



The Law Society

Enhancing Consumer Confidence by Clarifying Consumer Law

October 2012



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Response by the Law Society

Introduction

1. The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession and makes representations to regulatory and government bodies in both the domestic and European arena. Solicitors represent and advise a number of groups that are likely to have an interest in the present consultation; notably consumers, businesses and regulatory organisations. This response has been prepared on behalf of the Law Society by members of our Consumer Law Reform Reference Group. The reference group is comprised of senior and specialist lawyers (both in-house and private practice) with expertise in consumer contract law, regulatory compliance and litigation (defence and prosecution), consumer product safety law, competition, e: commerce and IP law.
2. The Law Society welcomes the BIS consultation on consolidating and modernising the law on the supply of goods, services and digital content.
3. We set out our answers to the specific questions in the consultation below. However, there are a number of general points to make at this stage, which will inform our responses to the consultation questions and offer a framework for understanding our answers.

General comments

Supporting modernisation

4. The Law Society supports appropriate reform of the law, where that reform is aimed at clarification and simplification and ensuring that it remains relevant in the face of technological change.
5. Making sure the law is up-to-date and as clear and simple as possible is an important ingredient in an effective rule of law¹. Clarity, simplification and relevance contributes to a stronger rule of law in a number of ways:
 - a. it makes the law easier to enforce against those who break it.
 - b. it helps those subject to the law comply more easily (if individuals can understand it); and
 - c. it increases respect for the law through greater familiarity and enabling better access to justice.
6. Clarity and simplicity mean that individuals can better understand when their legal rights have been violated and can take action directly. A simpler, clearer and more relevant law

¹ The rule of law is commonly agreed to consist of a number of key elements: rules published and thus readily accessible; rules which are reasonably certain, clear and stable (thus excluding decisions of unconstrained discretion); mechanisms ensuring the application of rules without discrimination; binding decisions by an independent judiciary; limited delay in judicial proceedings; effective judicial sanctions; compliance by, and accountability of, the government and its officials in relation to relevant rules. Source: World Bank (1992). 'Governance and Development, Washington DC', pub: World Bank: New York; World Bank (1997). 'World Development Report 1997: The State in a Changing World', pub: Oxford University Press: Oxford; Posner, R.A. (1998b) "Creating a Legal Framework for Economic Development", *World Bank Research Observer*, 13: 1-11.

can also mean more effective enforcement by regulators, increasing access to justice through the state.

7. In addition, as the BIS consultation acknowledges, economic benefits accrue from a simple and clear legal framework, as it creates greater certainty for both consumers and businesses and thus a firmer basis on which firms in particular can plan.

Key principles

8. Consumer law is complex for two key reasons. Firstly, the consumer contract differs markedly from other types of contract law². Consumer contracts:
 - a. are pre-drafted by one party;
 - b. they cannot be altered or re-negotiated;
 - c. they are executed between unfamiliar parties with unequal market power and sophistication (information).
9. Secondly, the law on consumer contracts has to take account of a wide range of variables and potential circumstances e.g. the law will have to apply to a very large number of individual situations spread across the economy and even across borders. In contrast, contracts in other areas of economic activity tend to be more bespoke and agreed to between parties, who are tailoring a relationship to mutual advantage.
10. With such complexity it is helpful to base reform on some sensible and enduring principles. We consider that, in relation to the reform of consumer contract law, these should be:
 - a. maximum transparency in consumer contracts. This has the practical benefit of helping the market to function better³ and sustains key English legal principles in the area of contract law⁴.
 - b. the fundamentals of contract law and wider principles of English law should be adhered to as much as possible. Deviations and innovations should be rigorously evidenced and justified.
 - c. consumer law is relatively old. There is over a hundred years worth of case-law and legal experience bound in up in the current body of law in this area. This should not be disregarded lightly and should inform the new law, where it is sensible to do so. The changes should therefore look to work with the grain of the consumer – retailer (service provider) contract and not deviate significantly from the underlying principles of the current consumer law framework i.e. play a role in correcting some of the inherent imbalances in the consumer – seller relationship.
 - d. the law should be technology and business model neutral as much as is practicable. This will ensure the law is as future-proof as possible and therefore remains relevant across a long period of time and will not have to be constantly amended in light of technological innovations.
 - e. simplicity can sometimes conflict with the peculiarities of individual cases. This may mean ‘rough justice’ on occasion. This is an inherent tension and one that the proposals need to balance carefully. In managing that tension the principle of proportionality should guide policy makers. In other words, where simplicity may lead to a disproportionate or unreasonable number of cases being unfairly dealt with, the reforms should aim to minimise them.

² Bechar, S.I. (2009). ‘A ‘Fair Contracts’ approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law’, pub: Social Science Research Network.

³ Consumers are making better informed choices and thus are increasing their welfare.

⁴ These principles encompass the fundamental idea of free exchange and party autonomy i.e. contracting parties need to be genuinely acting autonomously and engaging in contractual relations freely.

Enforcement

11. The Law Society considers that in addition to simplification and clarification of the law, there needs to be strong enforcement. The reformed law should enable individuals to better enforce their rights. However, this needs to be matched by better enforcement by regulators.
12. One gap in the current regime is the lack of up-to-date guidance for traders, enforcers, the legal profession and the Courts. Where there is ambiguity, assistance on interpretation is required in sufficient time to allow all stakeholders to prepare and, where necessary, adjust trading practices and enforcement policies to take account of the uncertainty. Proposals to enforce the Consumer Rights Directive in the UK through Part 8 Enterprise Act 2002 (Part 8 EA2002) are likely to be undermined by a lack of such central guidance. The OFT Guidance on Part 8 EA2002 is now old and, in any case, is little more than an overview. There is other Guidance in circulation, largely created by the Trading Standards Services and various Counsel, but it does not of course have the weight that would accrue to materials issued by the Ministry of Justice (MoJ) or the Judicial Studies Board for example. A Practice Direction would address much of the uncertainty and it is perhaps surprising that 9 years into Part 8 EA2002 no such PD exists. It may also be helpful if clear Guidance could be provided on prosecuting the Consumer Protection from Unfair Trading Regulations 2008 in the same way that the CPS issues material on the majority of matters with which it is concerned. As things stand, there is no common framework for the enforcement and defence of Part 8 EA2002 and any confusion that exists now is likely to be exacerbated with the introduction of further consumer protection measures. We urge BIS, in conjunction with relevant organisations, to work to correct this state of affairs as quickly as possible.

Questions: general

Q1. Do you agree that all businesses should be subject to the same framework of consumer protection for the sale and supply of goods, services and digital content, or do you consider that micro-businesses should be exempt from any or all of the new proposals and remain subject to the current framework?

13. We consider that all businesses (merchants) should be subject to the same legal framework. There should not be any exceptions for micro-firms. We understand that micro-firms cannot deal as effectively as larger firms with regulations. However, exempting categories of firms will cause unnecessary complexity (especially as firms reach the thresholds) which is at odds with the stated aim of the reforms, which is to increase simplicity in consumer law.
14. This complexity would likely cross-over to consumers. They would find their rights were different depending on the kind of firm they purchased from. This would run counter to the fundamental objective of consumer law, which is to try and re-balance the asymmetric nature of the merchant - consumer relationship.
15. It also runs counter to the principle that in consumer transactions the rights a consumer has (under the law) are associated with the particular activity or behaviour and are not dependent on the characteristics of the seller. Otherwise, a consumer might purchase a product from a large retailer and be entitled to a range of protections but, in purchasing the same product from a smaller retailer lacks those same protections. This is unfair from an access to justice perspective and is likely to have negative economic consequences as it will discourage consumers from purchasing from smaller retailers and impact retail competition.
16. Finally, a key principle of the rule of law is that the law should apply uniformly across all individuals. Exemptions dilute this principle and should not be introduced lightly. We do not consider that in this case there is a strong enough case for an exemption.

Q2. Do you agree with the Government's proposal to introduce a single definition of 'consumer' and a single definition of 'trader'? Do you have any concerns with any aspects of the proposed definitions?

