



24 June 2021

Dame Meg Hillier MP
Chair – Public Accounts Committee
House of Commons
London
SW1A 0AA

Dear Dame Meg

Protecting consumers from unsafe products

All consumers must have a right to buy a product which they can be satisfied is safe. When something does go wrong, members of the Association of Personal Injury Lawyers (APIL) a not-for-profit campaign group, support those who have been injured by unsafe products. We would, of course, prefer for no one to be injured, but there are failings within our safety regime which leave consumers vulnerable to faulty products which can cause harm. A summary of our recommendations to protect consumers from unsafe products is included below.

When a safety issue is identified, it is vital that the issue is thoroughly investigated. Only by finding out what went wrong and why, can action be taken to keep other consumers safe, for example by recalling a product, and making changes to prevent the same issue happening again. Unfortunately, the current system, whereby trading standards is devolved to local authorities, is not effective. Local authorities do not have the resources and power to collect data, identify and investigate risks, or enforce recalls or corrective action. Instead, corrective action and recalls are left to the responsibility of manufacturers.

We recommend a national regulatory body is established to identify and investigate risks, with appropriate powers to enforce recalls and corrective work for unsafe products. For this national body to be successful, it must be well-resourced and funded by the Government, and there should be no barriers in its ability to collect information on all suspected safety concerns and potential risks.

It should, therefore, be compulsory for this information to be provided to the new body. This would be similar to the yellow card scheme, which is a UK system which collects data and monitors information on suspected safety concerns or incidents in relation to medicines and medical devices. Unfortunately, this particular system is not compulsory.

Online shopping has become increasingly popular with consumers. Those who use sites, such as Amazon, will assume that their statutory rights are broadly equivalent to when they make a purchase on the high street, but this is not always the case. Amazon does not even guarantee that the product is of satisfactory quality or fit for purpose, and customers cannot be sure of the safety of the product which they purchase through the website from a third party based in a different country. It is not always clear what level of scrutiny, if any, the product has had in relation to its safety.

To protect these customers, the Government must ensure that companies such as Amazon owe a statutory duty of satisfactory quality. This includes making these companies jointly and severally liable for the third-party products which they sell. Regardless of where the product comes from, it should also be subject to the law in the country in which it is purchased. For example, if the product was purchased in England, but produced by a third party in China, the product safety issue should be dealt with under the law of England and Wales.

Steps should also be taken by the Government to protect those who purchase second-hand electrical products, which can present a significant risk of electrical shocks or fires. We recommend a new criminal offence is introduced for selling a second-hand portable electrical appliance without a recent PAT safety test certificate. A product can be tested for a small and proportionate fixed fee, and this would be important to reduce potential harm to the public from defective and unsafe products.

It is vital that those who are injured by unsafe products can receive help and support, including financial compensation, but this is not always possible. The Consumer Protection Act 1987 imposes a ten-year limitation longstop on product liability claims. If a product has been in circulation for over ten years, and someone is injured by the product after that time, that person is unable to make a claim for compensation. There is no justifiable reason for this longstop.

The longstop fails to recognise that a safety issue may not become apparent immediately when the product is new. It may not be until years later, possibly even after ten years, that the defect becomes known. Unsafe products can cause serious harm, but some injuries or illnesses do not surface until many years later, such as mesothelioma, which can take up to 30 years for the effects to occur. A legal claim would not be made until the injury or illness becomes known, by which time it could be too late because of the longstop. In some other areas of litigation, a court can extend the period in which someone has to bring a claim, if the circumstances of the case deem it necessary, but this cannot be done in product liability cases. The ten-year longstop unnecessarily impedes access to justice and should be removed.

We have made our recommendations to the Office for Product Safety & Standards (OPSS) as part of its UK Product Safety Review. I have enclosed our full response to the call for evidence from the OPSS should the committee find it of interest. Please do not hesitate to let me know if we can be of any assistance to the committee.

