

LAW SOCIETY SUBMISSION



SCHEME OF A PROPOSED CONSUMER RIGHTS BILL

DEPARTMENT OF JOBS, ENTERPRISE & INNOVATION

SEPTEMBER 2015

1. Background

The Law Society of Ireland (the 'Law Society') welcomes the opportunity to comment on the Scheme of a proposed Consumer Rights Bill ('the Scheme'). The Scheme aims to consolidate in a single modernised enactment, provisions currently spread over a number of different pieces of primary and secondary legislation. It also seeks to address significant gaps in current legislation and notably in relation to remedies available to consumers and contracts for the provision of digital content.

The Law Society is the representative organisation for the solicitors' profession in the Republic of Ireland. Our members provide legal advice in respect of business law, contract and technology matters, including advising those who create, develop, supply, distribute, consume and otherwise exploit digital content.

We have considered the Scheme published by the Department of Jobs, Enterprise and Innovation and appreciate that this particular legislative initiative is at a very early stage. We welcome that the Scheme has been published as part of a very useful engagement with stakeholders to elicit responses to matters of principle.

The Law Society of Ireland looks forward to providing further commentary once the Bill is published. In the interim, we provide the following observations in relation to certain aspects of the Scheme.

2. Comments on General Features

2.1. Modernisation and Reform

The Law Society welcomes the consolidation and reform of the law in this area into a single consistent and coherent instrument. The current state of the law with overlapping, but inconsistent, legislation, deriving separately from domestic law and European law, is very unsatisfactory.

2.2. Impact on Professional Services.

The requirement of fitness for purpose and absolute prohibition on the limitation of liability, in respect of the implied terms, in the case of Contracts for the Supply of Services should be reconsidered. These changes would be a radical alteration to the basis upon which solicitors (and other professionals) provide their services.

The price of a service should take into account the risk of providing it and the cost of insuring against that risk. It is, accordingly, commonplace that limitations are set out in the terms of engagement of solicitors and others. In the case of solicitors, such limitations are expressly permitted by existing law.

The availability and pricing of professional services in the State is likely to be adversely affected, if the providers of those services are exposed to unlimited risk.

We note that in the UK, where their consumer law has been recently reformed, a fitness for purpose requirement has not been included in contracts for the supply of services. We deal with these matters in paragraphs 3.11 and 3.12 below.

2.3. Incorporation of European Union (Consumer Information Cancellation and Other Rights) Regulations 2013

The Law Society is of the view that the opportunity should be seized to incorporate these regulations (amended as proposed) into the proposed Consumer Rights Bill. It would be a missed opportunity if the law in this area were not to be consolidated.

2.4. Non Business to Consumer Transactions ('B2C Transactions')

The Consumer Rights Bill applies only to B2C Transactions. The general law relating to sales of goods and supplies of services also requires urgent attention and reform. The Law Society accordingly welcomes the Department's confirmation of its intention to introduce an updated and reformed Sale of Goods and Supply of Services Bill after the enactment of the Consumer Rights Bill .

The general law will continue to be based on the Sale of Goods Act 1893 ('the 1893 Act') and Sale of Goods and Supply of Services Act 1980 ('the 1980 Act'). It would appear that only Section 4 of the 1893 Act is being repealed. Many of the other important provisions of the 1893 Act will continue to apply other than to transactions within the scope of the proposed new legislation. Accordingly, until new general legislation is introduced, the pattern of our law will, in some respects, become even more complicated after the enactment of the Scheme.

2.5. Developments at EU Level

The Department will be aware that the Law Society has been an active participant in the efforts at EU level to develop a coherent statement of contract law that might be used as a basis of reform and advancement of the consumer acquis. The Law Society notes that the Department has borne in mind these developments and incorporated them as appropriate.

It would be sensible to keep abreast of possible legislative initiatives at EU level which would impact upon the subject matter of the Scheme, and note in particular the "*Public consultation on contract rules for online purchases of digital content and tangible goods*" launched by the EU Commission on 9 March 2015.

2.6. Contracts for the Provision of Digital Content

The digital arena is becoming more and more economically important. The Law Society appreciates that there is a benefit to clarifying the rights and remedies for consumers in legislation specifically tailored to deal with digital content.

3. Comments on Specific Issues

3.1. Part 1 – Preliminary Matters – Interpretation

The existing law is bedevilled with inconsistency in relation to frequently used words and phrases. Even the basic definition of ‘consumer’ differs considerably between the European *acquis* and domestic law. The co-existence of multiple definitions of central concepts in the law is undesirable and the Law Society supports of a set of single definitions.