17. It is sensible to align the definitions of consumer and trader across as much of the consumer legislative framework as possible. With the superiority of EU law in this area, the best option appears to be to adopt the definition given in the Consumer Rights Directive (CRD), despite any drawbacks it may have. This would offer a degree of certainty in the law that the current myriad of definitions lacks.
18. The CRD definition does appear to be relatively future-proof as it is based on behaviour rather than tying it to a set of factors that could become outdated over time.
19. However, it should be noted that in other areas, such as telecoms, micro-firms are often treated as consumers, for regulatory purposes. OFCOM for example treats micro-firms as consumers⁵. The general consumer law should be very clear focused on the consumer and not (as a rule) look to blur lines between the consumer and the small firm.
20. If there is evidence across the wider economy that micro-firms, for example, suffer similar issues to the consumer, in terms of knowledge and power asymmetries, then BIS should look into them as a distinct issue. The simplicity of keeping the proposals in the consultation document confined to the consumer relationship is vital.

⁵ As part of the licenses it grants to telecoms operators it requires providers to treat micro-firms as consumers.

21. The impact of any change should be considered in this context in case any adverse consequences may arise. For example, there may be cases (under the current Distance Selling Regulation) where a seller is unclear as to whether he is selling to someone in the course of their business or as a consumer. Therefore there can be uncertainty as to extent to which certain cooling off periods will apply.
22. Areas where the definition remains different should be looked at urgently, in order to ensure consistency. In particular, EU legislation, where definitional differences may persist should be amended as soon as is practicable e.g. the General Product Safety Regulations 2005 has a different definition of 'trader' to the one in the Consumer Protection Regulations⁶.

⁶ The Consumer Protection from Unfair Trading Regulations 2008 defines a trader thus: 'trader' means any person who in relation to a commercial practice is acting for purposes relating to his business, and anyone acting in the name of or on behalf of a trader'. Source: The Consumer Protection from Unfair Trading Regulations 2008, accessed at <http://www.legislation.gov.uk/ukdsi/2008/9780110811574/contents>
The General Product Safety Regulations describe: '...a person carrying on a commercial activity'. Source: General Product Safety Regulations 2005.

Questions: Supply of Goods

Q3. Do you agree that it would be beneficial for a single definition of 'goods' to be used for the protections explored in this chapter and provisions of EU law? Do you consider that the use of the following EU definition would be appropriate (please give reasons)?

23. The arguments in support of a uniform definition of 'consumer' and 'trader' apply to the definition of 'goods' too. The objective of clarity and simplicity demands that one definition prevails across as much of the relevant legislation as possible. Further, a flexible definition of goods is needed in order to ensure it does not become redundant in the face of future changes. Both the EU and the traditional UK definition have proven durability in terms of their ability to cover most things individuals would understand as 'goods' over time. Either is therefore probably suitable for extending across all legislation.
24. However, given that EU law has superiority over domestic law it makes sense to use the EU definition. There is little the UK Government can do about this definition and has to accept its existence. Therefore, in order to have a uniform definition it has to be a case of harmonising around the EU.

Q4. Do you believe that this is a sensible change or can you foresee problems arising from a move away from the implied terms model?

Q5. What benefits can you see from moving away from the implied terms model?

25. The implied terms model had a number of strengths. These included the fact that, because it was rooted in the contract, it fitted easily with the standard contract law reasoning when it came to disputes settled in the courts and posed no problems in relation to key contract law principles such as consequential (indirect) loss⁷.
26. A statutory guarantees model would be a significant departure from the current law. There will be an inevitable period of adjustment as the new system beds in. Further the current system is based on a long accretion of case law and experience over a period of at least 100 years (since the first Sale of Goods Act⁸) and is a model that has worked remarkably well. It has offered the consumer a number of significant protections over that time. It is a model that has enabled the rapid development of the modern consumer society and it has coped well with significant (unanticipated) changes in the patterns of consumption. In light of these strengths and achievements it is not a model that should be replaced without significant thought. Nor by a model that throws away the accumulated experience contained in the current statute and case law.
27. The Law Society, however, does support reform. We consider a system of statutory guarantees will deliver a number of the benefits described in the consultation. We believe such a system will deliver greater clarity than currently exists. Consequently the law may become more accessible for both businesses and consumers. This greater legal certainty can only lead to better selling and purchasing decisions by businesses and consumers and a stronger rule of law with improved regulatory compliance.

⁷ A contract is generally liable for two types of loss: loss that arises naturally, according to the usual course of things, from the breach; and indirect, or consequential, loss is that which could have reasonably been contemplated by someone with knowledge of special circumstances outside the usual course of things.

⁸ The first Sale of Goods Act was passed in the UK in 1893.

28. Such a system of guarantees must be based, so far as possible, on continuity with the existing system. This will ensure that the new set of guarantees does not throw away the benefits accrued under the current system, while making sensible rationalisations where appropriate and modernisation where the current body of law may have reached its limits.
29. Fundamentally, the new statutory guarantees must be seen to exist clearly within the context of consumer contract law and the seller-consumer transaction. One of the strengths of the current system is that it sits easily and narrowly within a particular type of economic behaviour i.e. the consumer contract. This should remain the case with the statutory guarantee. This principle should be defined tightly in the legislation in order to ensure this is the case. We note, for example that the New Zealand Consumer Guarantees Act 1993 is very clear on this point, as should be the new UK legislation.
30. We would oppose any leakage into wider contract law. The latter has developed over a significant period of time. It is based on long established and effective principles. Further, English contract law is an internationally respected system of law⁹, which has delivered stability and certainty for individuals and businesses over many decades.

Q6. Is 30 days a reasonable period to set for the short term right to reject sub-standard goods?

31. For goods, a 30 day limit is a reasonable period of time. A clear and fixed period will contribute to clarity in the law. Although the downside of such a strict time limit is that it could mean a reduction in consumer protection, as under the current regime a consumer may get longer than 30 days in which to exercise their right to reject. Although, as noted in the consultation document, the ambiguity of a 'reasonable period of time' does not make that certain.
32. We consider this a case where the clarity and certainty brought about by the proposed limit will not result in a disproportionate number of incidents of injustice relative to the gains of greater simplicity.

Q7. Do you agree that an exemption is required for goods where there may be a delay before use, or does this represent an unwarranted complication?

33. While this issue is of some concern the introductions of exceptions to the general rule will introduce a complication into the law, when the aim of the reforms is simplicity. Therefore we do not agree that an exemption is needed for such goods.
34. As with the 30 day limit, we would not envisage a disproportionate increase in the instances of injustice. It is another instance where the gains from simplicity and clarity are likely to outweigh the disadvantages of trying to carve out an exception to the general rule.

Q10. Do you agree that the consumer should be allowed 7 days to examine the goods after any repair has been carried out, before losing the right to reject?

35. The Law Society supports this proposal. It is reasonable to allow a consumer a period of time in which to test a repaired good. By setting that period in the list of statutory guarantees the law sets a baseline on which sellers can compete for customers, perhaps offering better terms if such situations arise.

⁹ The total number of disputes resolved through arbitration and mediation in the UK reached 34,541 in 2009, up from 19,384 in 2007. Source: TheCityUK (2010). 'Dispute Resolution in London and the UK 2010', pub: TheCityUK: London.

36. Further, the clarity of the 7 day period fits squarely with the simplification policy objective behind many of the proposals.

Q11. Do you consider that there is a need for the remedies for sale by description and for misleading practices to be aligned? If yes, do you think that they should both have a period of 30 days or 90 days?

37. While alignment would clearly be a simplifying act, we consider that misleading practices are different. Therefore it is legitimate to treat each one differently, partly by having different time periods for remedies.

Q12. Which of the proposed models do you believe would be the best approach?
Q13. In Option 4, do you agree that a cumulative total of 14 days for repairs or replacements is a reasonable limit? If not, how many days do you believe would be preferable?

