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Building, Resources and Markets  
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## Submission: Insurance Contracts Law Review options paper

### Part 1 – About Fidelity Life

Fidelity Life is the largest Kiwi-owned and operated life insurer and the ANZIIF 2017 and 2018 New Zealand Life Insurance Company of the Year. We support more than 300,000 customers and their families and in 2018 we paid out \$106.9 million in claims.

We distribute our products through a network of 2,700 independent financial advisers, as well as through strategic alliance partners, and employ around 250 staff nationwide.

At Fidelity Life we take conduct and culture seriously. We want consumers to have confidence and trust in our industry so that more Kiwis can get the benefits of independent advice and insurance protection. We encourage all our staff to behave in a way that seeks to achieve good customer outcomes.

The life insurance industry is facing significant regulatory, technology and consumer change. Overall, we support the reviews of financial institution conduct and of insurance contract law. The output of the reviews should be quality and well considered regulations that provide long term certainty and ensure fair, efficient and transparent outcomes for both the industry and consumers. The reviews should balance industry and consumer expectations, with the goal of having a profitable, sustainable insurance sector that delivers for New Zealanders in their times of need.

We believe access to independent financial advice is important because it enables consumers to make informed decisions about suitable insurance protection. Alongside New Zealand's network of independent financial advisers, we're committed to reducing under-insurance while protecting our customers.

Advisers play a vital role in ensuring good customer outcomes. They look after customers for many years, ensuring they have adequate insurance protection as their circumstances change over time, helping them at claims time, and improving financial literacy.

Fidelity Life is committed to a model where customers' interests come first and we know there's always more that can be done. We're here for the long term and focussed on a sustainable and successful future, with the customer at the centre of everything we do.

## **Part 2- Fidelity Life's General Feedback**

### **We support modernisation**

Fidelity Life supports the modernisation of insurance legislation, as advised in its submission in July 2018 responding to the Issues Paper – Review of Insurance Contract Law (**prior submission**).

Over 20 years ago the Law Commission identified areas of insurance law requiring change. The most notable of these was the law of non-disclosure, which in New Zealand remains primarily based on the common law. We note a major exception to this relates to "life policies" as defined in the Insurance Law Reform Act 1977 where the position is altered so that the right to avoid by reason of misstatement is limited to policies that have been in force for less than three years unless the misstatement was fraudulent.

Fidelity Life has long recognised the potential for a strict application of the common law position to have disproportionate consequences and unjustified uncertainty. This is contrary to the purpose of our organisation – giving New Zealanders certainty to enjoy a more rewarding life.

Due to this, Fidelity Life has for a long period helped customers to provide us with complete and accurate information through asking a range of questions which are specifically designed to prompt customers. Our application forms also explain the need for disclosure and what the consequences can be where this doesn't occur.

Fidelity Life seeks to treat all our customers fairly, in situations where there has been a material non-disclosure, we aim for a proportionate response. The fact that the current law doesn't provide for a proportional response means we have a more complicated process when working to achieve a fair outcome for both parties.

Fidelity Life strongly supports the consolidation of all legislation relating to insurance law into a single act. This will make it easier for consumers, intermediaries and insurers to understand their duties and rights.

### **Extensive change requires proper consideration**

We also reiterate our prior submission noting the need for long-term certainty for all the participants in the insurance market. Many of the proposed changes would bring about fundamental change, such as changes to the duty of disclosure - the basis on which insurance contracts are entered - and this will have a significant impact.

It's important the bill is drafted after full consideration of all the implications of the changes - without this there's an increased risk of further amendment. Fidelity Life submits the best way of mitigating against unintended consequences and issues which have not been considered is an exposure draft of the bill. This would provide all insurance market participants the opportunity for full consideration of the additional issues and feedback.

## **Recognition of other changes**

As the Ministry of Business, Innovation and Employment will be aware there is other significant legislative change affecting insurance. The introduction of Financial Service Legislation Amendment Act 2019 (**FSLAA**) broadens the duties that apply to financial advice providers when giving financial advice. The proposed conduct of financial institutions bill (**COFI**) looks to introduce new duties for insurers and other financial institutions.