Yours sincerely

Sam Ellis
Public Affairs Officer, APIL

Email: sam.ellis@apil.org.uk

Telephone: 07703 719 644



Office for Product Safety & Standards

UK Product Safety Review: Call for evidence

A response by the Association of Personal Injury Lawyers

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Introduction

APIL welcomes the opportunity to respond to this call for evidence and the long-awaited review of product safety legislation. The Office for Product Safety & Standards (OPSS) argue within the call for evidence document that the UK has one of the strongest product safety systems in the world, it fails however to provide any evidence to support this claim. The current regulations are fragmented which makes it extremely challenging for experienced lawyers to represent an injured claimant. It is almost impossible for a claimant to represent themselves due to the complexity of the regulations and the underpinning legislation including the Consumer Protection Act 1987 (CPA). APIL is also concerned that there are no suggestions within the call for evidence document as to how product safety regulation may be reformed in the UK. There is no acknowledgement in the paper that regulating product safety and/or diverging from EU standards, will cost money. The OPSS does not highlight any potential financial implications of diverging from EU standards an important consideration in light of the review being undertaken.

APIL believes the focus of the call for evidence is unnecessarily narrow. It is ineffective to separate the focus of the review and exclude the regulation of food, chemicals, medical and healthcare products, construction products and vehicles. If the OPSS plans to change product safety regulation in the UK, all products should be considered within the scope of this review.

The local system in which the regulations are enforced is also ineffective as well as underfunded. Together with a review of product safety regulation, a review of the enforcement system is required to protect the public from defective and unsafe products. APIL suggests that there should be a national/central enforcement system rather than a local enforcement system, to ensure that it is adequately funded to thoroughly investigate risks and enforce regulations effectively.

APIL has responded to the questions within its remit.

Q1. How easy is it to understand the current framework of product safety regulation? What areas, if any, could be simplified or made easier to follow?

The current framework of product safety regulation is complicated to understand. Specialist lawyers find it challenging to understand and follow at times, so there is no doubt that individuals and businesses will find it complex. However, the regulations are written with manufacturers in mind rather than individuals. There are likely to be few circumstances in which a consumer will be navigating the system of regulations

themselves. The crucial aspect for consumers is that they understand the system of regulation and redress in relation to product safety.

APIL is concerned that this question suggests that a system which is easy to follow is effective in preventing unsafe products harming consumers. This is not the case. The most important part of testing whether the current framework is successful is whether or not the system is effective in protecting consumers. The current framework is not effective in protecting consumers because the system is fractured between the local and central governments and other regulators. A more centralised, national system will ensure that consumers are protected from unsafe and defective products.

Q2. In what areas, if any, should product safety regulation be strengthened or improved?

One aspect of product safety regulation which should be improved is the way in which products are quality checked for safety. For example, there is a significant issue with the UKCA/CE marks being mistaken for a quality assurance mark when in fact it is a form of self-assessment by the manufacturer. The UKCA/CE marks represent a manufacturer perceiving the product to comply with safety regulations, not that the product *actually* complies with safety regulations. It is only in devices of higher risk classification that a designated Notified Body must assess a device prior to the application of the mark. There are certain regulations to comply with to ensure that the product meets the required standard to have the UKCA/CE mark. A product may comply with the requirements of a UKCA/CE mark but nevertheless may be unsafe for consumers to use. The value of a CE mark is also often misconstrued by the judiciary.

One example is of a strobe light, designed to give the user a non-drug induced high, causing epilepsy in two cases due to the high-level frequency it transmitted. As this is an electrical product, it will have been certified to enable the sale to consumers. However, it is clear that there was a failure to check the safety of the frequency and the consequences to consumers using the product.