38. The Law Society considers that a limit on repairs and replacement is a sensible simplification and clarification of the law. It will help prevent a consumer getting into a cycle of constant repairs or replacements, and not receiving any final resolution to their problems.
39. Whether repairs and replacement should be completed within specified time limits, or there should be a limit on the number of repairs/ replacements, is less clear. Each has its own pros and cons. However, a hybrid model of Options 1 and 4 may be a sensible option, using the strengths of each to create a robust framework.
40. The requirements for a limit of two repairs and a single replacement could be buttressed with a cumulative time limit of say 30 days (for those two repairs and one replacement to take place within). This would ensure a clear framework for all parties to operate within. It would be very easy to judge, for the consumer, whether the trader was meeting their legal requirements. At the same time, it would mean traders having to put the processes in place (if they did not already exist) which would ensure they comply with the new requirements. This may facilitate wider improvements in customer service and satisfaction; where otherwise there may have been less impetus on merchants to improve after sales care practice.
41. The drafting of the new statutory guarantees should ensure there is clarity on whether a repair applies to the good as a whole e.g. is the consumer entitled to move to Tier 2 remedies if the good breaks more than twice (in any way) or whether the limits on the number of repairs is limited to the specific type of problem discovered with the good. If this is not clear it may lead to some ambiguity, in some cases. Lack of clarity would undermine the policy objective of simplification.

Q14. Do you agree that, if a temporary replacement of equal or higher quality is provided for the duration of any repair/replacement process, the limit under Option 4 should be set higher, for example at 28 days or 30 days, or waived altogether?

42. There is a good case for the cumulative period being something like 28 or 30 days in all circumstances. Many businesses will – for customer service reasons – want to turn around repairs faster than the upper limit. With such strict limits however, there has to be some leeway for allowing the more complex issues a realistic period of time to be resolved. While at the same time not being so long a period that it becomes meaningless.

43. We do not consider that the repair and replacement rules should be allowed to be waived altogether. However, there could be scope for a small extension of the cumulative period in cases where the retailer provides a satisfactory temporary replacement for the consumer to utilise while waiting for their repairs.
44. This should be a very limited exemption. For simplicity, we consider that it is best to keep periods of repairs and replacement as uniform and as clear as possible. Once boundaries begin to diverge, confusion sets in and uncertainty increases.

Q15. Do you believe that where a product can be proved to be dangerous, the consumer should have a right to move directly to a second tier remedy?

45. The Law Society concurs with the proposal in the consultation i.e. where a product is dangerous a consumer should be entitled to tier 2 remedies immediately i.e. refund

Q16. Do you agree that defining "dangerous" as a breach of the General Product Safety Regulations 2005 would provide adequate clarity and protection to consumers?

46. Harmonising the definition would bring greater simplicity to the law in this area. As with the other areas of consumer law, the benefits of simplicity here are that it will increase understanding and compliance. This will in turn enable businesses in particular (but also to some extent consumers) to plan accordingly and involve some reduction in reduction in some compliance costs. The Law Society considers the General Product Safety Regulations definition to be adequate for the impact of harmonisation of the definition not to be disproportionately negative for consumers.
47. As long as EU remains superior to domestic law uniformity can only be achieved through using the EU definitions.

Q17. Which of the proposed models (or which mix of the models) do you believe would be the best approach?

48. The proposed rules around refunds are an unavoidable complication. The balance between the policy objectives of simplicity, with the need to ensure justice in as many situations as possible, will inevitably result in some complexity. The use of a decreasing refund amount as a proxy for the usage of a good up to the time the problem emerged is inexact. However, it probably the best that can be achieved.
49. In order for such a system to work and be fair to consumers, there would have to be clear pre-contractual information requirements in relation to this. In addition, there would need to be simple official guidance from a body such as the OFT. These additional changes would help ensure the scope for protracted disputes to develop was minimised. Although they would only be likely to arise in a limited number of cases, the complexity of a sliding scale' would almost inevitably mean some disputes over details in certain cases.

Q21. Do you believe that this is a sensible change or can you foresee problems arising from applying broadly the same remedial scheme to all transaction types?

Q22. What benefits can you see from aligning the rules for different transaction types in this way?

Q23. Do you agree that the approach outlined above for hire contracts is sensible?

50. The Law Society supports the extension of the general goods regime to the other transaction types described in the consultation document. However, this extension has to be done with the knowledge that the goods regime will not be a perfect fit for the full range of contract types. On balance we consider that simplification will bring greater benefits than losses in relation to this range of contractual relationships.
51. There are potential problems in applying the same regime across all goods-based transaction types. The circumstances of one transaction type may not fit easily with a generic regulatory framework. While the latter may fit the majority of cases well it seems almost certain that there will be some cases that a generic framework fits less well with. However, if these cases are small in volume the greater gains are likely to come from simplification.
52. The additional protections the consumer will gain from the general application of the goods regime combined with the benefits of simplification suggest that it is a reform worth making.
53. Regarding hire contracts there may be a question as to the applicability of the full panoply of goods remedies. For example, there is a question as to what would be being refunded in some hire contracts. If amounts are paid monthly then the consumer can walk away from the product (they have hired) relatively easily. Although we note that the numbers of these types of contracts are likely to be falling and to continue to fall.
54. If the full amount is paid in advance for the hire of something, it may be more appropriate for the consumer to receive a refund, as they would not have enjoyed the full use of something for which they paid. Repair would likely be an inappropriate remedy, replacement however could be helpful e.g. if you have hired van for a number of days and its breaks down. However, it does not seem that anything is lost if the full range of remedies were applied to hire contracts. Therefore we would not oppose the extension of the goods regime to hire contracts.

Questions: The Supply of Services

Q24. Are these helpful distinctions? What problems, if any, do you envisage in dividing up services in this way?

55. The Law Society does not consider the distinctions set out in the consultation regarding different types of services necessary to create a clear and simple legal framework to govern the supply of consumer services.
56. Although the concerns the proposed distinctions try to address are real, we believe their use could complicate the development of a governing framework for the provision of services. This is counter to the important policy objective behind the proposed reforms of simplification and clarification. Distinctions are likely to confuse consumers as depending on the service the consumer may end up having a different set of remedies and avenues of redress. In addition, the slightly different regime which applies to different services is likely to increase compliance costs for firms.
57. We note the New Zealand experience is that one set of rules applies to all services¹⁰ and that their system does not appear to be creating any unnecessary problems
58. In the case of services, while we acknowledge the evidence that consumers do face a particular set of problems, in relation to household repairs for example¹¹, we do not consider the evidence strong enough to require a set of distinctions in the law which can then be used to differentiate the remedies. We believe the self evident need to distinguish between goods, services and digital are the main distinctions required in the area of consumer contract law.

Q27. Do you agree that the remedies for breach of implied terms in consumer contracts are difficult for consumers to predict?

59. The Law Society agrees that the current remedies for a breach of the implied terms in consumer services contracts are difficult for consumers to understand. Both sides of the consumer transaction would benefit from greater clarity.
60. Currently, consumers appear to show little understanding of the remedies available and find a breach of the liability standard in services very difficult to prove and thus enforce. This state of affairs partly stems for the current opaqueness of the current law, to the consumer¹². While sometimes practicality means a remedy can be difficult to enforce, principle requires it to be there. However, when practicality is much less of an obstacle and the regime can be reformed to enable it to be better enforced, then the problem becomes an avoidable weakening of the rule of law and an unnecessary block on access to justice for consumers in the first instance and traders who suffer from competition from poor service providers.

¹⁰ Consumer Guarantees Act 1993. This applies a number of requirements on service providers, across the full range of consumer services. It requires that they: must be provided with reasonable skills and care; they must be fit for purpose; provided within a reasonable time and at a reasonable price.

¹¹ The OFT noted that in 2008 4% of consumers had genuine cause for complaint in relation to a household maintenance and repair service, with an average financial lost of £533 associated with the problem. Source: OFT (2008). 'Consumer Detriment', pub: Office of Fair Trading: London, accessed at: http://www.oft.gov.uk/shared_oftr/reports/consumer_protection/oft992.pdf

¹² Supply of Goods and Services Act 1982 (ss12 – 16) implements the standard of reasonable skill and care. The Act requires the trader to use reasonable care and skill. It states that any materials or goods must be of satisfactory quality, be fit for purpose and as described. Finally, unless a specific date is agreed for a service to be provided, it must be carried out within a reasonable time.

Q28. The Government is not proposing a solution to this problem as it cannot identify a deficiency in the law or any obvious clarification that would help. Do you have any suggestions?