It's important these legislative changes are recognised in any reform seeking to provide greater consumer protection as both the FSLAA duties and any duties introduced by COFI will bring increased protection for consumers. If there were duties and obligations introduced as part of insurance contract reform which were in any way inconsistent with the duties in FSLAA or COFI, this would cause confusion and uncertainty.

The life insurance industry itself has also recently formally implemented protection of consumer interests with the Financial Services Council's Code of Conduct which came into effect on 1 January 2019.

## **Transition considerations**

Fidelity Life highlights the need for a transition period which reflects the magnitude of change. Implementation of the changes will require process and documentation updates and related training for insurers internally, as well as extensive communications with intermediaries and customers.

There needs to be consideration of the nature of life insurance contracts, which are not annual contracts and go for many years. Unlike general insurance, most life insurance contracts don't give insurers the ability to offer renewal on different terms each year.

The changes made by the legislation should only apply to contracts entered after the commencement date. If the changes were to be applied retrospectively to existing contracts, this would undermine the agreement of the parties.

Fidelity Life submits that if there is a desire to alter the law in respect of existing contracts there should be:

- (i) consideration of whether there is any way changes can be made to an existing contract without undermining the agreement that the parties reached;
- (ii) specific provisions detailing which of the changes would apply to existing contracts; and
- (iii) provisions facilitating any required change to a contract (noting there's unlikely to be any contractual right to make such a change).

## **Part 3 - Fidelity Life's answers to the questions in the Options Paper**

### **Q 1. What is your feedback regarding the objectives for the review?**

Fidelity Life supports the changes made to objectives 1 and 2, particularly as they recognise insurance contracts involve parties other than just the insurer and insured. Intermediaries play a valuable role in working with both these parties and this should be reflected in the review.

We're also supportive of the new objective 3. New Zealand's small size has a significant impact on insurers with our small potential customer base restricting the ability to spread compliance costs and risks. We suggest the cumulative effect of the changes proposed be given careful consideration in determining timings and transition.

In respect of objective 4, Fidelity Life agrees with the recognition and protection of consumer interests. However, in addition to the application of general consumer protections such as the Fair Trading Act 1986 and Consumer Guarantees Act 1993, we note the FSLA and the COFI already seek to provide specific protection in the financial services area.

Further duplication of duties related to consumer protection risks the potential for conflicting duties and confusion as to which duty applies in what circumstance. Confusion could arise from even minor inconsistencies.

### **Q 2. What is your feedback in relation to the options for disclosure by consumers? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?**

As explained above Fidelity Life agrees there's a need to modernise the law relating to disclosure. The current law does not reflect what occurs in the industry - insurers advise

customers of the need to provide information and ask questions to elicit information. Nor does the current law align with our purpose of providing certainty to our customers.

Fidelity Life has reviewed the three options set out in the options paper. We do not support option 3. If life insurers are expected to access all medical records at an underwriting stage, it would increase costs which would be passed to the consumer.

This would also significantly extend the application period. It can take several weeks to get medical records from medical providers. Requesting medical records for every applicant would also place an additional burden on medical providers who are already over-stretched. As noted in our prior submission from July 2018 there are also privacy considerations with this approach.

While we support a change in the duty of disclosure, we question whether the complete abolition of the duty proposed by Option 1, which introduces a limited duty to take reasonable care not to make a misrepresentation, is the appropriate approach.

We're concerned a duty limiting the insured's obligations to take reasonable care not to misrepresent is not reflective of the duty of utmost good faith which is fundamental to insurance contracts. It's important this remains, as it reflects the special nature of insurance contracts where the parties have greater obligations to one another than in standard contracts.

Fidelity Life believes if an insurer has made it known to consumers that certain information is relevant, through its questions or statements that there should be a duty to disclose the information, rather than a duty which is restricted to taking reasonable care to not misrepresent. Fidelity Life therefore prefers option 2 over option 1.

The options paper notes as a cost for option 2 that there may be some uncertainty as to what a reasonable person would know to be relevant. However, this could easily be resolved through insurers providing details or examples of what information is relevant to their consideration. This would result in both insurers and consumers needing to share the information that is not known to the other, with insurers needing to provide consumers with what types of information that are relevant and consumers having to provide full details for those areas. This could be achieved by adding to the duty in option 2 "in determining what the reasonable person would know to be relevant, the information provided and questions of the insurer should be considered".