There are numerous other examples which clearly demonstrate how the current system of product safety regulation fails to protect consumers from harm. One particular example is the Grenfell Tower fire which led to mass casualties in 2017. The fire started on the fourth floor of the tower block and was exacerbated by a significant lack of compliance with safety standards. This resulted in the fire spreading rapidly throughout the rest of the building. Although there is an ongoing public inquiry, reports strongly suggest that the unsafe and flammable cladding on the tower block was the primary cause of the spread of the initial fire. This resulted in 72 deaths¹. This demonstrates the significant impact the Government's failure to properly regulate can have on the safety of the public.

Q3. Should regulation be targeted more at the product itself or the manufacturer's systems that produce it? Please explain.

The current audit-based assessment fails to assess the design or manufacture of the product in detail. Currently, there is no one with real expertise checking the final product. Experts in the relevant product should be required to thoroughly assess the

¹ BBC News: Grenfell Tower: 'Catastrophic' safety failures outlined 4 June 2018
<https://www.bbc.co.uk/news/uk-44351567>

product before it is permitted to be distributed/sold to ensure that the product is safe for consumers to use. APIL argues that the audit-based approach needs to be replaced with a risk-based approach, focusing on the product. If a product is likely to cause significant harm to a consumer, then the product needs to be assessed thoroughly by an expert in that field. It is concerning that there is no proportionate assessment of risk in the call for evidence document. APIL highlights the need for regulation to target both the product and the manufacturer's process. A manufacturer can produce safe products if their systems are regulated properly. It is crucial that standards are compulsory to ensure that the manufacturer meets those standards and does not avoid sanctions if they fail to do so.

APIL argues that a system such as the yellow card scheme should be implemented for all products. The yellow card scheme is a UK system which collects and monitors information on suspected safety concerns or incidents in relation to medicines and medical devices. This scheme is not compulsory². A system similar to the yellow card scheme for all products should be compulsory. This can ensure that issues with unsafe and defective products are collected so that risks can be identified and thorough investigations can take place.

Q4. How could the current product safety framework do more to support innovation of the supply of new technologies to consumers? Using examples, how could it better anticipate upcoming changes in manufacture and production?

Q5. What areas of the current regulatory framework could the UK tailor to create more opportunities for UK innovation and manufacturing?

The purpose of the regulator and the product safety regulations are to ensure products are safe rather than facilitating innovation. This should not be the OPSS' aim and it is not their function as a regulator to support innovation over product safety. Divergence from the EU should not result in reduced safety in products.

Q6. How well is the conformity assessment system working? What are your experiences of it and of self-assessment?

The self-assessment system does not work well. This is demonstrated through the fact that hundreds of cases regarding unsafe and defective products settle annually. APIL suggests that the Government needs to set out the benefits of divergence from the EU more clearly because the divergence will come at a cost to both manufacturers and consumers of potential new tariffs and non-tariff barriers.

Q7. Reflecting on the response to the Covid-19 pandemic (as set out in the case study p 12), what changes could be made to help bring safe products to market more quickly?

Using a risk-based approach, the Government should play a role and identify higher risk products. They should ensure that there is rigorous oversight and proof that products are safe. Sufficient funding is therefore required to underpin the process and ensure that scientific and technical bodies are available to assess the products.

² YellowCard – About Yellow Card <https://yellowcard.mhra.gov.uk/the-yellow-card-scheme/#:~:text=The%20Yellow%20Card%20scheme%20is%20the%20UK%20system.the%20safety%20of%20a%20product%20may%20require%20>

Q8. What role should voluntary standards play in product safety? What are the benefits and drawbacks of linking regulation to voluntary standards?

Voluntary standards should not play a role in product safety. They create the impression that the required standard is being applied, however it cannot be certain that the standard has been applied unless a product safety assessment takes place on the final product. These standards therefore give the impression that legislation is not required to ensure that the standards are being met. Voluntary standards are also unenforceable, so there are no sanctions for manufacturers failing to meet the standards and producing a defective or unsafe product. These standards should be mandatory and set out in legislation. If the standards are worth having, which they are to ensure that manufacturers produce safe products, then these should be mandatory standards and therefore enforceable. This is crucial to ensure that members of the public are not injured by unsafe and defective products.