61. Where there is ambiguity over the distinction between a good and a service, some service suppliers may try to limit their liability in relation to the goods. Further, the consumer is unlikely to be aware of which set of rules should apply. This problem can be resolved in two ways:
- a. Greater education and unambiguous clarity in the law as to when a good is a good and when a service is a service i.e. a clear delineation in the new law, which sets out that when a good is the product of a service then the good in question comes with all the rights and remedies as if it had been bought off the shelf in a shop. In other words the merchant or the merchant equivalent (the bespoke supplier) is liable as a retailer is.
 - b. A greater alignment in terms of remedies for services and goods would reduce the scope for 'arbitrage' on behalf of the trader, between the two regimes. However, alignment will have limits because of the inherent differences between goods and services.

Q29. In your view, what problems are created for consumers by the current law? Can you estimate the impacts? What effects on the market do these problems cause?

62. In the view of the Law Society, the main problem with the current law on consumer services is twofold:
- a. the current law is unclear and this leaves individuals unaware or confused about what obligations they have under the law and what protections they can expect from the law. This has a negative impact on compliance with the law and respect for the law; and
 - b. the opaqueness of the current law leaves many consumers effectively unable to enforce their rights under the law, when there is a breach of contract. A law which does not deter poor provision of services undermines the good functioning of the market and in particular those service providers who deliver high levels of service and consumer satisfaction.
63. Therefore reform that clarifies the rules of consumer contract law in relation to consumer services will underpin a more effective market¹³.
64. Reform however, should be consistent with the principles we outlined in paragraphs 8 to 10 of this response. In particular reform should not look to sweep away the accumulated experience of the current law, it should remain consistent with principles of English law in general and contract law in particular and aim to be as technology and business model neutral as is practicable.

¹³ The need for sensible and effective law to enable markets to function effectively was noted at least as far back as Thomas Hobbes. More famously it was pointed out by Adam Smith, who wrote that: 'a *tolerable administration of justice was an important condition to carry a state to "the highest degree of opulence"*.'

In the 20th Century Max Weber pointed out the importance of a rational legal system for economic development. Most recently scholars such as Richard Posner, Oliver Williamson and Douglass North have all argued for the strong link between clear and strong legal institutions and effective market based economic development. Source: Ogus, A (2005). 'The Importance of Legal Infrastructure for Regulation (and Deregulation) in Developing Countries', Centre on Regulation and Competition Working Papers No 65, pub: University of Manchester: Manchester, accessed at: http://www.competition-regulation.org.uk/publications/working_papers/WP65.pdf

Q33. Do you agree that moving to a statutory guarantee will be easier for consumers and traders to understand? Do you foresee any problems with this approach?

65. First and foremost the Law Society supports making clear in statute, in the form of a statutory guarantee, the current law i.e. that a service should be delivered with reasonable skill and care, materials should be satisfactory quality etc. This would reduce a number of the current ambiguities and ensure more consumers and businesses are aware of their obligations and rights under the law.
66. The clarity this would bring would strengthen the rule of law and probably help some consumers bring actions for a breach of contract, where previously they may not have. This would be a positive outcome as it will lead to a greater access to justice and accountability.
67. We also note that a robust reasonable skill and care test should result in an outcome very similar (if not identical) to that which would be the case if there was an explicit outcome based liability standard. Therefore, in principle there should be few cases where one liability test (reasonable skill and care) would lead to a widely divergent outcome for a consumer compared to if an alternative one (outcomes based) was in place. However, we note the difficulty comes in relation to what the consumer is able to prove. Therefore there could be a measurable practical difference between the two liability standards. With the outcomes standard potentially leading to greater access to justice for some consumers, who find they are able to get a remedy, where before the possibility of a remedy may have been remote.

Q34. Do you agree that there should be a statutory guarantee that a service will meet the description given pre-contractually, including the information as to price and time for performance?

68. A statutory guarantee to deliver a service which meets the pre-contractually given description would bring the UK closer to the New Zealand model¹⁴. In New Zealand the law requires the service provider to deliver a service which is fit for purpose. In other words, the service provider must effectively provide the consumer with what they want. The New Zealand Department for Consumer Affairs gives the following example:

‘...if you let the hairdresser know that you want your hair dyed a particular colour and they agree to do it, they must give you hair of that colour’¹⁵.
69. However, this is subject to the appropriateness of the pre-contractual discussions and where the service provider has informed the consumer that it is unlikely that the consumer’s desired outcome can be achieved¹⁶. We also assume the reasonable skill and care standard would remain in place, as with the New Zealand Consumer Guarantees Act.
70. The Law Society does not object to this type of extension to the current law, provided that it is done cautiously and the impact of such a change is evaluated, with the intention that, if it has had any significant negative consequences, it will be revised. Indeed we are not aware of any significant negative consequences as a result of the changes which New Zealand introduced in the 1990s. We would however, urge a

¹⁴ The liability standards are set out in The Consumer Guarantees Act 1993, ss 28-31.

¹⁵ Consumer Affairs (No date given). ‘Consumer Guarantees Act 1993’, pub: CA, accessed at: <http://www.consumeraffairs.govt.nz/for-consumers/law/consumer-guarantees-act/guarantees-for-services>

¹⁶ Consumer Affairs (No date given). ‘Consumer Guarantees Act 1993’, pub: CA, accessed at: <http://www.consumeraffairs.govt.nz/for-consumers/law/consumer-guarantees-act/guarantees-for-services>

relatively narrow test for determining liability in order to minimise the potential downsides and ensure the law retains as much certainty as possible.

71. Disadvantages of introducing such a outcomes based guarantee might include:
- a. It could lead to some cases of injustice as service providers are held to unrealistic standards. Due to factors not entirely within their control they were unable to deliver the pre-negotiated outcome, despite the fact that they had provided their service with reasonable care and skill.
 - b. There may be cost implications for businesses, due to the new liability burden.
 - c. It could lead to greater contractual complexity as service providers try to limit their liability by using a wide range of contractual clauses to ensure that they cannot be sued because the consumer expected a particular outcome but which, in the end, proved undeliverable.
 - d. In many cases the failure to carry out a service with reasonable skill and care leads to a similar place. Therefore, depending on the number of cases each year such a change would be relevant to, it may be disproportionate change, relative to the amount of increased redress that may take place.
72. However, with few statistics seemingly available in order to estimate the potential costs and benefits of such a change all that can be said with confidence is that it seems likely that such a change could have considerable benefits for consumers, in terms of more opportunities to get remedies.
73. As already noted, consumers currently find it difficult to get redress in disputes over breaches of contract for consumer services because it is difficult to prove that a provider did not act with reasonable skill and care. While mere clarification of the current law could make a limited difference to a few people¹⁷, introducing an outcomes based standard might dramatically increase the numbers of situations where consumers can get redress.
74. In terms of the test to use for determining a breach, given the superiority of EU law and the proposals in the Law Commission Issues Paper on unfair consumer contract terms¹⁸, it perhaps makes most sense to use the European average consumer test¹⁹, despite the issues that exist with it²⁰. The simplicity this would bring in terms of uniformity across the law would likely outweigh the difficulties with the interpretation of this standard, which the Courts have had in the past.
75. Further, before any new standard was introduced, an analysis should be made of how it might interact with the misrepresentation rules in the Consumer Protection Regulations 2008²¹. If a consumer has been promised a particular outcome and this is not delivered, there may be an issue of misrepresentation. Obviously overlap would not be too much of an issue if and until the Law Commission proposals on allowing individuals to bring actions for misleading practices are legislated for²².

¹⁷ In terms of their ability to achieve a remedy against a service provider who has breached the contract and provided a poor/ inadequate standard of service.

¹⁸ Law Commission 'Unfair Consumer Contract Terms: Issues paper', pub: Law Commission: London.

¹⁹ The concept of the average consumer is set out in the Consumer Protection Regulations 2008. The case law of the European Court of Justice suggests that the average consumer should generally be assumed to be reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. The definition is further complicated by nuances, which apply when the average consumer is part of a particular community or group or is 'vulnerable'. Although covering much of the same ground, the average consumer is a more complex test than the traditional English definition of the 'reasonable man' with many more subjective elements. Source: BIS/ OFT (2008). 'Consumer Protection from Unfair Trading', pub: SO, accessed at: http://www.offt.gov.uk/shared_offt/business_leaflets/cpreqs/oft1008.pdf

²⁰ As footnote 19 shows, the EU definition is much more complicated definition than the traditional English standard of the 'reasonable man'. It has a number of more subjective elements. In individual cases this can mean more complicated decisions.

