OPINION

PRODUCT LIABILITY REFORM

The case for caution

Andrew Austin, Harriet Hanks and Laura Feldman of Freshfields LLP make the case for caution around potential reforms to the product liability regime.



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The product liability regime may be heading for significant change. The Law Commission's long-awaited review of the product liability framework is underway, with reform proposals expected to be announced in the second half of 2026. The review aims to determine what reforms are needed to ensure that the product liability regime in the Consumer Protection Act 1987 (1987 Act) remains fit for purpose, particularly in light of emerging technologies such as AI, software-enabled products and digital supply chains. Although still at an early stage, the review's terms of reference suggest that reform is firmly on the agenda and that the EU's new Product Liability Directive (*2024/2853/EU*) (the Directive), which EU member states must transpose by 9 December 2026, may provide an important reference point (*see feature article "New EU Product Liability Directive: businesses beware", www.practicallaw.com/w-044-7710*).

For businesses, the direction of travel matters. The reforms could make the system more claimant-friendly by easing the burden of proof, extending limitation periods for latent harms, expanding the categories of liable parties and widening the types of recoverable damage. We would urge caution, believing that, while some incremental changes may be appropriate, overall the current regime is sufficiently effective and flexible to address technological developments. Following the EU model could encourage speculative claims, impose unnecessary burdens on businesses and inhibit innovation.

Scope of the review

The review commenced with an initial scoping questionnaire and the publication of terms of reference on 8 December 2025. The terms of reference suggest that reform is on the horizon, stating categorically that the current regime is no longer fit for purpose due, in part, to technological advances such as AI. This is put more forcefully when compared to earlier Law Commission announcements, suggesting that, in its view, reform is not a question of "if" but "how".

Echoes of EU reforms. The terms of reference contain clear echoes of the Directive throughout, including that the project will assess whether:

- The burden of proof for claimants to bring a successful claim is too onerous. This suggests that the Law Commission may, like the drafters of the Directive, be considering the introduction of so-called "rebuttable presumptions" to establish a defect as a ground for a claim or causation. Currently, it is for the claimant to prove the defect, the damage and the causal link between the defect and the damage. Under the Directive, in certain situations, the court may presume that a product was defective, or that a defect caused the damage, without the claimant having to prove every element; for example, where the defendant fails to disclose evidence or where the product breaches safety requirements.

- To extend the ten-year long-stop period for latent harms under section 11A(3) of the Limitation Act 1980. Although no alternative time period is mentioned, the Directive extends the period to 25 years for latent personal injury cases.

- To broaden the definition of "producer" in the 1987 Act and to expand the range of economic operators that can be held liable. This echoes the Directive's broader approach to liable persons. Rather than relying on the traditional concept of "producer", the Directive defines "manufacturer" and "economic operator" more expansively and extends potential

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liability to component manufacturers, importers, authorised representatives, fulfilment service providers, certain distributors, substantial modifiers and, in some circumstances, online platforms.

Currently, there is no reference to the possibility of introducing psychological harm as a standalone category of compensable harm, as provided for in the Directive. However, the Law Commission will look generally at the types of damage that are recoverable under the 1987 Act, such as whether to include the destruction or corruption of data.

Emphasis on tech and AI. Emerging technologies, including AI, are clearly a prominent driver for the Law Commission's view that the 1987 Act is no longer fit for purpose. In particular, the project will consider whether:

- The definition of "product" requires reform to accommodate the intangible nature of digital technologies and should be widened to include software explicitly.
- The definition of "defect" requires reform to reflect the characteristics of emerging technologies, including AI.
- Products that are iteratively updated, such as some forms of software that receive patches, updates or AI model changes, may create difficulties in determining the applicable long-stop date for claims.
- The state-of-the-art defence may need amending. This defence applies where a defendant can show that, at the time the relevant product was put into circulation, the state of scientific and technical knowledge was not advanced enough to identify a defect (*section 4(1)(e), 1987 Act*). As software is often capable of later modification through updates, this defence may need changing to reflect the iterative nature of updates to some products.
- The definition of "damage" needs to be reformed to capture the types of harm that may arise from emerging technologies, such as AI, including data destruction or corruption.

Innovation. On a perhaps more reassuring note for businesses, the project will also assess how the reforms can promote innovation and the adoption of emerging technologies.

Assessing the options

The Law Commission clearly has a keen eye on the EU's approach as a potential basis for changes in the UK. On 31 March 2026, the government published a consultation on major reforms to the UK's regulations governing product safety, which similarly indicate proposals to align more closely with the EU (*see "Product safety framework overhaul: consultation", Bulletin, Commercial law, this issue*). This may suggest a willingness to accept reform proposals that align with the Directive.

In the authors' view, it is important to exercise restraint around any attempt to reform the current consumer protection framework, which we see as generally working well and adequately reflecting the intent of the original legislator to balance consumers' rights, innovation and technological development. The flexible definitions in the 1987 Act, combined with the adaptability of the common law, provide courts in England and Wales with tools to address the challenges of modern technological developments. This has allowed the liability regime to be applied to a wide range of increasingly complex products over time. The current regime is also embedded into UK supply networks and is familiar to, and generally well understood by, businesses and consumers.

If the UK were to follow the lead of the EU's very claimant-friendly reforms in the Directive, there would be legitimate concerns about the potential to encourage speculative or marginal claims. For example, easing the burden of proof with rebuttable presumptions, as the EU has done, would likely encourage claims even in cases where the evidence of defect and/or causation is weak. The expansion of recoverable damage to include data loss and psychological harm under the Directive is another area of concern.

Alternative approaches

Given these concerns, businesses are advocating a more measured approach. For example, rather than a wholesale legislative overhaul, the UK could pursue targeted amendments to the 1987 Act or the use of soft law guidance. Through these methods, courts could be given a clearer steer on how to assess defect and causation in cases involving complex technologies without introducing broad presumptions that unnecessarily shift the burden of proof. An illustration of such guidance is the work of the UK Jurisdiction Taskforce, a Ministry of Justice-backed initiative comprising experts in law, technology and digital innovation, which publishes authoritative legal statements addressing areas of legal uncertainty around novel technologies. Its recent statement on private law and AI-related harm suggests that many aspects of the current product liability regime can recognise perceived challenges posed by emerging technologies (*see Focus "Liability for AI-related harm: the UKJT's legal analysis", www.practicallaw.com/w-050-0533*).

Next steps

We expect that the final reform proposals will be announced in the first half of 2027 following consultation. In the meantime, businesses should engage with the expected formal consultation later in 2026, and the Law Commission welcomes further engagement. We responded to the initial scoping questionnaire, outlining the problems with extensive, pro-claimant reforms that would impose significant burdens on businesses and make the UK a less attractive place for investment and innovation. It is hoped that the Law Commission will take note and not make unnecessary changes to a product liability regime that broadly remains effective and balances the need for innovation with the need for consumer protection.

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The terms of reference and initial scoping questionnaire are available at https://lawcom.gov.uk/project/product-liability/.

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