

DERBYSHIRE COUNTY COUNCIL

Meeting with Cabinet Member, Health and Communities

12 November 2013

Report of the Strategic Director, Cultural and Community Services

**UNIVERSITY OF DERBY RESEARCH PROJECT INTO THE MIS-SELLING OF
MOBILITY AIDS**

1. Purpose of the report:

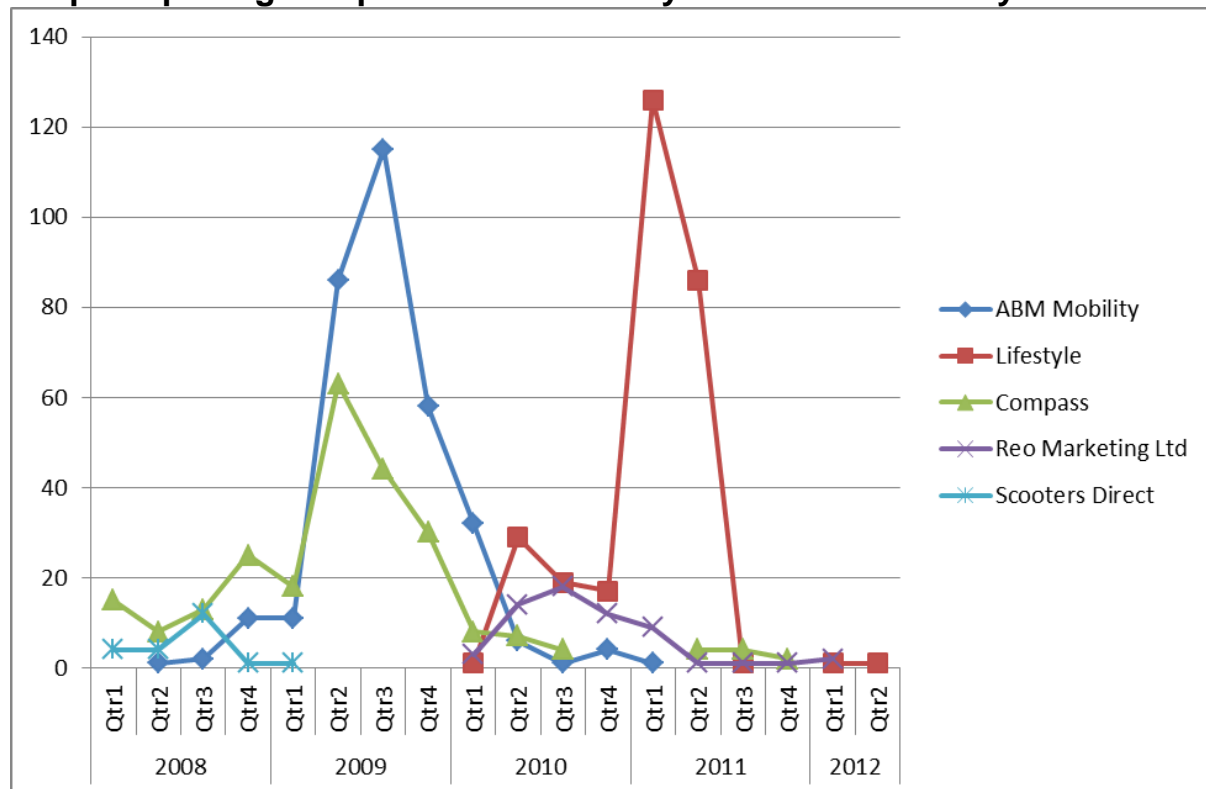
To advise the Cabinet Member – Health and Communities of conclusions and recommendations of a University of Derby research project into the mis-selling of mobility aids; and to seek approval to adopt some of the recommendations of the research report.

2. Information and analysis:

- 2.1 The Trading Standards Division first became aware of an increase in the number of complaints about the way in which mobility aids were being sold as early as April 2007. This prompted a project to visit and advise all 21 businesses based in Derbyshire to advise them of the requirements of trading standards law. It soon became apparent that a handful of local businesses were responsible for the vast majority of complaints; and one in particular prompted the county's first action under the Enterprise Act 2002. This legislation enabled the authority to apply to the County Court for an injunction against Scooters Direct to improve their standards of trading and reduce the volume of complaints.
- 2.2 Whilst successful in tackling that particular business, unfortunately the growth in the mobility aids market – which in 2008 was estimated to be worth £500 million per year - and the demand for products to assist people to live independently for longer in their own homes, meant that there were significant profits to be made by the unscrupulous salesman willing to take advantage of older citizens. Whilst the Enterprise Act proved helpful in exerting pressure over businesses that were willing to amend their ways, it proved relatively ineffectual against the determined rogue who was prepared to take advantage of consumers and to maximise profits by whatever means.
- 2.3 Two Derbyshire businesses in particular: Compass Mobility and ABM Mobility generated the vast majority of complaints and whilst the people responsible for running these businesses were eventually prosecuted by Derbyshire trading standards, it took several years and many hundreds of hours of officer time to bring the culprits before the courts. One of the issues – as is shown in the graph below – was that it was all

too easy for the rogue traders to set up new businesses which generated new complaints from the public. The graph depicts the volume of complaints received by Derbyshire trading standards about five businesses based in the county. The peaks and troughs in complaint levels correspond to enforcement action taken by the Division. It also shows that the individuals responsible for Compass Mobility set up a new company called Reo Marketing Ltd. Similarly, the individual trading as ABM Mobility set up a new trading style 'Lifestyle' (or Virgo Lifestyle) when enforcement action was taken against the original company.

Graph depicting complaints about Derbyshire based mobility traders



2.4 By definition, the vast majority of the consumers who suffered as a result of this type of rogue trading were already vulnerable due to their age, lack of mobility and poor health. Typical tactics employed by the rogues were to contact the householder by telephone and imply that they were from social services or the health service and wanted to make an appointment to 'assess the individual's needs'. This was a scam to facilitate a visit to their home by a salesman. The type of activities complained about included:

- Carrying out a bogus 'health assessment'
- High pressure sales techniques – e.g. saying that this was a limited offer
- Staying an excessive length of time

- Inflated prices
 - Failing to inform the customer of their cancellation rights
 - Failing to honour cancellations
 - Failing to deliver the goods
- 2.5 In September 2012 Derbyshire Trading Standards approached the University of Derbyshire to carry out research into the mis-selling of mobility aids; to assess the adequacy of the legislation and to consider the impact on the victims of that mis-selling. The research included interviewing both trading standards professionals as well as victims of the mis-selling of mobility aids and critically assessed the legislation and powers available to local authorities to tackle this type of behaviour.
- 2.6 The report concludes that the Enterprise Act has not proved effective in tackling rogue traders and that whilst the Government is proposing regulatory reform, the success of this will:
- “...require the skill and expertise and professionalism of those familiar with the existing regime for seamless transition. What has emerged from this research is that current powers and future changes will rely on the existing skills and expertise and the capacity of Trading Standards Services investigation teams for successful implementation.”*
- 2.7 Attached as an appendix is a copy of the research project report which makes the following six recommendations. Each of these recommendations has been considered by the Departmental Management Team within Cultural & Community Services and subject to Member approval, will be implemented as follows:
1. **Recommendation.** *Trading Standards Services need to work to educate the public and provide accessible and timely information as to their role and responsibilities in the investigation of this type of mis-selling activity. This should include information on the management and investigation of such complaints and the content, timing and communication of the outcomes of these, to ensure effective management of complainant expectations.*

Action. Guidance for complainants on our role in criminal investigations will be developed for dissemination to trading standards staff and the general public.
 2. **Recommendation.** *Trading Standards Services should give consideration to furthering links with external agencies such as Health and Social Services to assist in identifying and referring victims and contributing to effective ‘safeguarding’ of financial vulnerability.*

Action. Derbyshire trading standards already has effective links with colleagues in Adult Care and Public Health . These links will be reviewed

and trading standards' participation in the Derbyshire First Contact Scheme will be formalised.

3. **Recommendation.** *Consideration should be given to the standardising of the best practice in the use of video statements in accordance with the Ministry of Justice guidance.*

Action. At the present time, we would rely on the assistance of Derbyshire Constabulary to obtain any such statements from local people. This arrangement has proved satisfactory up to now but we will keep it under review and take additional action if necessary in the future.

4. **Recommendation.** *Consideration be given to developing support for victims who give evidence in court and for formalising the identification of the need for special measures applications in court proceedings, to support this process.*

Action. This will be progressed through liaison with the Witness Service provided by the charity Victim Support.

5. **Recommendation.** *A more formal process for the signposting and referral of victims to other agencies who can advise /assist /support victims who wish to pursue civil compensation.*

Action. The principal agency which helps victims to pursue civil compensation is currently the Citizens Advice Consumer Service and their role is recognised by the Government. At the present time, our links with Citizens Advice are very good but we will need to keep these under review in the light of any subsequent legislative or organisational changes.