²¹ Ss 5 and 6 of The Consumer Protection from Unfair Trading Regulations 2008 set out the rules on misleading omissions and misleading actions. The full list of prohibited activities can be found in Schedule 1. They can be accessed at: <http://www.legislation.gov.uk/uksi/2008/1277/regulation/5/made>

²² Law Commission (2012). 'Consumer Redress for Misleading and Aggressive Practices', pub: Law Commission: London.

However, to minimise possible overlap and thus confusion there is a case for ensuring any new outcomes based standard dovetails with the developing law on private enforcement of misleading practices.

76. For an outcomes based standard to be effective, the room for a service provider to use exemption clauses to limit their liability would have to be minimised. Not making this clear could undermine the additional protections such a standard would be aiming to provide.
77. Finally, given some of the difficulties with the outcomes based standard (set out in paragraph 72); we would like to propose a second possible reform for consideration. This would be to maintain the reasonable skill and care test as the only standard by which a service provider will be held liable but have a rebuttable presumption of breach as the test for liability. It might be considered something akin to the reverse burden of prove which exists in relation to cases brought by consumers under the Unfair Contract Terms Act 1977²³ ²⁴. By doing this, the perceived risks for service providers associated with an outcomes based standard would be reduced. However, in the event of a *prima facie* breach of contract e.g. poor service, a rebuttable presumption of breach of contract by the service provider would reduce the hurdles consumers have to jump in order to sue successfully for a breach of contract. This could lead to increased access to justice for consumers, while not unduly altering the current framework, which service providers are used to. We would support BIS examining a model such as this, as a compromise between the two on offer.

Q35. Do you agree that there should be a “default” period of 30 days in which a service must be carried out?

78. The current law requires services to be carried out within a reasonable period of time²⁵. This is vague. The Law Society would support a ‘default’ limit on the service. Such clarity would spur best practice among service providers and give consumers a minimum level of expectations.
79. There is a case for allowing consumers and service providers to agree an extension or reduction in this, as part of their contracts – as long as it is a ‘reasonable’ extension of a ‘reasonable’ period of time. Some contracts may require an extension due to the nature of the service. Other service providers may use guarantees of completing their service provision before the ‘default’ limit as part of their customer service offer.
80. However, the ability to vary should not be a term that a service provider can waive entirely or make so far into the future that it is meaningless. The service provider should not be able to sneak into the small print variations on the ‘default’ period. It should be a clear element of the agreed contract. The legislation should ensure consumers are protected against such attempts.

Q36. Do you agree that the statutory remedies for “faulty” or sub-standard services should be as similar as possible to those for goods?

81. The Law Society agrees that the statutory remedies for ‘faulty’ or sub-standard services should be as similar as possible to those of goods. For example, repair and replacement would seem like sensible remedies of first resort for a consumer. As with goods there is also a good argument for limiting the number of times and these

²³ Under the Unfair Contract Terms Act 1977 the burden of proving the fairness of a contractual terms lays with the party claiming it is fair in other words the business. Source: Law Commission (2012). ‘*Unfair Terms in Consumer Contracts: a new approach?*’, pub: TSO: London.

²⁴ The Act can be accessed here: <http://www.legislation.gov.uk/ukpga/1977/50>

²⁵ Supply of Goods and Services Act 1982.

can be offered before having to move onto tier 2 remedies. There is also a case for time limiting the period within which a repair or replacement has to be carried out. This may not have to be the same as for goods however, as services sometimes involve considerably greater labour input, which may not be as easily re-deployed to repair or replace a badly provided service as it is to replace a new TV or laptop.

82. Therefore in general, both the tier 1 and tier 2 remedies should be available for services, in the appropriate order.

Q38. Do you think that the tier 2 remedy should always include a facility for the consumer to terminate the contract from that point forward?

Q39. Alternatively, do you think that the right to terminate the contract should only be available in response to a failure to meet pre-contractual information requirements, or perhaps not at all?

83. Under contract law a party is entitled to terminate a contract in reaction to a breach of contract²⁶, if the breach is of a 'condition' or an 'innominate' term of the contract.
84. Therefore, the tier 2 remedies should include a right for the consumer to terminate the contract if the contract is breached e.g. by non-performance of the contract. This would be broadly in line with the principles of ordinary contract law. Having a right to terminate would appear to offer something similar, although not identical, to that on offer under the New Zealand model.

Q41. Do you agree that it would be disproportionate and also risky in terms of potential effects to try to codify current contractual remedies for damages in legislation?

85. The Law Society believes that it is important to codify the full range of remedies available for consumer contracts. This is consistent with the aim of simplifying and clarifying consumer rights and service provider's obligations. Excluding consumer contract remedies from codification would undermine the objective of these proposals. As long as it is done carefully there should not be too much risk in codification. With the legislation confined clearly to the consumer contract there should be little danger of interference or overspill into wider contract law.

Q42. Do you agree that there are few cases at present where a service provider would be able to limit its core contractual liability to a consumer in a way that a court would find reasonable?

86. The Law Society agrees that it seems improbable that a court would sanction a service provider limiting their core contractual liability, as described in the consultation document.
87. The new law must make it explicit that a service provider cannot limit their liability in relation to the core statutory guarantees set out in any new law.
88. It must also make it clear that a service provider could be liable for consequential loss, as under wider contract law principles. Alternatively, but in order to achieve the same end, it should be made clear that, in addition to the specific remedies available in the proposed statutory guarantees, the consumer should still have recourse to the traditional contract law remedies, such as an ability to claim for consequential loss, when appropriate.

²⁶ Chen-Wishart, M (2011). 'Contract Law: 3rd Edition', pub: OUP.

Q44. Do you think any strict liability standard for services should be imposed instead of or in addition to liability under the current fault-based regime?

89. The strict liability proposed in the consultation is a form of vicarious liability. It is a general principle of English law that the application of vicarious liability should only be in very limited circumstances, where there are very good public policy reasons for doing so²⁷. There is a public policy case for imposing such a system of strict liability, in order to create a system similar to that which exists in relation to goods. The case is that:
- a. such a system would be a simplification, harmonising with the goods regime (i.e. merchant liability) and thus fitting squarely with the policy aim behind the proposals being consulted upon;
 - b. liability would increase the ease with which a consumer could get a problem resolved;
 - c. it goes with the grain with consumer expectations and behaviour e.g. in response to a problem, the consumer would likely go to the service provider who provided the service to get a problem resolved.
90. However, on balance we are not convinced the public policy case is strong enough yet to override the important principle that liability should rest where there is fault. In order to justify a change along the lines proposed we would urge specific research to be undertaken and clear evidence to be found that consumers are significantly disadvantaged by a system that was based on liability where there is fault, before a move to strict liability should be considered.

Q45. Do you agree that an outcome based liability standard is likely to be more appropriate for services relating to property than for services to the person or pure services?

91. The Law Society believes the overriding principle in relation to liability for services should be whatever the liability standard decided upon; it should be uniform across the law in this area.
92. As we have argued, at a minimum there should be a codification of the reasonable skill and care standard. However, there are some good arguments for change and, if the Government does decide to reform the liability standard, we believe there is a case for following one of the two following options:
- a. a narrow outcome based liability standard, utilising a well established definition, such as the reasonable consumer, or the European definition of the average consumer. The New Zealand experience here could be instructive and we urge further investigation of the impact in New Zealand of this aspect of the Consumer Guarantees Act; or
 - b. maintaining the reasonable skill and care standard only, but when there is a *prima facie* breach of contract, the burden of proof switches to the service provider, with a rebuttable presumption of breach.

²⁷ Vicarious liability is mainly restricted to employment relationships in English law. The justification for this state of affairs is that the employment relationship is a special type of relationship which for public policy reasons legitimises the imposition of vicarious liability of the employer. Source: Turner, C. (2010). '*Unlocking Torts: 3rd Edition*', pub: Hodder Educational.

