

PRODUCT LIABILITY – LAW COMMISSION REVIEW

Terms of Reference

Introduction

- 1 The central statute for product liability (**PL**) in Great Britain is the Consumer Protection Act (**CPA**) (specifically Part I thereof).¹ The CPA came into force in 1987, pursuant to the EU's Product Liability Directive of 1985.² It is no longer fit for purpose, in part due to technological progress since its inception, including, but not limited to, artificial intelligence (**AI**). Numerous stakeholders have expressed concerns that the UK's PL regime requires reform, including specialist PL lawyers, law firms, industry and consumer groups, and insurers.³ The EU has also updated its product liability regime. A clear and efficient legal regime is necessary for PL, particularly with respect to emerging technologies, to balance business confidence and innovation against consumer and third-party protection. A PL regime that is fit for purpose also enables insurers adequately to price risk of emerging technologies to instil further market and user confidence.
- 2 Given the importance of PL to many different groups, and the public at large, this review will be conducted in close consultation with Governmental and non-Governmental stakeholders. The Commission will publish a report with recommendations for law reform.
- 3 The review will be informed by consultation. The Law Commission will work closely with the Department for Business and Trade in its review of the PL regime, and with the Department of Science, Innovation and Technology, specifically with respect to emerging technologies, such as AI.

Scope

- 4 The Law Commission will review and analyse the existing PL regime in England and Wales as contained in Part 1 of the CPA with a view to developing recommendations for reform that better achieve the purposes of the PL regime (particularly in relation to emerging technology, including AI). Issues to be considered will include, but are not limited to, the following.

¹ The Consumer Protection (Northern Ireland) Order 1987 applies the same regime.

² Officially, the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (**PLD**).

³ The Law Commission itself has also noted the need for a project on PL in other project reports. The EU has also updated the PLD, which changes took effect on 8 December 2024 (Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC (**NPLD**)). Among other things, the NPLD's amendments provide for emerging technologies, including AI.

- (1) Whether the CPA's definition of "product" needs to be reformed to accommodate the intangibility of digital technologies, and in particular whether it should be widened to include software even if it is provided in an intangible format (such as by download over the internet), and whether reforms are required to reflect the situation in which a product has been modified by either its producer or a third-party.
- (2) Whether the CPA's definition of "defect" needs to be reformed to account for difficulties for claimants to establish that a "product" is defective, and to account for the nature of emerging technologies, including AI.
- (3) To consider whether the purposes of the PL regime can be better achieved by reforming **(i)** the CPA's definition of "producer" and **(ii)** the range of economic operators which may be held liable under the CPA.
- (4) The CPA provides for "long-stop" dates, such that a claim cannot be brought more than ten years after a product is supplied. There is a question as to whether the ten-year period should be extended for latent harms, and whether products that are iteratively updated (such as some forms of software) pose any difficulties with the long-stop date.⁴
- (5) The PL regime contains a "State of the Art" defence, such that a product is not defective just because another similar product, supplied at a later time, is safer. Whether a product is defective is determined by the state of knowledge and the market at the time it is supplied. Given that much software is capable of being updated over time, the "Start of the Art" defence may need amending to account for the fact that some products can be updated iteratively.
- (6) Whether the burden for claimants to bring a successful claim is too onerous under the existing PL regime, including whether the nature of emerging technologies, particularly AI, is such that it may be very difficult to show that some products are, or software is, defective. For example, claimants may face difficulty bringing claims because: **(i)** AI is opaque, even to experts or AI developers; **(ii)** AI displays autonomy and adaptiveness that may make it difficult for claimants to establish that a product is defective, given the "entitled expectations" test for determining whether a product is defective; and **(iii)** given that "defect" is currently assessed at the time a product is supplied, latent defects may arise in emerging technologies for which no claims are available.
- (7) Whether the PL regime's definition of "damage" needs to be reformed to account for the types of harm caused by emerging technologies, such as AI. In particular, whether the meaning of damage should be extended to include data destruction or corruption.

⁴ On the assumption a review recommends intangibly supplied software is recognised as a "product" for the purpose of the PL regime.

- 5 While this review is being undertaken by the Law Commission of England and Wales, it will endeavour to consult with stakeholders in Scotland and Northern Ireland to record any relevant differences between the law of England and Wales and the law of Scotland and the law of Northern Ireland respectively. The Law Commission will also seek to liaise with the relevant devolved administrations to obtain relevant input.
- 6 The PL regime is a critical piece of legal infrastructure. Its aim is to impose a clear and efficient regime to manage harms caused by defective products, such that persons are protected, while business and industry are not discouraged from innovation and growth and are clear as to their obligations and potential liability. Ensuring that balance is achieved will be a central focus of the review. In particular, given the significance of emerging technologies, including AI, to the review, promoting innovation and adoption of emerging technologies will be a consideration within the review.