policy.