Q48. What would a “fitness for purpose” or “outcome-based” liability standard for some services look like?

93. We have set out in some detail our views on an outcome-based liability standard and a possible alternative. In summary, we believe if such a standard is introduced it must be:
- a. a narrow test;
 - b. based on the agreed outcomes between a supplier of a service and the consumer (although with restrictions on the ability to exclude liability e.g. by the use of an objective reasonable man standard); or
 - c. in the absence of an express agreement between consumer and supplier on the outcome, the use of the objective test e.g. the traditional reasonable man or the EU average consumer standard as indicative of minimum required outcome; and
 - d. liability for proving a breach should rest with the consumer bringing the action.

Q49. Do you agree that the quality standard in any strict liability scenario for services should be as above – the same as for goods?

94. Although, as stated above, we do not support the imposition of a strict liability standard for the provision of services at this stage, if the Government does move forward with such a policy then it makes sense for it to be aligned as closely as is practicable with the goods strict liability system.
95. As the aim of such a change would be to have a system similar to that which prevails in relation to goods i.e. the merchant is liable for faults, even if they are due to manufacturer's errors, then it is sensible to make the service provider liable as they effectively play the equivalent role of the merchant. to

Q57. Do you agree that all services to consumers' property should be treated the same? Are there any particular problems with strict liability in respect of any of the other categories of services to property?

Q58. What would be the impact of establishing a strict liability standard across these other services to property?

96. We note the simplification benefits of strict liability in terms of enforcement for consumers. However, we consider that to place liability on a service provider when, for example, all they may have done is to fit an appliance which was already faulty, is unnecessarily burdensome and unfair. The evidence to bring in such a change is not yet strong enough to create an exception to the rule that liability should fall where there is fault.

Questions: Digital Content

Q65. Do you agree that we should clarify consumer law for digital content transactions?

Q70. Do you agree that we should align our proposals for digital content as far as possible with the existing consumer rights framework?

Q71. Do you agree that digital content should be treated as a separate and bespoke category within the Consumer Bill of Rights?

97. The Law Society considers it important that the consumer law in relation to digital content is reformed and clarified. It needs to be made fit for the information society and the complex world of the technology driven consumer.
98. Currently the law is opaque, which is detrimental to the rule of law and access to justice and the development of a vibrant online consumer economy. With digital content becoming an ever increasing proportion of consumer purchases it is untenable for this situation to continue.
99. Digital content should be treated as *sui generis* because of the nature of the product and the nature of the transactions. The product is immaterial and can be reproduced at almost zero marginal cost, while a significant proportion of purchases are impersonal, online and distant (remote). These factors make it inherently difficult to treat digital content as the same as goods. Practical problems, which are a consequence of the immateriality and distance factors include the fact that consumers will:
- a. find it much more difficult to return an item to the merchant
 - b. the merchant will find it much more difficult to test for faults
 - c. the nature of digital content makes it difficult to prove the existence of faults by consumers
 - d. in extremis the ease with which content can be copied provides opportunities for dishonesty through gaming by unscrupulous consumers
 - e. the complex supply chain involved in delivering digital content blurs the lines of liability for the consumer and the merchant, including the myriad of ways of accessing digital content e.g. m commerce, e commerce etc.
100. When examining models of regulation for governing the purchase of digital content by consumers, there are a wide range of factors to take into consideration. The OECD has produced a comprehensive list of the key policy elements that need to be thought about when constructing a regulatory framework for online commerce. We urge BIS to use this helpful list to aid their thinking and inform their policy making in this area²⁸.
101. We believe one of the basic foundations of legislating in this area is to adhere to the key principles of contract law. Fundamentally, despite the practical differences noted above, the supply of digital content is a contractual relationship. Although the dominant model is not one based on the passing of title but on licensing, for the consumer the outcome is similar enough to a traditional consumer contract. It is worth noting that for the supplier there is often a *de facto* passing of ownership of a copy of an item of content even if it is not a legal passing of ownership.

²⁸ OECD, (2009). 'Conference on Empowering E-Consumers: strengthening consumer protection in the internet economy' pub: Organisation for Economic Co-operation and Development: Paris. The 'Key Policy Principles' state that when consumers engage in B2C commerce over digital networks consumers should benefit from: transparent and effective protection; fair business, marketing and advertising practices; clear information about online business identity, the goods and services on offer and the terms and conditions of the transaction; a transparent confirmation process; a secure payment mechanism; fair and timely and affordable dispute resolution and redress and privacy protection.

102. Therefore the key element in the new model for regulating digital content should be to base it squarely on the principle of the existence of a consumer engaging in a contractual arrangement with someone offering digital content, whether that is to purchase the ownership of or access to the content. In other words this can be a license agreement or a more traditional passing of title relationship.
103. By basing the new model around the existence of contractual relations, with clear counter-parties, the new framework will be as future-proof and as technologically neutral as possible²⁹. That is because it will be based on the behaviour of individuals and not tied to any particular technology and other transient factors.
104. The implication of this is that it is unlikely to be relevant whether a creator is happy to pass title or whether they only want to operate on a licensing basis as most digital content currently does. It is a business model neutral solution too.
105. Unfortunately, the nature of digital content and the wider technological infrastructure means that, whatever the framework put in place for some consumers, it will be difficult to get redress. We consider, however, that the benefits of having a sensible framework in place outweigh the potential problem that in some circumstances it may not work as well as its counterpart frameworks in goods and services.
106. A clear statement of rights and obligations will be adhered to by most businesses, because they want to be law abiding. Indeed most firms will offer remedies not required by law, because they know it makes good business sense to retain a customer rather than have to find new ones. Those who base their operations on cutting corners with their customers need to be dealt with effectively by the regulatory authorities. While enforcement is closely interlinked with the governance framework, it has issues of its own which, as suggested earlier, need to be dealt with.
107. In addition, the Government may want to consider reform in other areas, which impact on the purchase of digital content by consumers. These might include:
 - a. greater access to redress mechanisms for consumers, such as ADR systems³⁰;
 - b. extension of protections similar to s75 of the Consumer Credit Act to other less well protected payment mechanisms used for online (electronic) purchasing;
 - c. the specific applicability to e and m commerce of existing rules on third parties and contractual relations³¹ and scope for refinement where that may be appropriate; and
 - d. reform of the E Commerce Directive 2000³² e.g. so that it is less prescriptive in terms of the formation of contracts.
108. The Law Society does not endorse any of these particular suggestions. We offer them as initial thoughts only as to how the regulatory framework for the purchase of digital content may be further reformed in the future.

²⁹ Professor Chris Reed (in his new book) argues strongly and persuasively that behaviour based and technology neutral models of regulation are the only sustainable ones in a world of rapidly changing technology. Source: Reed, C. (2012). *'Making Laws for Cyberspace'*, pub: OUP.

³⁰ Greater use of ADR, especially in the area of online transactions was trailed in: BIS/ CO (2012). *'Better choices: better deals – consumer powering growth'*, pub: Department for BIS and Cabinet Office, accessed at: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/b/11-749-better-choices-better-deals-consumers-powering-growth.pdf>

³¹ Contract (Rights of Third Parties) Act 1999.

³² Ss 9 – 11 set out requirements in relation to online contract formation. Source: Murray, A (2010). *'Information Technology Law: The law and society'*, pub: OUP: Oxford.

Some have criticised the rules saying they are based too much on one concepts of contract formation, which devices such as Kindle are challenging.

Q67. Do you think the Consumer Rights Directive is sufficient in itself to address the issues relating from lack of clarity of consumer rights in digital content?

109. We do not consider the Consumer Rights Directive (CRD) sufficient in itself to address the issues relating to lack of clarity of consumer rights in digital content.
110. The CRD makes improvements in areas such as pre-contractual information, which are important for clarity and certainty. They will enable the consumer to better understand the terms on which they are purchasing the digital content and what they can expect from their purchase. Therefore the CRD will enhance transparency and reinforce the rule of law and could potentially increase access to justice (at the margins) because of that enhanced transparency.
111. However, in the / merchant – consumer relationship, there are instances where it is only after purchase (*ex post*) that problems come to light. In such circumstances it is legitimate for Government through public policy to look to bring in measures which recognise this reality and try to re-balance (to some extent) the relationship by enabling the consumer some avenues for remedy and redress.