6. **Recommendation.** *A review of the role and related policies and procedures of the Trading Standards Service is recommended in light of any increasing service and resource demands resulting from legislative changes.*

Action. Fundamental legislative changes of the kind proposed in the Consumer Right Bill will always prompt a review of our policies and procedures. Similarly, our activities are kept constantly under review as a result of the financial challenges facing the authority. No additional action is considered necessary at this stage.

3. Other considerations:

In preparing this report the relevance of the following factors has been considered; financial, legal, prevention of crime and disorder, equality of opportunity; and environmental, human rights, health, human resources, property and transport considerations.

4. Background papers:

- 4.1. Trading Standards Mobility Aids Project 2007/08 Restricted CabCo report dated 27th November 2007

http://www.derbyshire.gov.uk/council/meetings_decisions/meetings_archive/pre_2009_archive/meetings/cabinet_member_portfolio/community_safety/27112007_community_safety.asp

- 4.2. Action Taken Against Rogue Traders Selling Mobility Aids CabCo report dated 4th October 2010

http://www.derbyshire.gov.uk/council/meetings_decisions/meetings_archive/pre_2009_archive/meetings/cabinet_member_portfolio/communities/04102010_communities.asp

- 4.3. Action Taken Against Rogue Traders Selling Mobility Aids Update CabCo report dated 10th January 2011

http://www.derbyshire.gov.uk/council/meetings_decisions/meetings_archive/pre_2009_archive/meetings/cabinet_member_portfolio/communities/10012011_communities.asp

- 4.4. ACTION TAKEN AGAINST ROGUE TRADERS SELLING MOBILITY AIDS - UPDATE CabCo report dated 6th November 2012

http://www.derbyshire.gov.uk/images/2012-11-06%20Misselling%20of%20Mobility%20Products%20Update_tcm44-213283.pdf

5. Key Decision:

No

6. Call-in:

Is it required that call-in be waived for any decision on this report?

No

7. Strategic Director's recommendation:

That the Cabinet Member – Cabinet Member – Health and Communities notes the conclusions and recommendations of a University of Derby research project into the mis-selling of mobility aids; and agrees to the adoption of the recommendations in Section 2.7 of this report.

Martin Molloy
Strategic Director
Cultural and Community Services

APPENDIX

Research project - University of Derby and Derbyshire County Council Trading Standards Service

A critical investigation of the legal powers of Trading Standards Services in the prevention of the mis-selling of mobility aids.

Executive Summary

This report highlights the key role that local Trading Standards Services have in tackling the mis-selling of mobility aids drawn from the research practitioners' experience of investigating this kind of behaviour and the views of those who have fallen victim to this activity. The report sets out the social context (1.0) and outlines the research findings within a critical overview of the current regulatory landscape (section 2.0) and in light of recent changes to the role of the Office of Fair Trading (OFT) and Local Authority Trading Standards Services and recently proposed legislative changes.

The report makes several recommendations which include:

1. Trading Standards Services need to work to educate the public and provide accessible and timely information as to their role and responsibilities in the investigation of this type of mis-selling activity. This should include information on the management and investigation of such complaints and the content, timing and communication of the outcomes of these, to ensure effective management of complainant expectations.
2. Trading Standard Services should give consideration to furthering links with external agencies such as Health and Social Services to assist in identifying and referring victims and contributing to effective 'safeguarding' of financial vulnerability.
3. Consideration should be given to the standardising of the best practice in the use of video statements in accordance with the Ministry of Justice guidance.
4. Consideration be given to developing support for victims who give evidence in court and for formalising the identification of the need for special measures applications in court proceedings, to support this process.
5. A more formal process for the signposting and referral of victims to other agencies who can advise /assist /support victims who wish to pursue civil compensation.

6. A review of the role and related policies and procedures of the Trading Standards Service is recommended in light of any increasing service and resource demands resulting from legislative changes.

1.0 Defining the social context

This research project was undertaken in conjunction with Derbyshire Trading Standards to investigate the effectiveness of Local Authority powers in relation to the mis-selling of mobility aids, given the regional prevalence of this type of activity. The research aimed to review the legal powers of Trading Standards Services and their effectiveness in dealing with this type of 'rogue' trading.

Trading Standard Services have a wide general enforcement role. This includes the investigation of the mis-selling of mobility aids, an issue which raises particular concerns given the vulnerability of this group and their potential for exploitation.

It is estimated that there are over eleven million people with a disability or long term impairment in the UK.¹ Over 45% (5.3 million)² form the consumer group most likely to purchase disability equipment or a mobility aid. The projected 40%³ increase in the number of older disabled persons, particularly those over 85, makes this a current and future concern. One in five disabled people who require adaptations to their home believe that their accommodation is unsuitable,⁴ so may seek equipment as part of resolving identified accommodation and mobility problems. Seven million people would benefit from equipment to assist daily living, and disabled people commonly experience impairment of their mobility, or difficulties with lifting and carrying⁵ for which there is a significant unmet need for equipment.⁶ The demand on waiting times for assessment for equipment and the application of means testing for funded adaptations, has led to an increase in private purchases.⁷

¹Department for Work and Pensions 'Family Resources Survey' June 2012

²Spa Future Thinking, 'Mobility Aids Research Report' Prepared for the OFT. August 2011, 4

³Institute for Public Policy research, 'Disability 2020: Opportunities for the full and equal citizenship of disabled people in Britain in 2020' March 2007

⁴Source: Survey of English Housing 2007/08 At least four million disabled people are potentially self-funding.

⁵Department for Work and Pensions 'Family Resources Survey' June 2012 Table 5.3

⁶Consumer Focus, 'Equipment for older and disabled people: an analysis of the market' 2010,19

⁷Consumer Focus, 'Equipment for older and disabled people: an analysis of the market' 2010,5

Carers⁸ also purchase equipment to assist them in supporting the daily living activities of family members, with 58% of the population caring for someone with a physical disability.⁹

Mobility products and disability equipment 'play a significant role in enabling people to live more independently and to have a good quality of life',¹⁰ 'supporting the ways in which millions of elderly and disabled people live their lives by enabling them to live more independently, safely and healthily.'¹¹ A quarter of 'disabled people report that they frequently feel they have no choice and control over their daily lives';¹² equipment may assist with this.

'Disabled are the most vulnerable in society'¹³ and therefore require protection as a distinct consumer group particularly given that the poverty rates for disabled persons are twice that of non-disabled at 30%,¹⁴ making the financial commitment to the purchase of mobility equipment especially significant for this consumer group. UK Disabled people are estimated to have a spending capacity of £80 billion¹⁵ representing a lucrative potential market for this business sector. The UK disability equipment market has been estimated at £1.46 billion for 2008 compared with £1.34 billion the previous year.¹⁶ The Mobility equipment¹⁷ market was estimated between £200 million to £501 million for 2010.¹⁸ Sales of disability equipment have increased by 92.6% over the last 10 years and the total market size increased by 9.2% in 2008.¹⁹

⁸Carers UK Policy Briefing 'Facts about carers 2012' December 2012,2 The statistics indicate that in the ten year period from 2001 to 2011 the number of carers increased by 629,000 to 6 million,

⁹ Carers UK Policy Briefing 'Facts about carers 2012' December 2012,4

¹⁰Consumer Focus, 'Equipment for older and disabled people: an analysis of the market' 2010, 4

¹¹<http://www.oft.gov.uk/OFTwork/markets-work/mobility-aids/> Accessed 08/07/2013

¹²Source: ONS Opinions Survey 2011

¹³Consumer Focus, 'Equipment for older and disabled people: an analysis of the market' 2010

¹⁴English federation of Disability and Sport http://www.efds.co.uk/resources/facts_and_statistics Accessed 09/07/2010

¹⁵Employers Forum on Disability

¹⁶Key Note Market Report 2006, 'Equipment for the Disabled' (ISBN 1-84168-8975).

¹⁷Mobility equipment here refers to equipment that assists sit to stand and physical movement from one area to another, indoors or outdoors and includes walking aids, sit to stand chairs, wheelchairs and mobility scooters.

¹⁸Consumer Focus, 'Equipment for older and disabled people: an analysis of the market' 2010,5 The British Healthcare Trades Association estimated sales for 2010 to be £200 million for mobility products.

¹⁹Plimsoll Portfolio Analysis (Disabled Equipment) First Edition 2009, Dec 2008), pp.2.1 – a and b

2.0 The regulatory landscape

The Office of Fair Trading (OFT) has had lead responsibility for overall enforcement of consumer protection and for coordinating the involvement of other enforcers in this process. The OFT also has responsibility for ensuring that markets operate competitively and that there is no dominance by a single supplier or purchaser.

A recent Government review of the 'consumer protection landscape' identified an 'enforcement gap' between the national role of the OFT and the role of local Trading Standards Services²⁰ to be remedied by enhancing the role of local Trading Standards Services.