If it's determined the duty of disclosure should be entirely abolished, we suggest the replacement duty be rephrased so that it is not expressed as a duty not to do something. A duty not make a misrepresentation makes it harder for consumers to understand what they need to do and for insurers to explain to consumers what they need to do. For example, it could be to take reasonable care to ensure that the answers and information provided are a fair representation.

**Q 3. Should insurers be required to warn consumers of the duty to disclose? Why/why not? Should insurers be required to warn all insureds of the duty to disclose, including businesses?**

Fidelity Life strongly agrees that insurers should warn consumers of their duties because this helps to achieve the certainty that is important to both parties. We currently provide information on the duty of disclosure in our applications and other policy documentation. We don't think there's any reason for not also providing this information to businesses.

We think any legislative requirement should be technology neutral and allow differing ways of communicating about the duty.

**Q 4. Should insurers have to tell consumers what third party information they will access, when they will access it and if they will use it to underwrite the policy?**

Insurers should comply with the provisions of the Privacy Act 1993 with any access to third party information. Fidelity Life is concerned that the design option proposed in paragraph 40 of the options paper could cause confusion and reduce certainty for both consumers and insurers.

Consumers are likely to have relevant medical information with numerous medical providers but unlikely to have an exact recollection of which medical provider has what information. An insurer's advice that they have contacted the consumer's GP for their file may lead a consumer to think the insurer has all necessary medical information. But the reality is information relating to their hip problems, for example, is held by another provider such as a physiotherapist.

**Q 5. What is your feedback on the options in relation to disclosure by businesses? In particular: Should businesses have different disclosure obligations to consumers? Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?**

Fidelity Life believes it would be clearer if there was a single duty of disclosure regardless of the type of insurance contract or the category of insured. If there were differing duties based upon the category of insured or type of insurance this increases the propensity for confusion and uncertainty.

**Q 6. If we have a separate duty of disclosure for businesses, should small businesses have the same duty as consumers? Why/why not? If so, how should small businesses be defined?**

As noted in question five, Fidelity Life believes there should be a consistent duty for both consumers and businesses to reduce confusion and increase certainty. If there was a separate duty of disclosure for businesses, with small business having the same duty as consumers rather than other businesses, then there must be a clear demarcation between what is a small business and what is not. New Zealand law already provides several demarcations to identify small businesses. Fidelity Life submits the most appropriate demarcation is that applies to financial service provider dispute resolutions schemes, where a business which has 19 or fewer employees is treated the same as a consumer.

**Q 7. If a duty of fair presentation of risk is adopted, should businesses be allowed to contract out of the duty? What are the costs and benefits of allowing businesses to do so? If businesses are allowed to contract out, should the duty apply to all businesses?**

Fidelity Life's focus is ensuring certainty for both parties to the contract and is concerned that allowing contracting out to a different duty may reduce certainty.

**Q 8. What is your feedback in relation the disclosure remedy options? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

Fidelity Life supports a proportional remedy to whichever duty is applied and submits that option 1 appears to provide the most appropriate remedies.

It is inherent that any remedy regime intended to be proportionate would need to differentiate between circumstances where the non-disclosure or misrepresentation was deliberate or reckless as opposed to only careless.

There should also be a distinction between circumstances where the fact would have only altered the terms of the contract, in contrast to situations where the insurer would not have been willing to enter a contract of insurance upon any terms.

In respect of option 1 and circumstances where the non-disclosure or misrepresentation was careless (rather than deliberate or reckless) and induced the insurer, but they still would have entered the contract, it is important that the remedies provide for resolving any claim and the treatment of the contract going forward, which require separate consideration. To accomplish this, we suggest that the reference in the second and third bullet points of paragraph 53 should be "and/or the insurer can cancel the contract ..."

rather than only “or”. This is because the first limb may be appropriate for resolving the claim with the need to deal separately with the policy going forward. This is particularly important for contracts of life insurance which provide the insurer no opportunity to refuse or offer different terms at renewal or elect cancellation.