Q68. Do you think that digital content supplied on a tangible medium such as a disk should be covered by the same set of digital content quality rights and remedies as intangible digital content, such as downloads?

112. Ideally, all digital content should be treated identically. This would ensure a clear and simple set of laws, which adhered to the principle that the law should apply uniformly and equally to all instances and activities which are similar. However, the EU currently treats digital content embedded on physical objects such as a CD-Rom or DVD as a good³³. Therefore the ability of the UK Government to treat all digital content identically is not available, if the Government goes through with classifying digital content as *sui generis*.

Q69. Do you think reasonable consumer expectations as to quality would differ between digital content that is transferred to a consumer's device and digital content that is held on a 3rd party server?

Q78. Do you think that these rights to quality are broadly appropriate for digital content?

113. Below we respond to both Q69 and Q78 as they both relate to quality requirements in any new regulatory framework for digital content.
114. There are good grounds for believing that the reasonable consumer may think differently about the quality they expect from digital content. For example, an MP3 is not as good quality as a CD and a small data file such as the former might be expected to be 'bug' free, whereas complex software – such as a computer operating system – is unlikely to be 'bug' free and indeed are regularly updated with 'patches' in order to correct problems which emerge after it has been published for sale.
115. It is important that any measure on quality takes into account the varied expectations that apply to different types of digital content. Further, it is important that the benefits of regular updates of existing software are not undermined by a stringent application of the quality requirements in the law on supply of goods. This kind of complication reinforces the position that digital should be treated as *sui generis* and a strict read across cannot be made from the goods regime.

³³ Article 19 of the CRD sets out that digital content embedded on a physical object such as a DVD should be treated as a good. Source: OJEU (2011). 'Directive 2011/83/EU of the European Union', pub: Official Journal of the European Union: Brussels.

116. The use of the objective (reasonable man) or semi-objective (average consumer) test should help ensure that the standard for quality has some inbuilt flexibility, when it comes to any disputes which reach the courts. In terms of ensuring enough flexibility in the statutory guarantee, the guarantee should be a narrow and flexible requirement, possibly based on the adequacy of the content to serve its purpose. A quality standard based on this flexible standard of it being 'adequate for its purpose' recognises the inherently incomplete nature of some digital content.
117. In relation to content held on a third party server, with a flexible quality standard that recognises some of the inherent uncertainties with the delivery of digital content (along with and sensible requirements on pre-contractual information), a consumer should be able to reasonably expect their content to be delivered to a adequate standard, in the knowledge that sometimes quality will be contingent on a range of factors and therefore it will never be perfect. We note the New Zealand Consumer Guarantees Act has managed to strike this balance³⁴. We are unaware of any major problems caused by the New Zealand law.
118. Who is liable in such relationships should be dictated by the principle of who is in a direct contractual relationship with which counter-party. Any inadequacy in the quality due to the actions of the third party server would be dealt with under the consumer services framework, while problems with the file itself would be dealt with under the digital content framework, because the integrity of the particular content is a matter for the contract the consumer has with the original merchant. This should be identical to the goods regime.

Q72. Do you agree with the principles we have based our digital content proposals on? In particular do you agree that “related services” and “enabling services” could be distinct from digital content and from each other?

119. The Law Society considers the guiding principles outlined in the consultation to be a very useful conceptualisation of the different elements which are relevant for understanding the component parts of the supply chain and wider infrastructure which enables the delivery of digital content. However, we are concerned that the proposed division between 'related services' and 'enabling [pure] services' is not useful when it comes to deciding where legal liability should reside for a breach of contract.
120. Using the fundamental principle of the existence of a contractual relationship between the parties as the starting point gives some order to the often complex and confusing nature of the digital content supply chain. We believe, despite its imperfections³⁵, that the consumer can readily understand the principle that they have recourse to remedy and redress where they engage in contractual relationships.

Q73. Do you agree that the provisions as to passing of limited title work for digital content?

121. We do not consider the idea of the passing of partial title is necessary in order for the Government to achieve its aims in relation to digital content. A set of statutory guarantees legislated to apply to consumer contracts for the supply of digital content to consumers will not require there to be a partial passing of title, in order to be given effect.
122. We believe that such a change could even be counter-productive. It could change the basis on which the dominant model of supply of digital content is made. The potential disincentive effects of this should be considered carefully before this change is taken

³⁴ The Consumer Guarantees Act 1993 sets a standard of 'acceptable quality', which is widely understood to mean that the software need not operate perfectly. The extent to which it operates acceptably is determined by the circumstances. Source: Consumer Guarantees Act 1993, accessed at: <http://www.legislation.govt.nz/act/public/1993/0091/latest/DLM311053.html>

³⁵ The imperfections include: the myriad of contractual relationships and complex supply chain; the difficulty in identifying the cause of the fault e.g. it might be a problems with the original file, or the consumer's cloud services provider or possibly an issue with the consumer's bandwidth/ network provider or an compatibility problem with the consumer's operating system or software and hardware.

forward. In particular, it could negatively impact the willingness of creators/ suppliers to continually update programmes to ensure they run better and that 'bugs' which emerge, are 'patched'.

Q75. Should we remove the 'freedom from minor defects' aspect of quality (s.14(2B)(c) of SOGA) specifically and only for digital content? Should we do so for certain types of digital content, if so which?

123. The Law Society supports the removal of 'freedom from minor defects' from applying to digital content in general. Consistent with our response on the issue of quality, a narrower but flexible standard should be developed. This might be based on the idea that:
- a. the digital content be adequate to fulfil its main function³⁶;
 - b. Suppliers/ merchants/ creators should provide additional pre-contractual information as to what steps they may take to correct any problems (including partial refunds) and set out the types of minor defects a consumer may encounter; and
 - c. an objective (reasonable man) or more likely given the drive for uniformity a semi-objective (average consumer) test for disputes which reach the courts will ensure a degree of flexibility and pragmatism in each case, as to what is realistic in terms of acceptable minor defects and what is not.
124. In addition, it is worth noting that failure to describe potential defects and limitations correctly may fall foul of the Consumer Protection Regulations 2008. In such cases, TSOs should take a robust line and enforce the rules so that a firm message is sent to suppliers of content in the UK, that it is not acceptable to make claims about their content that is not accurate.

Q77. Do you agree that we do not need an express statement on durability in respect of new versions as the European Commission have proposed for CESL?

125. We agree that a statement on durability is not required.

Q79. Do you think these are suitable remedies for cases where sub-standard digital content has been supplied?

Q82. Should we align the approach to deducting for use when calculating refunds for digital content with the policy for goods?

Q83. Would a limit on the number of repairs and/or replacements be useful for digital content consumers and practical for digital content traders?

126. We will respond to Q79, Q82 and Q83 together as there are overlaps between them.
127. In general the Law Society considers an adapted version of the remedies regime for goods to be the most appropriate for digital content. Repair and replacement are likely to be the most frequently used remedy as it is relatively straight forward to replace an item of digital content. The marginal cost of an additional item is very nearly zero. Replacement is also the remedy least open to fraud by dishonest consumers.
128. However, some of the same arguments in relation to goods apply to digital content. It is sensible to place limits on the number of times a consumer can get a repair or a replacement to prevent the consumer being trapped in a circle of repair or replacement. It is likely to be a good idea to allow a supplier to offer more repairs and replacements that under the goods regime, in order to create a disincentive to

³⁶ As mentioned previously (in footnote 36) the New Zealand consumer law requires that the content is of 'acceptable quality'.

those who may be tempted to try and de-fraud a supplier. However, the time limits placed on repairs and replacements should be harmonised with the goods regime. This will help minimise the complexity, which inevitably arises out of having two different regimes for goods and digital content and different remedies and redress available within each regime.

129. In the interests of further minimising the complexity of different remedy and redress regimes it is sensible to align the rules around deductions for digital and goods. This is a complicated area in relation to goods. Therefore uniformity across the two regimes in relation to deductions for usage (although not perfect) will minimise complexity, by at least ensuring this aspect of the two regimes are sufficiently similar.