The OFT retains its role under the current legislation as lead enforcer limited for the future to targeting 'systemic failures' in consumer protection, where there is also evidence of uncompetitive practices. The need for this change in roles and responsibilities was highlighted by the National Audit Office and Public Accounts Committee in 2011.²¹ The more recent Government consultation revealed the lack of accountability of local Trading Standards Services for tackling cross-boundary and national threats and hampered by the limited resources within the OFT²² to support this. The aim of the recent changes was to reduce the enforcement gap and the resulting consumer detriment, estimated to be £3.3 billion, arising from unfair commercial practices,²³ promoting 'a targeted approach to compliance linked to the threat of enforcement action' as appropriate.²⁴ The Government aims to secure effective enforcement²⁵ and increased consumer confidence. Local TSS retain their duty to enforce the Consumer Protection from Unfair Trading Regulations (CPUTR), and the OFT retains a power to enforce here, but no longer a duty to do so.

The National Trading Standards Board²⁶ comprising of heads of local Trading Standards from each of the regions, with an independent Chair (Lord Harris) represents Trading Standards Services across England and Wales. They are also responsible for regional

²⁰ Department for Business and Innovation Skills, 'Consumer Landscape review: Impact Assessments on Enforcement, Advocacy and Information, Advice and Education' April 2012, 2

²¹ Department for Business and Innovation Skills 'Government response to consultation on institutional reform' April 2012 para 48, 54

²² Department for Business and Innovation Skills 'Government response to consultation on institutional reform' April 2012 para 6.2

²³ Department for Business and Innovation Skills, 'Consumer Landscape review: Impact Assessments on Enforcement, Advocacy and Information, Advice and Education' April 2012, para 10

²⁴ Department for Business and Innovation Skills, 'Consumer Landscape review: Impact Assessments on Enforcement, Advocacy and Information, Advice and Education' April 2012, para 11

²⁵ Department of Business innovation and Skills, 'Empowering and Protecting Consumers, Government Response to consultation on Institutional Reform' April 2012

²⁶ Department for Business and Innovation Skills 'Government response to consultation on institutional reform' April 2012 para 6.35 This was the preferred model indicated by the sector consultation.

Scambuster teams which were previously set up with government funding supported by a 'host' authority in each region. Their role is to secure an effective framework of governance for the delivery of consumer protection,²⁷ promoting cross boundary initiatives and enforcement and effective intelligence sharing, funded from within existing OFT budget. The shift in focus of local TSS due to the restructuring of services nationally and the need to prioritise resources to target those 'rogue traders' who have the potential to cause significant harm to consumers,²⁸ drives the local enforcement agenda.

2.1 Legislative provisions

The Enterprise Act (EA) 2002 implements a general enforcement regime for domestic and community consumer law, a hierarchy of enforcers including general, designated and community enforcers,²⁹ having enforcement powers. Local authorities in England and Wales, act as general and community enforcers, this role assigned mainly to the TSS. The EA 2002 Part 8 provides for enforcement of consumer protection law, 'intended to ensure a fair and safe marketplace',³⁰ by providing for civil injunction 'enforcement orders'.³¹

The EA aims to protect consumers through promoting compliance with consumer law, and requiring Trading Standards Service to engage in a process of 'appropriate consultation' before any enforcement action is taken. The consultation process³² for those in breach of consumer law, involves education and advice as to the action needed allowing reasonable opportunity³³ to secure compliance and minimise future consumer detriment. This process is time limited to a minimum of 14 days³⁴ after consultation before the enforcer can apply for an enforcement order. Otherwise Trading Standards Services have considerable discretion as to what constitutes an 'appropriate consultation.' The main legislation that triggers this enforcement regime is the Consumer Protection from Unfair Trading Regulations 2008³⁵

²⁷This framework for consumer protection is limited to trading Standard legislation that falls within the brief of the department for Business Skills and Innovation

²⁸Cultural and Community Services Department Trading Standards Division 'Service Plan 2010-2014' 2012-2013 Refresh, 2

²⁹EA 2002 s213

³⁰Cultural and Community Services Department Trading Standards Division 'Service Plan 2010-2014' 2012-2013 Refresh. 1

³¹EA 2002 s215

³²EA2002 s214

³³OFT 'Enforcement of Consumer protection legislation, guidance on Part 8 of the Enterprise Act' 2003, 5

³⁴This is reduced to a period of seven days in the case of the seeing of an interim order, EA 2002 s214 (4)(b) but the need for any notice can be waived if the OFT consider that the conduct in question merits the seeking of an enforcement order without delay. s214(3)

³⁵SI 2008/1277 The CPUR 2008 replaced the previous Trade Descriptions Act 1978

implementing European Directive³⁶ on Unfair Commercial Practices. Any action taken to enforce this in the UK requires that community infringements demonstrate 'harm to the collective interests' of consumers. There is little real guidance to how this test can be met other than the Explanatory Notes to the Act which make clear that this test applies to domestic and community infringements alike. 'Harm to collective interests' is not dependent upon a 'large' number of consumers being affected,³⁷ but simply that any single act or omission when continued or repeated may actually or potentially adversely affect the collective interests of the consumers.³⁸

The EA aimed to provide a speedy means to enforce regulation through civil injunctions, alongside a transparent process of consultation to allow businesses a reasonable opportunity to 'put things right.' The process of injunctions hinges on prohibiting further breaches of the relevant consumer protection, but does not mandate any other specific acts or measures to be taken by the business. As an alternative to seeking an enforcement order³⁹, Trading Standards Services can accept an undertaking from a business⁴⁰ that they will not engage in activity that will lead to further breaches, but this does not prevent them seeking an injunction later. Undertakings cannot be given without commitment to action since their breach will likely result in the application of an enforcement order by the court.

3.0 Aims of the research project

Given the regulatory landscape outlined above, it is clear that local Trading Standards Services will have an increasingly important role in the investigation of enforcement of breaches of consumer protection legislation. This recognises and draws on the current skills and expertise of local Trading Standards Services and requires effective liaison to manage the enforcement of cross border regulatory breaches, requiring sustainable funding⁴¹ and adequate powers to achieve success. Whilst there has been a national review of regulatory roles and responsibilities leading to a restructuring of these, the question as to the adequacy of the powers available to Trading Standards Services to effectively enforce legislation and the accompanying decision-making in applying these powers, has not been fully considered

³⁶Directive 2005/29/EC L 149/22 11.6.2005

³⁷Explanatory notes Enterprise Act 2002 c40 paras 483, 486

³⁸OFT v Vance Millar [2009] EWCA Civ 34

³⁹EA 2002 s217 s128 interim enforcement orders

⁴⁰EA s219

⁴¹Department of Business innovation and Skills, 'Empowering and Protecting Consumers, Government Response to consultation on Institutional Reform' April 2012 para 6.2

at local level. The issue of regulatory enforcement has been revisited since the introduction of the Enterprise Act in 2002. The 2005 Hampton Review⁴² concluded that “the current regime for achieving business compliance is ineffective and complex,”⁴³making the assessment of risk and prioritising of enforcement action challenging.⁴⁴ The subsequent Macrory Report⁴⁵ further considered the general issue of regulatory sanctions, and the application of the risk based approach to these, recommending a greater range of formal and informal sanctions to allow for their proportionate application.

In light of recent investigation of companies who have been involved in the mis-selling of mobility aids, Derbyshire County Council Trading Standards Service in partnership with the University of Derby, have endeavoured to research the use and application of the legal powers actionable by Local Authorities for the prevention of the mis-selling of mobility aids. The research aimed to tease out the critical factors that impact on the decisions to enforce consumer protection legislation, drawing on the consideration of the specific consumer protection powers for enforcement and the effectiveness of the range of powers available to prevent this mischief. The research was undertaken between May and June 2013.

3.1 Methodology

The interview design was based on qualitative methodology, involving semi-structured interviews, based on a standardised question set providing a core structure to all interviews. Key prompts enabled the interviewer to explore key issues in more detail and the semi-structured process left the interviewer free to explore more fully critical issues and themes that emerged. This was considered the most appropriate method for capturing the views and opinions of the research participants, which were considered in two separate groups, the victim complainant group and the as professional participant group.

The victim participant group were sourced from contacts provided with the permission of the complainants and the partner organisation. Due to the nature of ‘rogue trader’ activity a letter was sent to a group of randomly selected complainants who had made a complaint about mis-selling within the previous two years. The letter explained the purpose of the research

⁴²Philip Hampton ‘Reducing administrative burdens: effective inspection and enforcement’ March 2005
The seven Hampton Principles have been incorporated into the Regulators Compliance Code as incorporated in the Part Two of the Legislative and Regulatory Reform Act 2006

⁴³Consumer focus, ‘Consumer Focus response to the Department for Business, Innovation and Skills consultation on the pilot operation of civil sanction powers for consumer law enforcers’ May 2010

⁴⁴HM Government ‘Reducing regulation made simple. Less regulation, better regulation and regulation as a last resort.’ December 2010, 59

⁴⁵Professor Richard B. Macrory ‘Regulatory Justice: Making Sanctions Effective’ November 2006

and identified a nominated person from the Trading Standards Service, who subsequently contacted victims by telephone to verify whether they wished to take part in the project. This ensured that the participants were contacted in a secure manner and could ask further questions about the terms of participation. Once participation has been agreed, minimal contact details were forwarded to the University research team. Participants were advised that they would be contacted by the research team within a specific time frame. Interviews were by telephone and were recorded enabling participants to be interviewed at their convenience in the comfort of their home without a stranger present, and in the presence of a family member if they wished. Participants were given a unique identifier code and contact details for any subsequent withdraw.