In circumstances where the fact, had it been known, would have resulted in a higher premium being charged the remedies related to the claim should also include payment based upon the cover that the premium paid would have provided as an alternative to the deduction of additional premium. This alternative approach is the remedy in Australia. There are situations where the deduction of the additional premium from the claim may not be appropriate. There must always be an assessment of what is fair in the circumstances.

**Q 9. Is it fair to require insurers to pay claims that are not connected to a non-disclosure or misrepresentation, even if the insurer would not have entered the contract had they known the facts?**

Noting that Fidelity Life agrees the duty of disclosure should be changed from the prudent insurer test, if after applying the new duty the non-disclosure or misrepresentation related to a fact that was of the nature that the insurer would not have been willing to enter an insurance contract upon any terms, then it would not be fair to expect an insurer to pay a claim on a contract it wouldn't have entered. The appropriate remedy for this circumstance is as set out in option 1 of question 8.

**Q 10. Should insurers be able to offer reduced cover or ask the insured to cover the difference in order to recoup the amount they would have charged if they had the facts? Why/why not? (Discovered where no claim has been made)**

In circumstances where the insurer would still have been willing to enter an insurance contract but on different terms, then they should be able to offer reduced cover or ask the insured to pay the difference in premium to recoup the amount they would have charged if they had the fact - as that provides a proportionate response.

**Q 11. Should we clarify that where a contract has been avoided and all claims rejected, the insured is not required to refund claims money if it is not easily returnable and would hard and unfair to the insured? Why or why not?**

Fidelity Life notes the reference to it being unfair and would not seek to recover claims money in any circumstance in which to do so was unfair.



**Q 12 Do you agree that section 35 the Contract and Commercial Law Act should not apply to insurance contracts? Are there any other sections of the Contract and Commercial Law Act that should not apply to insurance contracts?**

It would be clearer for all parties to insurance contracts if the insurance-specific legislation dealt with all aspects of the law relating to insurance contracts and there was not the need to refer to additional legislation as well.

**Q 13. Do you agree with the proposed change to the misrepresentation provisions in the Insurance Law Reform Act 1977? Why/why not?**

The remedies for a breach of duty of disclosure and misrepresentation should be the same as non-disclosure and misrepresentation overlap.

**Q 14. Which of the terms in Table 4 are unfair? In your opinion, are they exempt from the unfair contract terms prohibition? &**

**Q15. What is your feedback on the UCT options? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

Fidelity Life recommends that all of the UCT provisions introduced to the Fair Trading Act 1986 via the Fair Trading Amendment Act 2013, which came into effect in the middle of 2015, be maintained for insurance contracts.

The provisions in section 46L(4) of the Fair Trading Act 1986 have been recognised as terms that are reasonably necessary to protect the legitimate interests of the insurer after specific consideration of the nature of insurance. Having this list of terms provides greater certainty for consumers. These terms factor in the implications relating to reinsurance and the need to ensure its continued accessibility.

If the UCT regime relating to insurance contracts is to be removed from the Fair Trading Act 1986 and included instead in the proposed insurance contracts legislation, it needs to continue to identify terms that are reasonably necessary to protect the legitimate interests of the insurer to reflect the unique nature of insurance contracts.

The duty of utmost good faith that the parties to insurance contracts have to one another limits an insurer's ability to act unfairly which would include relying upon a provision which is unfair.

**Q 16. What is your feedback on the options to help consumers understand and compare contracts? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which options do you prefer and why?**

Fidelity Life supports the use of plain language in its policies and definitions as this helps to achieve greater certainty for consumers, intermediaries and insurers. We note the nature of life insurance means there's technical information which needs to be included in policies. We seek to mitigate the complexity inherent in life insurance by working with intermediaries who can help consumers to understand the technical information.

Fidelity Life is concerned that any requirement to provide summary statements would result in the situation that exists in Australia where the product disclosure statement (PDS) requirements have led to insurance policy documentation becoming very much longer and repetitive.

Experience shows that consumers seem reluctant to read the documentation they are currently provided. Increasing the volume of material provided could frustrate customers and have the unintended effect of reducing engagement.

There are also concerns surrounding the ability to identify what, over and above the information provided in a customer's policy schedule, would be key information for all consumers, as what's key will depend upon the circumstances of each consumer. The need to provide details of everything that could be considered key would result in long disclosures and lead to the problem noted in the paragraph immediately above.