Q9. What are the key challenges for ensuring product safety in online sales? What has worked well in terms of regulation and where are the opportunities?

UK consumers are now familiar with using online platforms such as Amazon to buy products, due to competitive prices and ease of use. Consumers assume their statutory rights in such platforms are broadly equivalent to making a purchase on the High Street. However, Amazon's terms and conditions include a jurisdiction clause providing that the contract is made according to foreign law. Amazon themselves do not guarantee that the product is of satisfactory quality, fit for purpose, reasonably durable or have any of the statutory consumer rights.

Also, consumers cannot be sure of the safety of the product which they are purchasing via an online platform from a third party which may be in a different jurisdiction. It cannot be clear what level of scrutiny, if any, the product has had in relation to its safety.

APIL argues that the Government should impose joint and several liability on big platforms such as Amazon so that consumers have a statutory right when they purchase a product through a platform from a third party. In addition, regardless of where the product came from, it should be subject to the law in the jurisdiction in which it was purchased. If the product was purchased by a consumer in England and the product was produced by a third party in China, the product safety issue should be dealt with under English law. This would require the Government to change legislation to make platforms such as Amazon a producer rather than a supplier under the CPA. This should also be implemented into the Sale of Goods Act 1979 and Consumer Rights Act 2015 (CRA) to ensure that such platforms owe a statutory duty of satisfactory quality.

Q10. Thinking particularly about new models of distribution and supply (including online sales and the sharing economy), is it always clear where responsibility/liability for product safety lies?

This is a significant issue which lawyers acting on behalf of an injured claimant deal with daily. It is difficult to hold a party accountable for an unsafe or defective product because there are typically four potential defendants; the seller, the online platform, the manufacturer and the insurer, who all blame each other. There may also be other

potential parties liable. This is inherently complicated for the average consumer. APIL argues that there needs to be a change in consumer rights in light of modern day purchasing. Consumers often deal with online platforms such as Amazon to purchase from third parties, however a consumer has no rights against them. APIL reiterates that the Government should impose statutory joint and several liability on these platforms.

Q11. To what extent do you see product safety issues arising from consumers producing (eg. 3D printing) and/or hiring out and selling products to each other?

Our members do not come across these types of cases often. We suspect that these types of cases will become more frequent in years to come. If a consumer 3D prints a product and hires it out or sells it on, it is likely that they will become a manufacturer and thus liable. For online sales of such products, platforms such as Amazon should make consumers aware of their responsibilities regarding this. However, APIL reiterates that online platforms should be jointly and severally liable for harm caused by unsafe and defective products sold through their platform including those which may be home made. This would put the onus on platforms to ensure products they sell are safe.

Q13. What role should voluntary commitments such as the Product Safety Pledge play in consumer protection from unsafe products? Can you share any evidence or experiences of the benefits and drawbacks?

Voluntary schemes are ineffective in ensuring products are safe. It is crucial that such schemes are mandatory. These standards are vital in ensuring public safety and therefore should be enforceable.

Q14. What might typical product lifecycle look like in the future as we move towards a circular economy? Can you provide examples, including of connected and second-hand products?

The case study referred to in the call for evidence document is a useful yet worrying example of the issue with selling second-hand products. Buying second-hand products isn't bad, however second-hand electrical products should require safety testing prior to being sold. Electrical products present significant risks of electrical shocks or fires. Therefore, they should be tested to ensure they are safe for the next consumer. APIL suggests introducing a new criminal offence for selling a second-hand portable electrical appliance without having a recent PAT safety test certificate. We do not think this would be disproportionate because a product can be tested for a small and proportionate fixed fee. This is also important to reduce potential harm to the public from defective and unsafe products.

Q15. How can we build flexibility to the regulatory framework to adjust to changes in product lifecycles and technology, including changes in understanding risk? How do businesses integrate safety considerations with other aspects of product regulation such as environmental considerations?