For the professional group, several local authority enforcement teams, four in total, were approached to engage in the research project. Selection was based on open source intelligence gained from media reports identifying local authorities involved in enforcement of this issue. This was used in combination with 'snowball sampling' drawing on the profession contacts of those interviewed, and the knowledge of the partner organisation. Participants had past or current experience of working within Trading Standards or regulatory enforcement at a national level.

Complaints in relation to this activity began to be received 5-6 years ago triggering initial investigations across the region and nationally. Participants had personal experience as part of teams involved in one or more investigations leading to subsequent civil and criminal action. Two of these were described as 'major' and significant' and lasted for a period of four years and involved a large number of complaints and significant consumer detriment.

All participants were keen to share their experiences and opinions about their enforcement role and the legislative context that underpins this. The research team would like to thank all participants for their generous support of this project.

4.0 Research Findings and Analysis

The research findings have been grouped into several themes which are linked to the research objectives and the key issues and findings from the research project. Each section provides an overview of the views and opinions expressed, placed within the context of the mis-selling of mobility aids and the role of Trading Standards Services in tackling this.

A starting point is the profile of the victims that are targeted by this type of activity and the process of referral to Trading Standards Services, aligned to the expectation of victims throughout the process of investigation and enforcement.

4.1 Victim Impact

This section is divided into two parts. This first details the views of complainants, in the main victim's themselves or their families, as to the form and impact of the mis-selling activity and their perception of the role of the Derbyshire Trading Standard Services in responding to their complaints. The second section details the views of the professional participants from in a number of Local Authorities involved in investigating mis-selling activity and acting to enforce consumer law. This provides balance in ascertaining both the aims and views of enforcers and those who are directly affected as victims of mis-selling.

Interviews were undertaken with seven complainants. In six cases sales appear to have taken place, and in two instances the carers had made the complaint on behalf of the relative. Sadly since the complaint was made two of the victims had died.

During the interview process it was clear that participants, inadvertently disclosed information about their health and social circumstances indicating the ease with which 'rogue traders' are able to misuse such information to target and exploit those who are elderly, have health problems and poor mobility, live alone, or have sensory impairments and poor memory.

Some complainants responded to adverts, one visited a business (not untypical of elderly people who are less likely to use the internet) and others were cold called by telephone with a later visit, one complainant receiving a doorstep call. Two of the interviews revealed that the traders appeared to have prior information about the victim's health. One victim was contacted under 'the guise' of medical research, and in another the person was taken by the complainant to be someone from social services. It also emerged that in some cases the victims did not complain or raise the issue in terms of requesting a refund or declining the product until sometime after the sale. This indicates the need for consumers to be more aware of their rights and the timeframes in which to exercise. The feeling expressed by victims and their families as a result of the incident included loss of confidence and a sense of distrust:

"I wouldn't trust anybody else" and feeling, *"more suspicious."* Other feelings expressed included distress, stress and annoyance, disgust, loss of confidence:

"I was on the verge of tears with all the stress and hassle I had experienced,"

"I felt foolish," "I won't be so daft again... I was easily persuaded," "really, really, annoyed and it was upsetting," "just relieved we got the money back." There was no indication of the duration of these feelings but the fact they that could be so easily recalled some considerable time later, suggests that the emotional upset caused by this kind of activity is not transient. These feelings are naturally and understandably exacerbated where this directly impacted on the victim's health or where there victim later died before the issue was resolved.

Interviews revealed some of the various strategies/ behaviours these businesses engage in: *"they're approaching old people that live on their own,"* and *"I had a phone call saying they would like to call because they were in the district."* These rogue traders use persistence to engage home visits: *"I'd sort of made, made it clear that I really didn't want a visit but [they] pestered and pestered and I kept saying no.... and in the end I gave up."* In one case the complainant stated *"I had been sold something that claimed to be very unique but really it was just a standard [equipment] that I could have got anywhere."*

Some of the complainants attempted to resolve the issue with the companies themselves contacting them directly with varying degree of success: *"it's very difficult to get hold of the right people because the sales don't answer the phones."* Companies used a variety of tactics to evade disgruntled consumers: *"There was ..some kind of name changing in the company... I don't know if they traded in a couple of names"* and a feeling that: *"there was some kind of heel dragging."* One participant stated: *"I couldn't get anywhere with the phone call."* Another was told: *"due to your contacting Trading Standards you are damaging our business."* One complainant clearly identified how they considered genuine businesses should behave: *"if they have got anything about them"* they would they *"contact a member of .. family and explain to them and that's what they should do."* One complainant was clear that consumers should be left to initiate contact and that cold calling was unacceptable: *"if you want something you should ring them, we don't want people coming knocking on the door and troubling people. That's what's got to be stopped."*

Participants were asked to rate the role of Trading Standards Services on a scale of 1-5, five being very good and one being poor. Of the six who scored the service, four scored five, one gave a score of one and another a score of zero. Most participants were highly satisfied Trading Standards Services, stating: *"they were really reassuring I felt.. safe to be honest"* stating *"they were really good."* The importance of the support of the service was recognised: *"it's nice to know I've got the backing of a national protection agency"* and *"I was pleased that they did take it on rather than it just be resigned to history."* The protective role in acting

to protect vulnerable consumers was apparent: *“It’s nice to know that people are trying to stop this to know that vulnerable people are being protected..”*

All complaints had been followed up by the service in some form: *“they did send a letter .. regarding it.”* The need to know how the issue was progressing and the outcome seemed to be important to complainants and appeared linked to the assessment of the quality of the performance of the Trading Standards Service: *“I’ve had to contact them I think. It’s just been a complete waste of time.. all they do is apologise for what’s happened to you...”*

One participant stated: *“the only contact I had from them was a phone call asking me if the issue had been resolved. . So I don’t know what steps they may have taken as no one has told me anything.”* Given the number of potential complaints and the diverse responsibilities of the service, the time and resources to provide ongoing feedback as to the progression of an investigation is limited. The service is also restricted in the information that can be divulged at this stage. The consequences of this do however create the perception that the issue is not taken seriously or acted upon and that there is no outcome: *“They have looked into the crime and it is under police investigation... However nothing is being done... trading standards aren’t doing anything in my view.”* This could be resolved by information sheets outlining clearly the role of the service and how cases are managed and investigated to indicate how and when complainants can be informed of any outcome. This would reduce frustration and promote transparency regarding service expectations and reduce the negative perception of the effectiveness of the service.

In some instances dissatisfaction linked to a perceived lack of action and prevention : *“I told Trading Standards ... that they’re still trading and they’ve .. gone somewhere else, and they’re still doing it,” and “They should be stopped. But they’re not.”* One complainant stated their expectation as being: *“to get some kind of retribution [for] this firm.”* In some instances expectations were unrealistic and indicating more information was needed about the ways the service is able to respond. There was some frustration where Trading Standards Services could not act and consumers were advised to seek other contractual remedies: *“if I could have [taken] them to court, I would have done but, unfortunately ...it was harder...for me to try and do all the paperwork.”* There was no mention in interviews of further signposting to services to assist with this. In light of the proposed changes to consumer law detailed below, signposting to services such as Citizens Advice may need to be more formalised, in written form (leaflets) with a protocol to secure the transfer of complainants contact information (with their permission) and procedures for follow-up by

Citizens Advice. Effective remedies can only be secured for this user group through procedures that provide for effective support.

The small sample of interviews illustrate the complexity of the impact on victims emotionally and financially and their expectations of how this should be dealt with. The protective role of the service for this vulnerable group was emphasised in interviews, captured by one victim who regarded the role of Trading Standards as providing an *“optimistic message that they would crack down on the criminals and stop them,”* hence the greater disappointment if complainants are left unaware of the outcome or without redress.

4.1.2 Victims and referral process

The determination of consumers who are victims of mis-selling is critical to the Trading Standards Services enforcement role. The impact of the mis-selling activity on this vulnerable consumer group is clearly acknowledged. It was also clear that a significant number of businesses that purposely targeted this group indicating: *“almost immediately, age or physical issues that might determine vulnerability.”* Characteristics of vulnerability identified by participants included: physical disability needs, age, dementia, loneliness, isolation, level of trust in others, tiredness.

Vulnerability is one of a number of factors relevant to how complaints received are prioritised for future action by Trading Standards Services, where they satisfy the test set out in s217 of the Enterprise Act 2002, in demonstrating harm to collective consumer interests.

“Vulnerability of consumer is a core indicator generally, we have an undertaking within our policies and priorities that we will intervene where we believe that someone is vulnerable.”