Fidelity Life works with several third-party comparison platforms. Comparison platforms will only help consumers with the comparison of policies if they correctly identify the differences between products and the value of the benefits. Analysis of the number of benefits offered by each insurer without assessing the value of benefits can lead to a distorted assessment. This has the added drawback of insurers structuring their policies to increase their comparison rating. As participants in the insurance market comparison platforms should be subject to regulation.

A further difficulty with comparison platforms is that the relative value of each benefit depends upon the circumstances of the consumer. Intermediaries who understand the circumstances of the consumer are better placed to help consumers determine which policy is better suited to their situation.

**Q 17. What is your feedback on the options in relation to intermediaries? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

**Q 18. Can the issues with the status quo be overcome with insurers contractually requiring representatives to pass on all material relevant information? What are the benefits of a statutory obligation requiring representatives to pass on information?**

**Q 19. Should consumer insureds be treated differently from commercial insureds in relation to these issues?**

Insurance contract law should help provide certainty by applying equally to all participants in the insurance market, and a statutory obligation on representatives to pass on all material relevant information, with remedies for non-compliance, would encourage this.

**Q 20. What is your feedback on the options in relation to section 11 of the Insurance Law Reform Act 1977? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why? Are the options preferable to the status quo?**

No comment.

**Q 21. What is your feedback on the option to provide that Section 9 of the Insurance Law Reform Act 1977 does not apply to time limits under claims made policies? In particular: Do you agree with the costs and benefits of the option? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Is the option preferable as compared with the status quo? &**

**Q 22. If the option is adopted, should there be an extended period (e.g. 28 days) for notifying claims or potential claims after the end of a policy term?**

The issues are not relevant to life insurance.

**Q23 What is your feedback in relation to the option for section 9 of the Law Reform Act? In particular: Do you agree with the costs and benefits of the option? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why? & Q 24 If the option is adopted, should it apply to insolvency only? Should third parties be required to get**

**leave of the court? Should reinsurance contracts be excluded from the application of the option?**

The issues are not relevant to life insurance.

**Q 25. What is your feedback to the options in relation to the duty of utmost good faith? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

Interpretation of the duty of utmost good faith is best done by the Courts which enables continued development to respond to new circumstances, as opposed to statutory prescription.

**Q 26. What is your feedback on the proposal to consolidate non-marine insurance statutes into a single statute?**

Fidelity Life supports such consolidation as it would make the law more accessible to all parties.

**Q 27. What is your feedback on our proposed approach in relation to the Marine Insurance Act 1908**

This question is not relevant to life insurance.

**Q 28. Are the above provisions redundant? Why/why not? Are there other redundant provisions in the legislation covered by this review?**

No comment.

**Q 29. What is your feedback on the proposed option in relation to registration of assignments of life insurance policies?**

Fidelity Life proposes that there could be a simpler process where a valid notice of assignment is sent to the insurer. Any process should not require any particular formality (other than meeting the prerequisites of a notice of assignment) and be technology neutral.

**Q 30. Should the maximum payment amounts for life insurance policies for minors be increased? Why or why not?**

Yes, the maximum amount of \$2000 was set over 30 years ago and there has been significant increase in funeral costs during this period.

**Other Issues - Interest on Death Claims**

As noted in our prior submission responding to question 52 of the Issues Paper, making interest payable on death claims from the 91<sup>st</sup> day after death under section 41A of the Life Insurance Act 1908, regardless of when the claim was made causes uncertainty. Until an insurer has received the claim and the details necessary for payment they have no ability to pay the claim. Despite this they are incurring a liability to pay interest. Even with the Interest on Money Claims Act 2016 reducing the rate of interest payable, the rate will still be more than the rate the insurer can earn due to its prudential obligations. With the length of time taken for claim submission being entirely in the hands of those managing the estate insurers have no certainty as to the amount of interest that they will have to pay.

A fairer outcome would be that interest is payable only after a reasonable period (for example, 30 days) following receipt by the insurer of all information necessary to assess the claim.

Thank you for the opportunity to make this submission.

***Fidelity Life Assurance Company Limited***