Q85. What issues do you see with how option 1, treating the services surrounding digital content as services, would work in practice?

130. In evaluating option 1 in the consultation document the Law Society believe that it is feasible to treat services surrounding digital content within a new consumer services framework. By going with option 1 the new framework will adhere to key principles, which have underpinned English law in general and contract law in particular for many, many decades i.e. liability resides with those who have agreed to partake in the relevant contractual relationship.

Q86. Do you think there should be the equivalent of a short term right to reject for digital content?

131. It is difficult to see the short-term right to reject working effectively in relation to digital content. The availability of remedies that involve more than repair or replace opens up the door to attempts to dishonestly game the system. The short term right to reject would not be subject to a number of replace and repair attempts first, which create a disincentive effect for those who might think about trying to defraud a merchant.

Q89. Do you think the provider of a related service should have responsibility for ensuring that the digital content is of a satisfactory quality once the related service has been performed? Please explain why.

132. Liability should be based on the contractual relationship. There should only be liability where there is a clear counter-party and they can be held accountable if and when something goes wrong with the content or service. The provider of related services should be responsible for the service they contract with a consumer to provide. They should not be liable for content for which they have only been the conduit.
133. If the merchant/ supplier is supplying the content and the related services it makes sense to have the liability focused on that one business in these circumstances e.g. if the content and related services come as a bundle or package, or you are accessing mobile phone apps from the same company that also provides your mobile phone network. However, where the related services provider and the content provider are different, then liability for each must be separate, with the services standards applying to the related services provider and the digital content statutory framework applying to the provider of the content.
134. In the longer run, after the current proposals have had time to bed-in, and if they fail to produce the expected results in terms of greater access to remedies for consumers, then BIS may want to explore ideas in relation to:

- a. joint-liability; and
- b. the third-party contract rules in situations of complex consumer supply chains.

135. Radical changes such as might be implied by these suggestions should not be contemplated until the new reforms have had a chance to prove themselves.

Q91. Do you agree that internet service provision should remain completely outside whatever new consumer protection mechanism is set up for consumers of digital content and “related services”?

136. The contract a consumer has with their network provider (e.g. ISP) is often separate to their contract with a merchant or supplier to access digital content. In such circumstances, and consistent with the guiding principle of delineating liability and accountability based on clear contractual relationships, the ISP should not be responsible for poor quality digital content, unless that poor quality is the fault of the network provider e.g. there are network / transmission issues. In such circumstances the consumer should take action against their network provider for a breach of their service contract.

137. In addition, under the rules of general contract law the consumer may be able to get additional damages for consequential loss³⁷, if they have suffered indirect financial losses on a digital purchase due to the failure of the network provider.

Q94. Which of these remedies do you think consumers would be most likely to find satisfactory?

138. Absent the complete breakdown of the relationship where the consumer may want to terminate all future relations with a particular provider, it is likely the consumer will want their digital content and related services repaired or replaced so they can go on using the service/ accessing the content.

Q95. What kind of evidence could a consumer provide to show that the digital content did not comply with quality standards and that the fault was inherent? What evidence would digital content traders consider as sufficient to show that they would need to provide a remedy?

Q96. Which option do you prefer? If you could mix and match the options, is there a preferable combination of proposals, especially those relating to the right to reject and the treatment of “related services”?

139. The first piece of evidence a consumer would have to show to a supplier/ merchant is proof of purchase. However, we recognise that when the purchase is remote and digital it can be difficult for the consumer to prove there is a problem with what they have purchased. This compares unfavourably to a physical good, which can be tested by a merchant for the fault. Therefore trust will play a significant role in cases of fault for digital content.

140. Further, a domestic system of consumer ADR, acting as a ‘back-stop’ in digital content purchase disputes would give an accessible mechanism which might offer an opportunity for discovering whether a purchase was faulty or not. If both parties knew that ultimately there was a system in place that could decide on their dispute this would likely encourage honest claims and dissuade those few individuals and businesses who might try their hand at dishonesty to avoid the temptation.

³⁷ In other words get damages for a loss that would be reasonably foreseeable to someone possessed of special facts. Source: Chen-Wishart, M (2011). ‘Contract Law: 3rd Edition’, pub: OUP.

141. There may be a number of other measures that could be used, which between them may offer the consumer the opportunity to prove a fault in at least some circumstances. These include:
- a. the consumer taking a screen shot of any fault or error messages which come up on screen when trying to access/ use a particular piece of content;
 - b. return an MP3 file if it resides in their cloud server or on their hard drive (although it would be difficult to know whether it was a copy or the original);
 - c. DRM may develop further allowing rights owners/ merchants to know when content (which has been sold/ licensed) has been accessed and copied or to take remedial action remotely in relation to downloaded files e.g. already in relation to e-books retailers retain the right to delete books from the e-reader of the consumer remotely;
 - d. the consumer may also allow a seller to access their computer remotely so they can investigate a problem;
 - e. a new market may develop, whereby systems are created which allow sellers or consumers to identify faults in downloaded files or enable consumers to prove or merchants/ rights owners to know whether a consumer has deleted their faulty file.
142. It is a legitimate role for the law to help shape markets in a particular way. Indeed law has long had a role in catalysing new markets with entrepreneurs taking advantage of changes in the legal framework in order to develop new offerings for customers. Based on this long established reality a requirement could be written into the law to encourage 'reasonable efforts' to be made by consumers and merchants/ suppliers to identify proof of fault or no fault. By writing this requirement into the law it might spur content suppliers into developing measures to help them identify faults remotely or offer services to evaluate faults (when a consumer claims to be experiencing one).
143. The Law Society considers that the regulatory model for remedies and redress in relation to digital content should offer:
- a. replacement and repair as the first tier remedies;
 - b. a numerical limit higher for repair attempts and replacements than for goods.
 - c. a cumulative time limit - within which the replacements and repairs have to be undertaken. This should be the same or something similar as for physical goods.
144. The supplier or merchant should be liable if one of the statutory standards is breached. For example, if a song is purchased from an online store then the store should be liable, akin to the liability with goods. By following the contract the liability also 'follows the money'. Further it means that digital content will adhere to the well known and instinctively attractive idea that the merchant should be responsible to the consumer for what they sell.
145. In some cases the 'related service' is likely to be part of the same contract as the content e.g. a network provider who also provides content such as a broadband provider who also supplies content. However, sometimes there is a very distinct contractual relationship. Where a related service is separately provided by a different/ distinct provider/ supplier then the framework for general services should apply. We do not consider there needs to be a special regime for related services.

Q98. Do you think that consumers should have the right to digital content meeting a certain quality even if they do not pay money for it?

Q99 Do you think that consumers should only have remedies if digital content has been paid for with money?

- **Or should the rights apply but we expect consumer expectations to be lower because it was free?**
- **Or should we provide for limited remedies if the digital content was provided for free?**

146. The Law Society considers that a consumer should be entitled to the same protections if they enter a contractual relationship with a provider/ rights owner/ merchant. Outside of a contractual relationship it is difficult to see why a consumer should be protected by which should only apply to particular and clearly established set of economic relations.
147. Ensuring that statutory guarantees remain within the contractual relationship will ensure these new developments are consistent with existing consumer contract law principles and do not risk developing beyond the confines of that well established relational model and risk becoming a set of standards outside of such economic relationships.
148. A contractual relationship requires three elements to be present: an offer, an acceptance of that offer and consideration³⁸ (which can be 'token'³⁹). Therefore where a relationship between a consumer and a supplier of goods, services or digital content contains these elements a contractual relationship is present. In such circumstances the proposed protections we have discussed in this response should apply.

Q100 Should our proposals apply to Open Source software that is offered from a business to a consumer?

149. In relation to open source software, where there is a consumer contractual relationship we would support the application of the proposed new regulatory framework. However, if there is not a contractual consumer relationship we do not believe it is appropriate to make available the proposed remedies and redress.

³⁸ Chen-Wishart, M (2011). '*Contract Law: 3rd Edition*', pub: OUP.

³⁹ Chen-Wishart, M (2011). '*Contract Law: 3rd Edition*', pub: OUP.