The vulnerability of the victim is also relevant to their capacity and willingness to provide accurate factual statements of the selling activity, to assess its lawfulness and to act as a potential witness in enforcement proceedings. Impaired memory, physical or cognitive function may impact on this. Participants highlight age and health as significant to the participation of the victim as a witness, given duration of investigations. One participant indicated the reality of the situation was that: *“by the time we got to court I would say 60% of our victims had actually died.”*

A significant number of complaints/ reports of incidents, estimated by participants to be three quarters, are made by relatives or carers on behalf of the consumer. Reporting by relatives is no doubt linked to the consumer's lack of perception as a victim, and also relevant to the

victim's vulnerability and own capacity to take action to report. One participant acknowledged that family support and sense of protection may promote a complaint but may deter/ influence further involvement of the victims' families: *"I don't really want to put my mother my father through that."*

Participants recognised the importance of building relationships with possible referral agencies, in particular Social Services and charitable organisations, to assist in the reporting of complaints: *"We've spent a lot of time talking to key people that might be able to identify this is going on."*

Significantly, the perception of some consumers as to whether or not they considered themselves to be a victim of mis-selling activity, was recognised by one participant who stated some consumers were: *"perfectly happy with the way that they'd been dealt with, they didn't feel that they'd been particularly misled."*

This lack of perception of being a victim may arise from the consumers' limited knowledge of consumer law and their consumer rights leading to them being misled: *"Whether they have but they just don't realise it is another issue."* The consumers' perception as a victim is however relevant to trigger making a complaint to bring possible breaches of Trading Standards Services for investigation, and may impact on their willingness to provide a statement to support enforcement action. The gap between actual 'victim' status and the perception of 'no harm' is relevant to the educational role of Trading Standards Services in raising the general awareness of consumer rights in conjunction with other agencies such as Citizens Advice. One participant commented: *"It beggars belief that people will enter into such significant transactions without seeking proper advice."*

The research indicated that services are unaware of the total number of actual victims. Those who did perceive themselves to be a victim were often prevented from coming forward by feelings of embarrassment, shame, and a desire to move beyond the incident. Additionally reporting was cited as affected by concerns as to how a victim's exposed vulnerability would be perceived by carers, and the consequences for current and future independence.

Managing victims' expectations was identified as an important aspect of the Trading Standard Service considerations, requiring transparency about the enforcement processes and the role of the victim in this; *"You've got to be very up front with everything."* Victims' expectations were cited as varied, ranging from a desire to raise awareness of the problem without any specific expectation as to outcome: *"I've spent this money, the company's gone, I'm not gonna get the money back, and they're just letting us know. They just want someone*

to sound off at.” Another participant confirmed a *“genuine desire on the part of the victims of actually stopping it happening to anyone else because it's so distressing and so upsetting.”* In other instances expectations were considered high and unreasonable. These included seeking guarantees as to financial compensation and preventing the company from trading. One participant noted that some victims; *“want retribution [they] just want to see somebody prosecuted.”*

Any financial loss has the greatest impact on those victims who are unable to sustain this, since life savings of retired elderly people cannot easily be replaced, motivating victims to report complaints. Significantly the degree of financial loss is one factor, but not paramount, in the harm to the ‘collective interests’ of consumers: *“who’ve only paid a small or modest deposit and lost that deposit, or indeed they might have even got it back, but what had happened to them is still enough to give us a statement.”*

Complaints are made to Citizens Advice (CA) as a first point of contact with cases prioritised and referred for investigation to local Trading Standards Services. There is, however, no access to data⁴⁶ to support an analysis of this process. This partnership between Trading Standards Service and Citizens Advice secures public access to consumer advice and reinforces public education on consumer issues. The Citizens Advice service is reported to have dealt with over 77,000 complaints relating to misleading claims and high pressure selling between April 2012 and March 2013.⁴⁷

Those interviewed recognised the current Trading Standards Service role in this area has been ‘reactive’ and “light on prevention” since the filing of a complaint already reveals the victim. Local Trading Standards Services also operate a duty officer system and may use their ‘discretion’ to act on more serious complaints. This is directly determined by the vulnerability of the consumer and whether the business is subject to open investigation.

4.2 Business and Offender Profile

Enforcement participant’s identified from their investigation experience the practice of assessing *“their activity on its own merits basically”* identifying two main business types. Firstly, the businesses that appear to be genuinely set up to trade in mobility aids with

⁴⁶<http://www.tradingstandards.gov.uk/policy/CitizensAdviceandtradingstandards.cfm>

⁴⁷Department of Business skills and Innovation ‘New powers to protect vulnerable and elderly consumers against rogue traders’ 6 August 2013 <http://news.bis.gov.uk/Press-Releases/>

insufficient awareness of consumer protection law, but showed a willingness to address identified deficits to ensure future compliance.

The second businesses type identified were those set up with the aim of financial exploitation by those who *“found that they can make significant amounts of money out of exploiting vulnerable people.”* These were most problematic and were described *“very much in the rogue trading camp because of the systematic and premeditated way in which they deal with their customers.”* These ‘rogue traders’ viewing vulnerable consumers as *“lucrative..... readily identifiable and easy pickings.”*

The individuals operating these businesses had previous complaints or convictions; the latter. Trading Standards Services would be unaware of until a decision to prosecute was filed. They commonly derived from a sales background, prone to using high pressure sales tactics described as those *“that most normal people or right thinking people would find reprehensible,”* and moved quickly between sectors. One participant stated that these rogue companies often lacked *“any professional or technical background in relation to disability or mobility products or medical background,”* and another describing them as *“out and out criminals,”* and *“organised criminal operations designed to fleece people.”* The need for public protection is clear.

Participants reported ‘clusters’ of businesses operating in single areas or regionally. Those involved (directors, managers or employees) being connected through links with different businesses operating the same unlawful practices. A common trend in one investigation was to wind-up the investigated businesses whilst setting up a new named business, with the same ‘players’ operating in the background, termed ‘phoenix companies.’

4.2.1 Nature of unlawful activity

There is little industry guidance as to good practice other than consumer codes of conduct, previously approved by the OFT and now subject to the Consumer Codes Approval Scheme (CCAS)⁴⁸ managed within the Trading Standards Institute.⁴⁹ One such voluntary code is that of the British Healthcare Trades Association,⁵⁰ which requires businesses to refrain from

⁴⁸To gain approval the relevant code must demonstrate compliance with existing legal obligations of businesses and demonstrate a significant contribution to reducing consumer detriment ‘The Consumer Codes Approval Scheme (CCAS)’ Trading Standards Institute Available at <http://www.tradingstandards.gov.uk/advice/ConsumerCodes.cfm> Accessed 10/09/2013

⁴⁹Trading Standards Institute manages the Consumer Codes Approval Board who oversee this process.

⁵⁰This organisation represents nearly 500 companies manufacturing and/or retailing assistive equipment or technology, including mobility aids. <http://www.bhta.net/> Accessed 10/07/2010

high pressure selling techniques and requires the presence of a third party during any home visit. The CPUTR⁵¹ determines the lawfulness of the selling activity. Victims may not appear to suffer any financial loss, having received what they had paid for, but the contractual or selling practice may breach consumer law; hence the difficulties for consumers perceiving a 'breach'. Unlawful sales practices used varied from omitting information they have a duty to provide, to providing misleading information, pressurised cold-call telephone calling to instigate a home visit, doorstep selling, lengthy home visits conducted with victim alone, vastly over inflated prices with false reductions to prompt sales, failure to provide the goods paid for, or a failure to comply with the legal rights of cancellation or refund. One participant commented: *"it's not really much of a silver lining, they will have paid a lot but they will have got something"* another stating: *"It is about how they're sold and how much they're sold [for]."*

Victims were stated to be *"easily influenced, unduly influenced by quite polished smartly dressed, very convincing salespeople"* targeted in their own home, providing the opportunity for exploitation of personal physical and environmental characteristics. Common tactics reported by participants included attempts to *"establish a long running relationship with the victims concerned, to gain trust and then they'll sell them all sorts of things,"* posing as a professional to gain the trust and confidence of victims. The attendance of salesmen at day centres and older people's forums, use of address/mailing exposing vulnerable characteristics, the use of scripts and guidance manuals advising on aggressive sale practices were also reported. These were described as *"tactics that most normal people or right thinking people would find reprehensible."*

4.3 Investigation

Victim statements and the number of complaints are critical to prioritisation of further investigation. One participant commented that it was a *"bit of a struggle early on to find sufficient victims who were willing to stand up and be counted."* Trading Standards Services work together throughout the country to support the taking of victim statements which in some areas video recorded. In light of past experience where victim's health has deteriorated or they have died before conclusion of legal proceedings, this is recommended best practice. Whilst this is not yet standard practice it would be useful for the future to develop a protocol governing the use of video statements. This is to secure the best evidence possible in anticipated court proceedings, in line with the current guidelines from

⁵¹Schedule 1

the Ministry of Justice.⁵² Additionally there was no mention in the interviews of the use of the application of special measures⁵³ in the criminal process to protect vulnerable witnesses,⁵⁴ the application of which would be an incentive to vulnerable victims to provide testimony. The use of video testimony in court is possible under a special measures direction⁵⁵ but at present this only applies to criminal proceedings. In relation to civil proceedings, the civil process allows for the use of written witness statements.⁵⁶ The use of a live video link and the option of pre-recorded video⁵⁷ statements in civil proceeding may be applied at the discretion of the court.