The Law Society notes the new concept of a ‘contract for the supply of goods’. The current protections which are confined to transactions for the sale of goods, contracts of hire and contracts of hire purchase do not embrace the wide range of economically-significant transactions that are becoming increasingly important, such as contracts for exchange and loyalty schemes. The Law Society agrees that protection should be extended to this wider range of activity.

The Law Society also welcomes recognition in the Scheme that consumers now frequently discharge payment obligations indirectly and that protections should therefore embrace transactions paid for in that fashion. The Law Society accordingly welcomes head 2(3).

3.2. Part 1 - Repeal of Section 4 of the Sale of Goods Act 1893

The provisions of the 1893 Act which require a contract of sale for £10 and upwards to be in writing, has long been ignored. It brings the law into disrepute, if legislation that in practice is ignored continues to stand on the statute book. This repeal is welcomed by the Law Society as pragmatic and helpful.

3.3. Part 1 - Head 8 - Burden of Proof

Head 8 repeats the existing law (as it applies to the sale of goods) that any lack of conformity which becomes apparent within six months of the date of the delivery of the goods shall, unless the contrary is proved, be presumed to have existed at the time of delivery. The Scheme proposes the extension of this provision to digital content and services contracts. In the Law Society’s view, there seems no reason not to extend such provisions in this fashion as a number of distinct considerations apply to the digital sphere, for example the lack of control over final delivery on the part of digital content suppliers, the role of other intermediaries in relation to support and maintenance of data and the possibility of degradation. See Section 3.9 for further consideration of this point.

3.4. Part 2 – Chapter 1 - Head 15 – Right of Recipient of a Gift

The Department points out that under our existing law a person who receives a gift of goods that proves to be faulty may not be in a position to take action to enforce the contract against the seller by reason of the doctrine of privity of contract. Head 15, accordingly, proposes that where a consumer acquires goods from a trader and the consumer transfers ownership of the goods to another person by gift, that other person may exercise any rights or remedies under the

legislation as if he or she were the consumer. Those rights are subject to any defence available to the trader against the consumer.

The Law Society recognises the issue sought to be addressed. However, we are of the view that that right should only be exercisable if the other person is also a consumer. As currently drafted, it would appear that, provided that the initial purchaser is a consumer, the recipient need not be a consumer. It should also be made clear that the other person should have no greater remedy than that of the original acquirer.

Head 15 only applies to goods. The Department invites views as to whether a similar rule should apply to digital content and services. As to digital content, the Law Society notes the ability to make multiple copies of digital content, the possibility of a gift of digital content being made to more than one person and the legitimate use of digital rights management (DRM) methods by digital content providers to track digital content. As to services, such contracts are frequently personal to the individuals concerned.

For these reasons, the Law Society is of the view that the argument for the extension of the rights to a recipient of a gift of digital content/services is not as clear cut as in the other case, and merits further consideration.

3.5. Part 2 - Chapter 2 – Consumer Rights and Contracts for Supply of Goods

The Law Society notes with approval that the Scheme moves away from the distinction between conditions and warranties.

3.6. Part 2 – Chapter 2 - Head 24 - Safety of Motor Vehicles

This restates the key provisions of section 13 of the 1980 Act. It implies a term into a contract for the supply of a motor vehicle that it is free from any defect that would render it a danger to the public. Section 13(3) provided for the disapplication of the implied term where it is agreed that the vehicle is not intended for use in the condition in which it is sold, where a document to this effect is signed by the parties and given to the buyer prior to or at delivery and where that agreement is fair and reasonable. No similar exception is produced in Head 24.

It is not clear to the Law Society why such an exception to the general rule has not been reproduced. It is noted that the report of the Sales Law Review Group does not address this issue or recommend the omission of that exception.

3.7. Part 2 - Chapter 3 - Consumer Remedies

The Scheme replaces the current confusion of two parallel systems of remedies with a single regime. The consumer has the right in the first instance to a choice of repair, replacement or refund in the case of non-conformity of the goods to the contract. However the Scheme requires that the right to end the contract and receive a refund would expire 30 days after the goods have been delivered (or installed, if required under the contract).

The Law Society agrees with the Department that the current rules are, by comparison, complex and not capable of ready understanding. The arrangements proposed by the Scheme undoubtedly have the benefits of clarity and certainty.

3.8. Part 2 – Chapter 3 - Head 35 – Passing of Risk in Sales Contracts

Under the existing law, the passing of risk is not based on delivery or possession, but rather on the passing of the property in the goods concerned.

Where written terms are entered into between a trader and consumer, under the current law, it is very common that the transfer of risk is linked to delivery. Indeed, one could argue that it would be the assumption of the non-lawyer that risk would pass with possession of the goods.