When building flexibility into the regulatory framework, safety should always come first and is the paramount consideration which the OPSS should take into account. A risk-based approach to regulation could give flexibility. It would ensure that stricter regulations are imposed on products which have greater risk of harm to consumers.

Q16. For how long should responsibility for the safety of the product lie with the manufacturer? What responsibilities should apply to software that is integral to the product, second-hand goods or supply of replacement parts?

It is unfair and unjust for the CPA to impose a ten year long-stop limitation date on product liability claims. This means that after the product has been in circulation for over ten years and a consumer has been injured by a product after that time, they will have no right of action. A consumer may have a reduced time to take action because they may not receive the product until a few years after circulation. This is a particular issue where a consumer may have purchased a second-hand product. There is no justifiable reason for this restriction. A manufacturer's liability diminishes over time due to wear and tear of the product in any event. In addition, a product may have a defect but may not show until later down the line, possibly after ten years. Products can cause serious harm to consumers. Some injuries and/or illnesses do not surface until many years later, such as mesothelioma, which may take up to 30 years for the effects to occur. Furthermore, in other areas of litigation the judiciary often have a discretion to extend this long-stop, however this does not apply to product liability cases. The ten year long-stop therefore unnecessarily impedes access to justice.

The OPSS should use its powers to diverge from the EU Product Liability Directive to address this serious access to justice issue. The focus of the OPSS work should be on consumer protection and ensuring only safe products are being manufactured and sold. Therefore, abolishing the ten year long-stop for product liability claims would meet the aim of the OPSS by providing UK consumers with enhanced protection.

Q17. How is enforcement of product safety changing in light of new products (eg. Connected devices, 3D printers) and new ways of distributing products (e-commerce, sharing economy). What are the greatest challenges?

APIL has discussed the greatest challenges in enforcing product safety in the above questions and has made suggestions on how these challenges can be tackled to ensure that consumers are protected as far as possible. It is crucial that online platforms such as Amazon are jointly and severally liable for injuries resulting from defective or unsafe products sold through their platform. In addition, in the situation where a consumer manufactures a product using a 3D printer and then sells or hires out this product, then that manufacturing consumer should become a manufacturer for the purposes of claiming liability. APIL also reiterates that there should be a criminal offence for those who sell second-hand electrical products without first having the product tested to ensure that it is safe.

Q18. How well does the current system for corrective action and recalls system work? How could the regulatory system better support it?

There is no legislation that implements a system for corrective action or recalls. Although Local Authorities have a role in this, they have no statutory basis to effect this. In addition, currently there is not a body which deals with risk management or intervenes where a recall or corrective action is required. Corrective action and recalls are left for the manufacturers to deal with and action required is not enforceable. Ultimately, a system for corrective action and recalls does not exist. Legislation and a specific body are essential to ensure that manufacturers correct or recall defective and unsafe products to protect consumers.

Q19. When it comes to product enforcement, how well does the system deliver transparency and confidence while maintaining confidentiality? Please explain.

The current system of enforcement devolving trading standards to local authorities is not effective in today's society. Dealing with traders and their standards is different to product safety. Product safety should be considered as a national priority. APIL suggests that a well-resourced central enforcement agency would better deal with product safety issues. It would deal with product safety issues nationally rather than locally, and thus be more effective. A national enforcement system requires sufficient resources and expertise to identify risks, undertake thorough investigations and intervene where necessary to protect consumers from defective or unsafe products.

It is crucial that a product enforcement system is as open and transparent as possible. The purpose of product safety regulation is to ensure that consumers are protected from unsafe or defective products. The OPSS' duty is to protect consumers rather than protect the reputation of manufacturers. Therefore, it is unnecessary and potentially harmful for confidentiality to play a role in product safety regulation.

Q20. What toolkit of enforcement duties and powers is needed for effective enforcement now and in future? Do enforcement authorities have the right tools they need, including data availability, to do the job?