The willingness of victims to provide statements was noted to be connected to their lack of understanding of the role of Trading Standards Services, suggesting that investigation by police would yield the desired outcome, linked to the victims perception and distinction between regulatory breaches and 'real crime.' Victims are more willing to act as a witness in civil proceedings which allow the use of hearsay evidence where statements can be made in their behalf by family or enforcers.

Investigation of business activity to determine its lawfulness involves an assessment of the impact on the victim and overall extent of the consumer detriment, including the circumstances of the sale and the sale practices and business history. This draws on tactical tasking information to assist intelligence sharing between Trading Standards Services. Investigations involve working with financial investigators and the police economic crime unit. Investigations can be lengthy and resource intensive. One was cited as lasting over four years occupying two team members entirely for a year. For larger investigations involving a sizeable number of complaints Trading Standards Services request that these be taken over by regional teams, subject to negotiation, where this outstrips the resources of local services.

4.4 Enforcement action

⁵² 'Achieving best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures' Ministry of Justice March 2011.

⁵³ The Youth Justice and Criminal Evidence Act 1999 provides for a range of special measures to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses s23-30

⁵⁴ In law those who are over age 18 but who through fear and or intimidation which is likely to diminish the quality of evidence are classed as intimidated witnesses, s17 Coroners and Justice Act 2009. The age and the circumstances of the offence, where for example the offending has taken place in the victim's own home, will be relevant to an assessment of the victim as 'intimidated'.

⁵⁵ Youth Justice and Criminal Evidence Act 1999, s16 s17 s27

⁵⁶ Civil Procedure Rules 32.2-32.7

⁵⁷ Civil Procedure Rules 32.3 and 32.4

The two routes of enforcement are the Enterprise Act (EA) or criminal prosecution. The Local Authority has the general power to prosecute⁵⁸ under consumer legislation. Prosecution is generally secured using specific offences in the CPUTR and the more general offences of theft, fraud and occasionally in some instances conspiracy to defraud. These are each considered in relation to the effectiveness of legal powers and process.

4.4.1 Enterprise Act

The use of the EA was seen as a civil enforcement process as only appropriate to secure compliance by education and supervision of minor deficiencies to “*nip,, in the bud*” activity where there were few complaints and no significant consumer detriment. The act requires a prior consultation⁵⁹ before seeking enforcement orders, so participants considered this to work well for ‘genuine’ and non-criminal businesses that were responsible at the outset, and needed “*bringing back in line.*” It was not appropriate for ‘rogue traders’ engaged in deliberate prolific and persistent breaches. In one investigation the directors of the business appeared to use the consultative and cooperative stance to seek advice, reassure the Trading Standards Services and obscure their criminality, masking their use of phoenix companies and changes of directorship, with ‘original players’ remaining in control. Alternatively businesses “*just shut up shop and moved elsewhere because they got a bit sick of us just chipping away under the civil provisions.*”

Undertakings are available in lieu of enforcement orders.⁶⁰ In one instance the undertaking was breached resulting in contempt of court and a suspended sentence was imposed by the court. Other opinions were mixed, one participant commented on the lack of understanding of the workings of the act by the judiciary.

One obstacle cited was the requirement for legal representation to pursue civil matters at county court. In contrast enforcers have the power to bring prosecutions on behalf of an authority in the magistrates’ court for criminal proceedings⁶¹ and are familiar with this process. This requirement had an additional cost element and makes proceedings more lengthy. Whilst civil action was intended to be quicker than prosecution and has the less burdensome civil standard of proof, this was not the case in practice. Participants commenting that the EA fell short of expectations in this respect: “*the idea is that it should be used quickly to bring a stop to these sorts of things ... the reality is that it doesn’t.*” The most effective process was to engage civil and criminal processes in tandem, since using these as

⁵⁸Local Government Act 1977 s222

⁵⁹EA s214

⁶⁰EA s219

⁶¹Local Government Act 1977 s222

consecutive alternatives would render the conclusion of enforcement action longer. There has been some limited success using the EA where cases got to *“court quicker under the EA and got [them] banged up for a few months, and took [them] off the streets effectively while the criminal process was going on.”* Its effectiveness is patchy and the overall view is that the EA has *“not been that effective or speedy.”*

The determination of civil or criminal action: *“we’re totally focused on stopping the detriment to those people out there as quick as we can.... the focus is on getting the right result.”* One interviewee cited instances of repeat non-compliance: *“you get to a sort of wall with the EA where they say it’s not serious enough to take to court. We can’t keep consulting and advising because that’s not making any difference.”*

The EA was stated as being *“pretty ineffective as a tool for dealing with this widespread rogue trading problem”* having several flaws. It offers collective protection but no redress for individual loss, leaving victims to seek recompense through the civil courts, which in one instance a victim did, but this is uncommon and often unenforceable and costly for the victim. One participant noted that criminal businesses *“aren’t going to be bothered about CCJ”*.

4.4.2 Available powers

The powers available to further the investigation process and necessary for enforcement action, are, to some extent, dictated by use of civil or criminal process, but are the same. Enforcers have powers under most legislation they enforce. These powers include a right to enter premises⁶² with⁶³ or without warrant, inspect business records⁶⁴, seize documents as evidence and seize cash under POCA.⁶⁵ In one case a large amount of cash was seized on domestic premises. The preference appears to be to seek a warrant in order to have police support in its execution. These powers can however be circumvented by: *“changing one limited company for instance into a second limited company, and liquidating the first, means that it restricts consumers’ ability to take action and it does to a certain extent restrict ours because you can’t take action against a corporate entity if it no longer exists.”* General powers also exist under Regulatory Powers of Enforcement Act 2000 to identify criminal contacts. These have recently been amended and to require approval by a Justice of the

⁶²EA s227A, CPUTR regulation 21

⁶³EA s227C CPUTR regulation 22

⁶⁴EA s227B

⁶⁵POCA 2002 and Proceeds of Crime Act 2002 (References to Financial Investigators) (Amendment) Order 2009

Peace,⁶⁶ and now only apply to criminal offences having a minimum custodial sentence of six months.⁶⁷

Critically there is no power to search domestic premises without application to court, but since most business are not operated from domestic premises this was not seen as a hindrance, and where needed was evidenced. There is no power of arrest, which is arguably appropriate for the context of enforcement of civil regulatory measures. Most critically, however, there is no power to prevent businesses from continuing to operate pending prosecution, or to prevent the directors thereof from setting up a new business.⁶⁸

4.4.3 Criminal law and prosecution

Criminal prosecution was considered as the only tool which effectively brings serious offenders to account, punishing by imprisonment and confiscation of assets and effectively stops the offending: *“the only thing that will stop [them] is .. prison.”* The decision to prosecute appears based on the assessment of the business type, the scale of consumer detriment, the period of conduct and ineffective enforcement under the EA and the type of conduct as to whether, as noted by one participant, it *“falls so far below the legal threshold that they deserve to be prosecuted.”* Prosecution is not perceived as a last resort, a number of participants stated investigations and lessons learnt mean that where evidence indicated the business was ‘rogue’ that prosecution would be pursued at the outset.

Prosecution in accordance with the CPS code for crown prosecutors,⁶⁹ requires the prosecution be in the public interest and requires robust scrutiny of evidence, given the higher burden of proof.⁷⁰ Participants cited processes for signing off on this decision, which

⁶⁶Protection of Freedoms Act 2012 s37,38 in force from November 2012 amends RIPA 2000 and requires approval of Justice of the peace for Local Authority authorisations in relation to the use of covert techniques.

⁶⁷Local Authorities can now only grant authorisation for Direct and covert Human Intelligence pursuant to The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) Order 2012 SI 2012/1500 in force on 1 November 2012.

⁶⁸The OFT has the power under the EA 2002 to apply for disqualification of director is limited to breaches of community competition law only.

⁶⁹See ‘The Code for Crown Prosecutors’ January 2013 Available at http://www.cps.gov.uk/publications/docs/code2013english_v2.pdf In addition there protocol governing the relationship between the CPS and prosecutor including the Department for Business Skills and Innovation, the Office of Fair Trading and Local Authorities available at http://www.cps.gov.uk/legal/p_to_r/prosecuting_agencies_relations_with_other_agencies/

⁷⁰See Derbyshire County Council Policy on Prosecution, available at http://www.derbyshire.gov.uk/business/trading_standards/prosecutions/default.asp

required prior legal opinion to confirm the sufficiency of evidence. The investigation stage leading to prosecution is a lengthy and resource intensive, taking about nine months from notice of intention to prosecute to conviction, with significant penalties. The criminal process can have a powerful effect in raising awareness of this activity and in restoring consumer confidence. Several participants confirmed that directors and employees of rogue businesses had been pursued in several cases which received media attention and in one case led to a sentence of eighteen months imprisonment. Prosecution also allows for disqualification as a director.