Head 35 will bring about a welcome change in the law that risk will now pass with the physical possession of the goods.

The implementation of this proposal, however, would have the effect of there being a different set of rules relating to the transfer of risk in the case of consumer and commercial transactions.

The Law Society supports the view of the Sales Law Review Group that this should also be the default rule for commercial contracts of sale (Recommendation 6.56).

3.9. Part 2 - Chapter 4 – Guarantees

The Scheme substantially reproduces the existing law in relation to consumer guarantees in respect of sales contracts.

The Department is considering the option of extending these provisions to digital content and services. The Law Society is of the view that this warrants careful thought. Because certain types of digital content degrade and/or require ongoing support (thus the fact that a services or ongoing relationship regarding updates can apply) guarantee-style language in digital content/services contracts tends to be carefully conditioned and often, reasonably, qualified.

3.10. Part 3 – Contracts for Supply of Digital Content

Head 2 contains a definition of "digital content" which is a necessary element required to facilitate interpretation of the operative sections. However defining "digital content" as data in a digital form, while excluding from the definition "services supplied by electronic means" may not have the intended effect set out the Explanatory Note attaching to Head 41. That note states that "*Subhead (2) clarifies that this Part does not apply to a service supplied by a trader, such as an Internet or mobile phone service provision, that merely enables consumers to access digital content. Services of this kind are subject instead to Part 4 of this Scheme.*"

Giving the words contained in the definition of "digital content" their usual meaning, the Scheme's current definition might have the impact of excluding

from the definition of "digital content" delivered over the internet or dedicated content subscription channels, such as a service that allows users to download or access music files for consumption. We suspect this is not the intended effect of the definition.

Part of the current frustration with our current laws applicable to the digital world is the difference in treatment by the law of the same digital content (e.g. software) delivered in different media. The consumer receives the same content (i.e. code with specific functionality to use on a device) but the method of delivery currently, gives the consumer a different set of rights. See the discussion of this issue in the 2011 Report on the Legislation Governing the Sale of Goods and Supply of Services of the Sales Law Review Group. This Bill is an ideal opportunity to eliminate the anomaly.

We note the principle encapsulated by Head 42 of the Scheme, implying a term into each digital content contract that the trader has the right to supply the digital content to the consumer *"at the time when it is to be supplied"* (our emphasis). It would be better to imply the term at the time of actual supply, and that would be consistent with the treatment of other implied terms applicable to supply of digital content (e.g. Head 43). In terms of such an implied right any legislation ought to make clear that (because of the nature of intellectual property rights intrinsic to digital content) the right to supply may be qualified, and indeed subject to the consumer accepting limitations regarding its use. For example, the right to supply held by the trader may itself be limited by licence conditions.

In Head 43(2)(b) we suggest that the requirements referred to should be to representations or claims made in relation to the digital content. Head 43(3) should cater for delivery of physical media holding digital content which the consumer can access, and any other method or media pursuant to which the consumer can access the digital content at a time of his or her choosing.

Digital content is prone to degrade, and so the implied term in Head 44 should relate to the "digital content supplied on the date of supply" matching its description as "given to the consumer". We feel that this would be consistent with Head 8 Burden of Proof.

Head 44 should require the trader to specify in the contract the period for which the trader gives the assurance regarding conformity with description. Given the nature of many types of digital content, it would be unreasonable for this implied term to survive indefinitely. Head 44(3) does not go far enough to deal with this point as support can be reasonably needed to maintain content whether or not updated content is made available. Head 44(3) could also be expanded to note that there is no failure of digital content matching its description where the sole reason is that it is no longer compatible with later standards, operating software, devices and or services required to access it.

Head 47(2) (c) covers statements made by a producer. For clarity, a specific definition of "digital content producer" should be introduced, as references to "manufacturer" and "importer" do not align adequately with the concept of digital content and it is important that relevant statements referred to in this Head be identified easily.

As digital content is often simply made available to download or access to a consumer, the concept of supply in Head 50(1) should capture such accessibility methods.

We note the Explanatory Notes attaching to Heads 51 and 54. However given the rights of digital content traders, the fact that many will be licensors (not owners) and the problems that traders and licensors face with unauthorised copying of digital content, we think that it is important to require consumers to return digital content (e.g. return a disk) or to confirm deletion/destruction and/or non-use in certain circumstances. That digital content is more difficult to manage than physical goods is not a good reason to ignore the digital content in the possession of the consumer. A trader may find itself in breach of a licence to provide content to consumers subject to certain terms, should the consumers hold the digital content without any binding terms and conditions applicable to it. Generally this entire chapter should be considered with that point in mind.

