

ALERTER

THE TIMES THEY ARE A-CHANGIN?

Law Commission opens consultation on a potential overhaul of product liability

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The Consultation Paper proposes arguably the most extensive reform of Product Liability law in England and Wales since the [Consumer Protection Act 1987](#) (the “CPA”), which implemented the [EU Product Liability Directive 85/374/EEC](#) of 25 July 1985 which continues to apply to products placed on the market in the EU until 9 December 2026 when the regime will be replaced and substantially reformed by the [EU Product Liability Directive 2024/2853](#) (the “new Product Liability Directive”) which will not have effect in the UK (except in Northern Ireland). The introduction to the Consultation Paper questions whether a regime designed in the 1980s is fit for purpose over forty years later due to changes in products, consumer behaviour and the advent and proliferation of online marketplaces and new technologies (Consultation Paper §§ 1.1-1.3).

The Law Commission’s provisional view is that the CPA may not fully have achieved one of its central aims: alleviating the claimant’s burden of proving fault: “In some instances, claimants appear to have relied on arguments closely resembling fault-based

reasoning in order to establish defect. In others, they have encountered significant evidential hurdles, akin to those arising in negligence, in establishing defect and causation” (Consultation Paper § 1.47). Another important factor will be how far any new regime aligns with the new Product Liability Directive, which will apply to products placed on the market in the EU and Northern Ireland.

The terms of reference for the Law Commission’s review were published in December 2025 and are set out in Appendix 1 of the Consultation Paper. They include the following:

- (1) Whether the CPA’s definitions of “product”, “damage” and “producer” should be reformed to accommodate new technologies and economic operators.
- (2) Whether the definition of “defect” should 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) Whether the existing ten-year long-stop date should be extended for latent harm, and whether products that are iteratively updated (such as some forms of software) pose any difficulties with the long-stop date.

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(4) *Whether the statutory defences require updating, including to account for the fact that some technology-based products can be updated iteratively.*

(5) *Whether the burden for claimants to bring a successful claim is too onerous under the existing product liability regime.*

The extensive Consultation Paper runs to 258 pages, and as such there is a lot to digest. The most eye-catching questions and issues raised in the Consultation Paper are as follows:

First, proposals would extend “product” to software and AI systems, however supplied, including software-as-a-service (§§ 2.49 and 2.50), and to the design features of social media and other online platforms (§ 2.123). Developers would become “producers” (§ 3.11), and fulfilment service providers, online marketplaces and UK representatives of overseas operators would be liable where no UK producer, own-brand or importer can be identified (§§ 3.57, 3.78 and 3.92).

Second, on defect and causation under the CPA, the Consultation Paper proposes “that the CPA should include a non-exhaustive list of principles for assessing whether a product has met the entitled level of safety. The principles would operate as alternative bases for establishing the entitled level of safety, meaning that a product would be defective if any one of the principles is satisfied” (§ 4.61). Most strikingly, Consultation Question 34 asks:

[4.139] *We provisionally propose that the defendant(s) must either elect to accept the alleged defect or assume the burden of rebutting a presumption of defect where the claimant can show that:*

- (1) *it is arguable that the product is defective;*
- (2) *the facts relied on are not fanciful;*
- (3) *they face exceptional evidential difficulties due to the limited availability of evidence; and*
- (4) *the risk of harm is not so widely known as to be socially accepted.*

[4.141] *Where the defendant elects to assume the burden of rebutting a presumption of defect and fails to discharge that burden (and provided that the claimant establishes damage and causation and that no defence is established), we provisionally propose that damages should be assessed as they would be if defect had been proven.*

Other notable proposals include a clearer framework for psychiatric harm (§§ 5.50, 5.51 and 5.74), recognising the destruction of data as compensable damage (§5.92), removing the £275 property damage threshold (§ 5.107), retaining but recasting the development risks defence (§§ 6.35 and 6.48), and Consultation Question 55, which states:

[6.99] *We provisionally propose that the 10-year long-stop period for latent personal injury claims should be extended in cases where it was not possible for the individual to initiate proceedings within the initial 10 years. In such cases, the long-stop period should be extended to 25 years.*

Consultation Question 58 states:

[8.11] *We invite consultees to tell us about:*

- (1) *the costs consumers bear as a result of harms caused by defective products;*
- (2) *the value of potential claims, including those that settle;*
- (3) *the proportion of claims that settle rather than proceed to trial;*
- (4) *the proportion of claims that do not settle but are ultimately withdrawn before proceeding to trial;*
- (5) *where claims do proceed to trial, which courts they are heard in and whether judgments are published;*
- (6) *the costs to businesses of complying with the current regime;*
- (7) *the costs of legal advice and litigation in cases of harm caused by defective products, including the cost of obtaining technical evidence or expertise;*
- (8) *how such claims are generally funded (for example through self-funding or “no-win, no-fee”*

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*arrangements); and
(9) any access to justice issues associated with
product liability claims or potential claims.
We are particularly interested in any evidence
consultees can provide about monetisable costs and
benefits.*

For practitioners and industry, there is much to consider, but if even a handful of the proposed reforms were implemented, it would dramatically reshape the law of product liability, expanding who claims could be brought against and making the

mechanics for bringing such claims easier.

The consultation closes on 14 January 2027, and a response will likely follow at some point in 2027 or early 2028.

Members of Henderson Chambers will publish a more detailed analysis of the provisional proposed reforms and their potential implications in the coming weeks. If you would like to discuss any of the matters raised in the Consultation Paper, please contact clerks@hendersonchambers.co.uk