Although the criminal process is preventative and one participant correctly identified that *“it doesn’t have victim restitution at its core,”* although it does allow for the possibility of restitution for victims under the Proceeds of Crime Act.⁷¹ This is however, conditional upon the availability of funds, business presence, and is limited to those witnesses whose evidence was presented at trial. The policy was summarised by the comments of one participant: *“These people are living lifestyles way beyond their means so a lot of the time the assets aren’t there or have been spent living the high life but wherever we can; we get the cash back.”* If the offender is on bail then steps need to be taken to freeze business and individual assets to prevent dissipation as one participant noted *“Because they’re not stupid. They know that somewhere down the line we’re [going to] come looking for the money so they’ll do whatever they can to hide it away.”* This use of freezing order in advance of court proceeding does not seem to have been considered by those interviewed to date. The Trading Standards Services are able to recover the costs of their investigation. Recent figures indicate that 126 orders have been obtained in the last 12 months with 13.7 million recovered.⁷² Of this a modest £850,000 has been paid out to victims of rogue traders. Trading Standards Services were reported in one interview to have discretion to compensate other victims whose complaints were not used as evidence, but whose loss makes them no less deserving. It remains to be seen what effect pressures on Local Authority budgets have in the exercise of this discretion.

The ability of Trading Standards Services to seek recovery under the POCA is conditional upon their appointment of an accredited⁷³ financial investigator⁷⁴ who has the power to⁷⁵

⁷¹Proceeds of Crime Act 2002 where a Confiscation Order is made under the Act.

⁷²Local government Association GA press release 13 June 2013

http://www.local.gov.uk/web/guest/media-releases/-/journal_content/56/10171/4029113/NEWS-TEMPLATE

⁷³See ‘Financial Investigators’ Registration, Accreditation and Monitoring Policy’ NPIA 29 October 2010

⁷⁴POCA 2002 s453

⁷⁵The Proceeds of Crime Act 2002 (References to Financial Investigators) Order 2009 SI 2009/975 as amended by The Proceeds of Crime Act 2002 (References to Financial Investigators) (Amendment) Order 2009 (SI 2009 No. 2707)

assist with assessing the criminal benefit in confiscation proceedings on conviction and can also seek forfeiture of cash in civil proceedings in the magistrates court.

Victims may also be protected after the conclusion of criminal proceedings, as well as during these,⁷⁶ by court orders preventing the publication of their identity and any personal details that may reveal their identity, to secure their protection. This is particularly important given that the individual and companies involved in this type of criminal conduct are most likely to serve a local community, where the scale and type of offending creates a community and public interest and a desire of the press to report this.⁷⁷ However, such restrictions in order to preserve the privacy of victims, protected by Article 8, are contrary to the principle of open justice and Article 10, freedom of expression, so requires robust consideration.⁷⁸

The criminal process also offers victims who testify as witnesses, greater support and protection in advance of proceedings through well established and national provision of victim support schemes.⁷⁹ There is no mention in interviews of victims being referred to these schemes, which would provide specific reassurance and information, leaving Trading Standards service free to focus on the evidential preparation for criminal proceedings. There is currently no parallel scheme for civil proceedings to support victims in this capacity but locally based schemes drawing on support from the legal sector could be developed.

4.5 Proposed solutions

Practitioners should inform the debate on regulatory reform and this has been a consistent theme of the new coalition Government and the department for BIS. One participant highlighted the lack of information about the *“less tangible impact and the indirect costs”* which may hinder this. The disqualification of directorship is meaningless where ‘shadow’ directors are used and a ‘fit and proper’ test can only be applied where registration is required. This could be imposed on some sectors, but would be uneven and unduly burdensome on businesses. One participant commented that the sale of mobility aids itself would benefit from regulation. This was viewed as necessary, akin to other health areas and offering comparable protection for other groups. The sale of alcohol and tobacco to children

⁷⁶Youth Justice and Criminal Evidence Act 1999 s47

⁷⁷‘Reporting Restrictions in the Criminal Courts’ e JSB, the Newspaper Society, October the Society of Editors and Times Newspapers Ltd October 2009

⁷⁸Witness anonymity orders can be made under the Coroners and Justice Act 2009 s88 sets out the relevant conditions to be satisfied.

⁷⁹<http://www.victimsupport.org.uk/>

was cited as an example. The requirement for licensing could be dependent on product knowledge and training to sell disability equipment generally, and additionally requiring staff CRB checks, to protect the public.

One suggestion was to ban cold-calling and doorstep selling since these often demonstrate elements of aggressive sales practices, one participant commenting: *“how many legitimate businesses need to cold call?”* This would enable Trading Standards Services to send clear messages to consumers as to their rights. Insightfully one participant recognised that businesses could easily circumvent this by asking consumers to *“sign a waiver or a disclaimer of some sort to say I was quite happy with the visit and everything was done satisfactorily.”* Consumers need protecting from these tactics. The right to cancel door step contracts is not widely known. An alternative is to licence companies engaging in these activities. The simplicity of prompt action for operating without a licence was clear. From an: *“enforcement point of view you create a simple offence of selling these things without a license. That might be a quicker way of stopping people and that's what I'm interested in.”* The practicalities and burden of administration, led to participants favouring an outright ban, given this would be ineffective against rogue traders who would not comply.

Some participants did not see the need for any regulatory change: *“I don't think in terms of the legislation, in terms of what we can do, there's a need for any significant change to that. I think that the tools we've got work perfectly well.”* Others focused on solutions from within existing practice: *“in terms of law enforcement, [if we] were a bit smarter about it, we could spot these clusters and put some resources into a particular region that's got a problem, and some expertise, and stamp it out more quickly.”*

What emerges from the research is the need for some form of redress for consumers where there is a breach of the CPUTR, to address the gap in civil measures and secure redress whilst businesses are still operational. It is clear that the EA offers a limited form of civil sanction and its application can be protracted, offering inadequate consumer redress.

If the power was available to prevent rogue traders from continuing to operate and enable the ‘profit’ from this unlawful activity to be ‘removed’ at an earlier stage, then there would be no need to resort to prosecution and POCA. Criminal businesses are more likely to desist since illegitimate profit is their only motive. The power to close a business, even as a temporary measure on breach of undertakings, would be strong incentive for compliance, but also affects contracts with other consumers and employees. The power to apply tiered fines for breaches and to apply specific remedial actions to enforcement orders would broaden existing powers under the EA making it more flexible, proportionate and effective. Rights of audience in civil proceedings extend to the legal profession, but the possibility of

extending this to enforce would most likely rally their support.⁸⁰ The different approaches to the role of enforcers in relation to criminal and civil court processes is hard to justify, a potential barrier to effective enforcement. The Government has recently announced that it does not plan to legislate to create this power for Trading Standards Services.⁸¹ Instead it considers the solution lies in the Trading Standards Institute applying to the Legal Services Board (an approved regulator⁸²). The granting of rights of audience will however need to also address the 'gap' in existing knowledge and familiarity of civil court process and procedures and civil procedure rules. This will reduce enforcement and legal costs, and would enhance the use of civil process rather than criminal for minor offending.⁸³

The need for a stronger focus on prevention emerged in one interviewee's comments, regarding education of and contact with vulnerable groups. This recognised that Trading Standards Services did not *"necessarily have the skill set or the ability to ...engage and communicate effectively with those people."* The need *"to think about multi-agency awareness"* was evident. To this end all local authority staff are well placed to work together to draw on the skills of other professionals to engage in seamless *"protection mechanisms around older adults."* This could include harnessing cross-agency implementation and support of the safeguarding process.⁸⁴ This would secure protection for vulnerable victims from repeat victimisation and from non-financial types of harm.

Despite participants having raised suggestions previously with the OFT and BIS, they commented: *"the response I got from them was not encouraging because their view is that generally the prevailing wish of government is that they don't want any more regulation on anything."* The Government has since reviewed this position in light of the changing European context of regulation.