In Head 55(2),(3) and (5) it seems reasonable that the remedy chosen be at the trader's discretion and that the possibility of the provision of a replacement device as an alternative be available. Although the Explanatory Note states that the amounts available to a consumer are limited to those described in Head 55(5) we are not confident that the wording in that Head achieves that concept.

The inability of traders to manage liability by introducing any liability caps and/or exclusions which are fair or reasonable in relation to liability for any of these heads, as contemplated by Head 56, seems to us unduly onerous and one-sided. While not a strictly legal comment, this approach may well dis-incentivise entities from trading with consumers in Ireland and may make it difficult, prohibitively expensive or impossible for traders with such contracts to get insurance cover for such uncapped, unqualified risks.

The explanatory note with this Head seems to conflate the concept of the nature and level of liability, with the concept of recognition and respect of consumer rights. In our view a trader who accepts a reasonable, fair but capped, level of liability in a contract could still be considered to be acting in a manner consistent with a consumer's rights. What a reasonable and fair level of liability might be, could be determined by factors that are the same or similar to those in Head 47(2).

3.11. Part 4 – Chapter 1 - Head 60 – Service to be fit for a particular purpose

Head 60 (Service to be fit for particular purpose) is a major change. The existing law requires a supplier of services to exercise due care, skill and diligence. There is currently no statutorily implied fitness for purpose standard.

The Sales Law Review Group noted (at paragraph 14.34) a distinction between certain professional services and other services that are relatively standardised in ways that are akin to goods, for example, dry-cleaning, fast food outlets, telecommunications and cable services, many transport and accommodation services and some software.

The introduction of a fitness for purpose standard (albeit in the modified form proposed by the Scheme) is a significant development in respect of contracts for professional services.

The Scheme proposes that there would be an implied term that the service will be:

- a) reasonably fit for any particular purpose that the consumer makes known expressly or by implication to the trader ...as the particular purpose for which the service is required and
- b) be of such a nature and quality that it can reasonably be expected to achieve any result that the consumer makes known expressly or by implication to the trader as the result that the consumer wishes the service to achieve.

This approach (based on legislation in New Zealand), was recommended by the Sales Law Review Group (paragraph 14.37). The group recognised that a reform along those lines would represent a significant departure from the present approach to the regulation of services contracts.

It is notable that the recent consumer rights legislation in the United Kingdom does not adopt an outcome-based standard for services, but continues to rely upon a duty of care and skill. The Law Society is not aware of cases where the absence of an implied term as proposed has caused a difficulty. In appropriate cases, the courts have implied from the facts fitness for purpose type obligations, without the need for a statutory right.

The Law Society can see the argument for such an implied term in the case of standardised services that are akin to goods. The Law Society is concerned, however, that the extension of such an implied term to the very wide range of services (including professional services, construction services and health care services) could give rise to unanticipated consequences in circumstances, where it would not appear that the current state of the law gives rise to any special difficulties.

3.12. Part 4 – Chapter 2 - Head 70 – Exclusion or Limitation of Liability of Trader

Head 70 would make a very significant change in relation to the limitation of liability of the provider of a service.

Section 40 of the 1980 Act allows the statutorily implied terms to be negated or varied by an express term of the contract where the recipient of the service deals with the consumer and where the express term is fair and reasonable and is being brought to the consumer's attention.

Head 70 will provide that a term of a services contract cannot exclude or restrict the trader's liability in respect of the statutory implied terms. Sub-section 2 makes it clear that this would include limiting a right or remedy in respect of the liability.

The enactment of this provision would require a significant change in commercial

practice. Providers of professional services frequently agree limits on their liability. It is common for such providers to set a limit by reference to the value of the fees to be paid or some other measure.

In the context of solicitors such an arrangement is specifically facilitated by the Civil Law (Miscellaneous Provisions) Act 2008 which permits a solicitor to limit his liability by contract provided that the amount must not be less than a minimum level of professional indemnity insurance required by solicitors (currently €1,500,000).

The level of exposure of a professional is commonly related to the insurance cover they purchase and, thus, is reflected in the fees that are charged. Contracts for the provision of services to consumers may include transactions of enormous value and risk.

The absolute bar on limitation of liability set out in Head 70 is unduly inflexible and should permit of limitations, provided they are fair and reasonable.

4. Conclusion

The Law Society welcomes the Scheme. Were many of the concepts within the Scheme implemented, it would represent a significant improvement from the point of view of coherence and clarity. We hope the Department will find the above comments constructive and helpful. The Law Society would be happy to engage further with the Department, if required.

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