A properly funded regulatory body, similar to the MHRA, is required to collect data, identify risks and act on those risks to ensure that meaningful change is implemented to protect consumers from harm. There does not seem to be any data on defective or unsafe products generally. A mandatory yellow card system is crucial to ensure data is collected for a well-resourced body to act on. This system should also require Accident and Emergency departments and GPs to report injuries which are suspected to have been caused by a defective product. This would help to identify risks to investigate. It is crucial that this regulatory body is sufficiently funded to ensure they have the required expertise to thoroughly investigate defective and unsafe products and also enforce corrective action or recalls where necessary.

Q21. How could greater use of technology and innovation support more effective, business friendly enforcement and compliance?

Greater use of technology and innovation could be effective in informing consumers of product recalls or corrective action required for defective and unsafe products. Registering warranty or registering the purchase at the point of sale may ensure that consumers are more aware of product recalls, thus protecting consumers from potential harm.

In the call for evidence document, the OPSS seems to criticise the CPA for being out of date in light of current technological advancements in products. There does not seem to be any evidence in support of this or any suggestion as to how this could be rectified. In APIL's members' experiences, the CPA is equipped to deal with new technology, however the act fails to establish a high enough bar for safety. The state-of-the-art defence within the Act can deal with changing technology in a flexible way.

However, the CPA fails to protect consumers and their right of action if they are harmed by a defective or unsafe product. It is extremely challenging for a consumer to face a well-resourced manufacturer in a product liability claim because it creates an unlevel playing field. The OPSS fails to outline any credible alternatives to the CPA to better protect consumers in light of new technologies. APIL would welcome any suggestions in relation to this, to comment on.

Q22. When it comes to product liability, do consumers have the right tools and information to take action on their own behalf? Please explain.

Currently, the tools which consumers have to take action on their own behalf is the CPA and CRA. Unfortunately, these are complex and therefore unhelpful to an average consumer. It is extremely challenging, and almost impossible, for a consumer to get anywhere with taking action themselves. There are too many strands of the law and too many defendants to consider when taking action. If the consumer is able to establish which defendant to pursue action against, it is very difficult for a consumer to interpret the law in their favour against the defendant. The tools are there; however, they are inherently complex and it is almost impossible for a consumer to pursue a product liability claim themselves. Ultimately, a consumer requires the assistance of a specialist solicitor who has the required expertise to navigate product safety legislation and the legal process.

Q23. Does the current framework adequately protect all people in society, including vulnerable groups and those with particular needs? Could it be improved?

Products should be safe for all people in society to use and the framework should therefore adequately protect everyone. The OPSS state that their aim is to make the framework better for all, however they fail to propose options or suggestions on how to improve the framework to better protect society. They also state that “small changes could improve overall accessibility or usability”³, however there is no suggestion of what these small changes may be to enable comment.

Q24. Are there any examples of, or issues where, the impact of regulation is different for people from different groups in society?

Strong regulation is required to protect all groups in society but especially vulnerable groups such as those with disabilities. Those with disabilities may not appreciate the quality of products they purchase. For example, they may not appreciate that products purchased through Amazon may not have had sufficient safety checks. Also, they may be more at risk from purchasing defective or unsafe second-hand products which have not been safety tested prior to being sold on. It is crucial that platforms take responsibility for ensuring safety for all, especially vulnerable consumers and users.

Q25. How can we ensure the processes for consumer recourse are accessible to all kinds of consumer?

Currently, no form of redress is made available for consumers in relation to product safety. The only support they can obtain is very limited help from charitable organisations. Since the OPSS’ paramount consideration should be consumer safety, APIL suggests that they should fund legal advice to ensure that consumers have access to redress. As discussed, it is almost impossible for a consumer to navigate product safety legislation and the legal process themselves without specialist advice from a solicitor. Funding legal advice would ensure that consumers have vital access to justice when injured by a defective or unsafe product.

³ OPSS UK Product Safety Review Call for Evidence p 20

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,000 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.