4.5.1 Proposals for reforms

⁸⁰BIS 'Impact Assessment Enhancing consumer confidence encouraging a more proportionate enforcement by removing barriers to civil enforcement' March 2012, para 9 "Thirty out of the forty authorities indicated they would be interested in their officers presenting simple civil cases in the County Court"

⁸¹Department for Business skill and Innovation, 'Draft Consumer Rights Bill, Government Response to Consultation on Consumer Rights' June 2013, 45

⁸²Legal Services Act 2007

⁸³The Coalition: our programme for government, page 11, HM Government, May 2010, http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf

⁸⁴Derby Safeguarding Adults Board, 'Safeguarding Adults Procedures and Guidance' January 2010

The current coalition Government is keen to reduce the regulatory burden on business⁸⁵ and streamline fragmented regulatory regimes, but it will only support new proposal or amendments where these are shown to be necessary and only retain those measures that are effective.⁸⁶ One concern relating to consumer protection and the current consumer detriment of £3.3 billion,⁸⁷ is that CPUTR do not give rise to a private right of redress. A proposal for this right is supported by 78 per cent of consumers, and would bridge the gap where 31 banned practices under the CPUTR have no right of redress in existing law.⁸⁸ This would offer restorative justice and the threat of redress would prompt greater compliance with CPUTR and support enforcement.⁸⁹ The now disbanded BERR, has previously referred the issue of consumer redress to the Law Commission.⁹⁰ The Commission recommended that redress should not in fact be available to all breaches of the CPUTR and would not be as of right. Significantly for vulnerable consumers, it was suggested that a right of redress should only apply to the average customer,⁹¹ and further recommended the retention of the current test of “reasonably well informed, reasonably observant and circumspect”⁹² in relation to the standard of diligence of an average reasonable consumer and breaches of the CPUTR are assessed. The Government White Paper “A Better Deal for Consumers: Delivering Real Help Now and Change for the Future”⁹³ proposed to test new powers under the Regulatory Enforcement Act 2008 applied to areas of consumers law.⁹⁴

The recent Government review of civil enforcement remedies favoured some amendments to the EA 2002,⁹⁵ to extend the content of enforcement orders to require businesses to take particular and specific recommended remedial action and to allow the redress, providing

⁸⁵BIS ‘Enhancing Consumer Confidence by Clarifying Consumer Law Consultation on the supply of good services and digital content’ July 2012 para 4.9

⁸⁶HM Government ‘Reducing regulation made simple. Less regulation, better regulation and regulation as a last resort.’ December 2010, 5

⁸⁷Bello I., ‘Waiting to be heard. Giving consumers the right of redress over Unfair Commercial Practices’ Consumer Focus August 2009, 10

⁸⁸Bello I., ‘Waiting to be heard. Giving consumers the right of redress over Unfair Commercial Practices’ Consumer Focus August 2009, 16, 20

⁸⁹Collins H., ‘A Private Right of Redress for Unfair Commercial Practices’ Consumer Focus April 2009

⁹⁰The Law Commission and The Scottish Law Commission, ‘Consumer Redress for Misleading and Aggressive Practices’ Law Com No, 332 Cm 8323 March 2012

⁹¹The Law Commission and The Scottish Law Commission, ‘Consumer Redress for Misleading and Aggressive Practices’ Law Com No, 332 Cm 8323 March 2012, para 5.3

⁹²CPUTR 2008 regulation 2.4

⁹³HM Government ‘A Better Deal for Consumers Deliver Real Help Now and Change for the Future’ July 2009

⁹⁴BIS Civil Sanctions Pilot ‘A consultation on the pilot operation of civil sanction powers for consumer law enforcers’ March 2010, para 1.4

⁹⁵BIS, ‘Civil Enforcement remedies: extending the range of remedies available to public law enforcers of consumer law – Impact Assessment’ November 2012, para 5

reasonable and proportionate, including financial redress to identified consumers.⁹⁶ The Government has recently announced that gap in the current CPUTR will be remedied by amending the CPUTR.⁹⁷ The newly proposed Consumer Protection Regulations offer the right to 'unwind',⁹⁸ rescind a contract and the right to a discount,⁹⁹ all applying where traders have engaged in prohibited practices.¹⁰⁰ There is also a civil right to damages¹⁰¹ for financial loss, alarm distress and inconvenience,¹⁰² as a remedy for misleading and aggressive sales practices. Whilst this provides remedies, it may well add to the current workload of Trading Standards Services in attempting to secure compliance, creating the expectation that and redress for consumers can be negotiated without the need to resort to civil action. These remedies are consumer focused but do not add to the existing powers of enforcers. They do, however, have financial consequence for businesses in breach of the law which is likely to act as an incentive to securing improved compliance.

These proposals go some way to remedying the consumer detriment, but not where mis-selling of mobility aids is driven by criminality rather than ineffectual regulatory compliance, which research suggested was the main incidence and concern. The Government have recently proposed a Consumers Bill of Rights¹⁰³ which is aimed at consolidating existing piecemeal consumer legislation on consumer protection improving consumer rights and providing more effective sanctions for breaches.¹⁰⁴ The new proposals also aim to streamline the existing investigation powers within one piece of legislation, to enable Trading Standards Services to work more effectively across local authority boundaries.¹⁰⁵

⁹⁶BIS, 'Civil Enforcement remedies: extending the range of remedies available to public law enforcers of consumer law – Impact Assessment' November 2012, para 38

⁹⁷The Consumer Protection from Unfair Trading (Amendment) Regulations 2013: Draft Regulations

⁹⁸The Consumer Protection from Unfair Trading (Amendment) Regulations 2013 : Draft Regulations 27E to 27H This right extend to 90 days after the contract has been entered into.

⁹⁹The Consumer Protection from Unfair Trading (Amendment) Regulations 2013 : Draft Regulations s27I

¹⁰⁰The Consumer Protection from Unfair Trading (Amendment) Regulations 2013: Draft Regulations s27J

¹⁰¹The Consumer Protection from Unfair Trading (Amendment) Regulations 2013 : Draft Regulations s27J

¹⁰²The Consumer Protection from Unfair Trading (Amendment) Regulations 2013: Draft Regulations Explanatory Note

¹⁰³Secretary of State for Business, Innovation and Skills 'Draft Consumer Rights Bill' Cm 8657 June 2013 Schedule 6 amending s215 of the EA 2002

¹⁰⁴Department for Business skill and Innovation, 'Draft Consumer Rights Bill, Government Response to Consultation on Consumer Rights' June 2013,15

¹⁰⁵Department for Business skill and Innovation, 'Draft Consumer Rights Bill, Government Response to Consultation on Consumer Rights' June 2013, 42

Further regulations,¹⁰⁶ aligned to improving consumer protection and integrating the EU Consumer Rights Directive¹⁰⁷ add to the information traders must provide consumers and strengthens cancellation rights. These changes will amend the EA 2002 enhancing consumer protection, offering consumer redress and compensation within enforcement orders. These measures address the views of one participant regarding the need for current regulation to place; *“victims at the heart of the justice system... and this restorative justice. There is no sense that this is anywhere near the top of the priority list for the sort of things that we deal with.”*

This new legislation may address the current preference for criminal measures confirmed by OFT figures for the last five years. These indicate that the number of regulatory undertakings continues to decline to 99 nationally for 2011/12, with only seven enforcement orders made. The number of prosecutions for the same period was 1866.¹⁰⁸

4.6 Overall conclusions

The EA as a civil regime offers prevention through education, supervision and cooperation aimed at the businesses generally and individual roles within. The EA has clearly not met the expectations of the enforcers, these expectations being that this legislation would be *“wonderful, you know you can get a complaint in the morning, you can get an injunction in the afternoon and they’ve stopped trading in the evening.”* The courts are unfamiliar and lack an understanding of the purpose of the EA, the behaviour targeted appears “petty” making it *“quite difficult to get an enforcement order.”* Where enforcement orders are breached there is a patchy response to further sanctions, at best a suspended sentence.

The ultimate challenge was summarised by one participant: *“I don’t know how you stop people breaking the law deliberately.”* The enforcement system remains straggled between two different but complimentary regimes, civil and criminal. Whilst they share common aims of prevention and deterrence these are achieved in different ways, requiring different resources and delivering different outcomes. For the future the changes proposed by Government provide a more effective range of tiered civil sanctions to enable a more flexible application of these to secure regulatory compliance. One participant stated the *“need to view prosecution as a failure in a sense”*. Overuse of the criminal law may indicate a

¹⁰⁶The Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013

¹⁰⁷Directive 2011/83/EU 22.11.2011 L 304/64

¹⁰⁸BIS, ‘Civil Enforcement remedies: extending the range of remedies available to public law enforcers of consumer law – Impact Assessment’ November 2012, para 23

compensation for the deficits in the EA undermining its deterrent effect for regulatory offences, which whilst significant to the victim, can reasonably be classed as moderate financial losses. It may also indicate a targeting of specific sectors by criminal rogues who continue to see vulnerable groups as easy prey.

The 'consumer regulatory landscape' remains subject to ongoing review. The Government is aiming for further reform to streamline the mass of legislation covering this area, with 12 main pieces of legislation and the investigatory powers of Trading Standards Officers found scattered in around 60 pieces of legislation.¹⁰⁹ The recent legislative proposals aim to reduce the complexity for both enforcers and businesses, since this in itself hinders compliance giving advantage to "*less scrupulous businesses which do not value consumer goodwill and exploit consumer uncertainty.*"¹¹⁰ Further regulatory changes will require the skill and expertise and professionalism of those familiar with the existing regime for seamless transition. What has emerged from this research is that current powers and future changes will rely on the existing skills and expertise and the capacity of Trading Standards Services investigation teams for successful implementation. This is supported by the continued application of the principles of regulation. It requires; "*sufficient resource being channelled into tackling those people that are causing the most harm.*" The desire to protect vulnerable adults from exploitation was cited as giving rise to a "*sense of outrage about it to motivate you to keep on and do the investigations and get these cases to court,*" to which end Trading Standards Services in the Midlands region have had considerable success.

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¹⁰⁹BIS 'Enhancing Consumer Confidence: Generic set of consumer law powers impact assessment final' June 2012

¹¹⁰BIS 'Enhancing Consumer Confidence by Clarifying Consumer Law Consultation on the supply of good services and digital content' July 2012 para 4.10