

Peter Deft  
Department for Business, Enterprise and Regulatory Reform  
CCP  
1 Victoria Street  
London  
SW1H 0ET

70 St Mary Axe  
London  
EC3A 8BD  
Telephone: 020 3102 4030  
Facsimile: 020 3102 4476  
[www.thehearingaidcouncil.org.uk](http://www.thehearingaidcouncil.org.uk)

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Dear Peter

**Draft consumer protection from unfair commercial practices regulations – response to consultation**

The Hearing Aid Council is the statutory registration and regulation body for individuals and organisations involved in dispensing hearing aids in the UK. The Hearing Aid Council is an executive non-departmental public body, established in primary legislation (the Hearing Aid Council Act 1968, as amended). The Department for Business, Enterprise and Regulatory Reform (BERR) is the sponsoring department for the Hearing Aid Council.

The definition of dispensing<sup>1</sup>, the functions and powers of the Council are set out in the Hearing Aid Council Act 1968 (as amended). Section three of the Act makes it a criminal offence for anyone not registered with the Hearing Aid Council to dispense or be involved in dispensing. Dispensing involves a clinical process that leads to the sale of a hearing aid. Dispensing therefore includes both clinical and commercial transactions between businesses and consumers.

In March 2005, the Government announced its intention to transfer the registration and regulation functions of the Hearing Aid Council to other bodies. The Council has proposed that its healthcare professional regulation functions should be transferred to the Health Professions Council. The Council has also proposed that the commercial practices involved in

dispensing should be specifically regulated, probably through a trade code approved by the Office of Fair Trading.

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<sup>1</sup> The Act defines a dispenser as an individual who conducts or seeks to conduct oral negotiations with a view to effecting the supply of a hearing aid, whether by him or another, to or for the use of a person with impaired hearing.

The Government has not announced when or how the transfer of Hearing Aid Council's regulatory functions will happen. However, it will require the repeal of primary legislation. At the point of repeal, the current legal prohibition on dispensing by unregulated individuals will be lifted. Individuals who use the professional title of hearing aid dispenser will need to be registered with the Health Professions Council, but anyone is likely to be legally entitled to dispense hearing aids. The Hearing Aid Council believes that this will create a gap in the regulatory cover that protects hearing aid consumers. The Council is minded to recommend to Ministers that the current s3 offence within the Act should be replaced with a similar offence.

The Council is mindful, however, that the proposed regulations might well afford a of protection to hearing aid consumers equal to that currently afforded by the s3 offence. The key issue here will be the interpretation of 'professional diligence' as it applies to hearing aid dispensers. The Hearing Aid Council believes that 'professional diligence' in this respect means that the individual must be registered with and regulated by an appropriate statutory healthcare professional regulator. Unless this interpretation is correct, consumers may be put at considerable risk when the s3 criminal offence in the Hearing Aid Council Act 1968 is repealed. The Council would welcome an opportunity to explore this further before the end of the consultation period.

In response to the specific questions listed in the consultation document, the Hearing Aid Council would like to make the following comments:

#### **Question 1**

The Council believes that both sets of regulations substantially meet the intentions set out in the Government responses to the two previous consultations.

The Council believes there is an issue with the definition of consumer set out in the regulations. The majority of hearing aid consumers are elderly, with a substantial proportion aged 75 and over. Many are at risk of vulnerability, either because of the impact of the hearing loss, impact of other health issues or because many hearing aids are dispensed in

the consumers home. We recognise that the definitions of consumers in the regulations reflects the definitions in the directive, but believe the three types of consumers identified in

the regulations will be confusing, both to businesses and to consumers themselves. Consumers need clarity about the protections afforded to them by the regulations, both so that they can make informed decisions before beginning a commercial transaction and so they can take appropriate action should they be treated unfairly during a commercial transaction.

**Question 2: Are there any changes to the regulations you would like to see?**

The Council believes the regulations are sufficiently comprehensive, and does not believe any additions are required. The Council does believe that the regulations should be formally reviewed in three years time, to coincide with the sanctions review.

**Question 3: Do you agree that the powers to enter premises with or without warrant should be exercisable to investigate breaches of these regulations and not only in relation to determining whether an offence has been committed?**

Around forty per cent of the individuals registered with the Hearing Aid Council work as micro or small businesses. Many work from home. It is essential that the investigation powers associated with the regulations balance the rights of micro and small businesses against the investigation needs of those organisations enforcing the regulations.

The Hearing Aid Council is not aware of the development of a risk-based investigations strategy by local trading standards office (or the LBRO) or the Office of Fair Trading. Without such a risk-based assessment, it is possible that regulators may abuse the right to enter premises, without warrant and as part of a preliminary investigation of a potentially minor breach of the regulations, which would never lead to enforcement action. The Council does not believe that such powers are warranted or appropriate.

**Question 4: Are there any impacts or unforeseen consequences of these proposed regulations that you can identify?**

The Hearing Aid Council has not identified any impacts or unforeseen consequences during its consideration of these proposed regulations. The Council does believe that the regulatory

framework (the regulations, investigations and enforcement actions and available sanctions) should be formally reviewed in three years time.

**Question 5: If you are a small business, what (if any) costs or other burdens could be associated with the introduction of these regulations.**

Not relevant to the Hearing Aid Council.

**Question 6: Do you agree that authorised trading standards officers in England and Wales should have rights of audience and rights to conduct litigation in the country courts in England and Wales.**

The Hearing Aid Council believes that authorised trading standards officers with appropriate skills and training should have rights of audience and rights to conduct litigation should it be demonstrated that these additional rights will enhance the level of regulatory protection afforded to consumers and that the current arrangements cause some level of consumer detriment.

**Question 7: Do you think that OFCOM should be given a duty to consider complaints about unfair commercial practices in the broadcast media to reflect their existing powers under the CMARs and which are retained in the BPRs?**

No comment.

Questions 8 and 9 relate to the BPRs and are therefore not relevant to the regulatory scope of the Hearing Aid Council.

## **Conclusions**

The Council is also mindful that the Unfair Commercial Practices Regulations offer an opportunity for significant and material protection to hearing aid consumers. Generally, the Hearing Aid Council welcomes the proposed regulations. The Council believes they are consistent with the general thrust of the directive, and should ensure a significant improvement in the level of general consumer protection afforded in the UK. The Council is

therefore disappointed that it is not one of the organisations to be consulted on these regulations.

Yours sincerely

**CHRIS O'LEARY**

Director of Policy and Communication