

Submission template

Exposure draft Insurance Contracts Bill

This is the submission template for responding to the Consultation Paper accompanying the Exposure draft Insurance Contracts Bill.

The Ministry of Business, Innovation and Employment (MBIE) seeks your comments by **5pm on 4 May 2022**.

Please make your submission as follows:

1. Fill out your name, organisation and contact details in the table: “Your name and organisation”.
2. Fill out your responses to the discussion document questions in the table: “Responses to discussion document questions”. Your submission may respond to any or all of the questions in the discussion document. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.
3. If you would like to make any other comments that are not covered by any of the questions, please provide these in the “Other comments” section.
4. When sending your submission, please:
 - a. Delete this first page of instructions.
 - b. Note that, except for material that may be defamatory, MBIE intends to upload PDF copies of submissions received to MBIE’s website. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission. If your submission contains any confidential information:
 - i. Please state this in the cover page or in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.
 - ii. Indicate this on the front of your submission (eg the first page header may state “In Confidence”). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).
 - c. Note that submissions are subject to the Official Information Act 1982 and may, therefore, be released in part or full. The Privacy Act 2020 also applies.
5. Send your submission as a Microsoft Word document to insurancereview@mbie.govt.nz.

Please direct any questions that you have in relation to the submissions process to insurancereview@mbie.govt.nz.

Submission on *Exposure draft Insurance Contracts Bill*

Your name and organisation

Name	Privacy of natural persons
Organisation (if applicable)	
Contact details	Privacy of natural persons

[Double click on check boxes, then select 'checked' if you wish to select any of the following.]

The Privacy Act 2020 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

MBIE intends to upload submissions received to MBIE's website at www.mbie.govt.nz. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

I do not want my submission placed on MBIE's website because... [Insert text]

Please check if your submission contains confidential information:

I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

I would like my submission (or identified parts of my submission) to be kept confidential because... [Insert text]

Responses to consultation paper questions

Part 1: preliminary provisions

1 Do you have any feedback on Part 1 of the Bill?

Part 2: disclosure duties and duty of utmost good faith

2 Do you have any feedback on the Bill's provisions in relation to the duty for consumers to take reasonable care not to make a misrepresentation, including the matters that may be taken into account to determine whether a consumer policyholder has taken reasonable care not to make a misrepresentation?

3 Do you have any feedback on the Bill's provisions in relation to remedies for breach of the consumer duty?

4 Do you have any feedback on the Bill's provisions on remedies for breach of the consumer duty in relation to life insurance policies where the misrepresentation was not fraudulent and more than three years ago?

5 Do you have any feedback on the Bill's provisions in relation to the disclosure duty for non-consumers?

6 Do you have any feedback on the Bill's provisions in relation to remedies for breach of the non-consumer duty?

7 Do you have any feedback on the provisions in relation to the insurer's duties to inform policyholders of the disclosure duties, and insurer access to third party information, including how the duties apply for variations of insurance contracts?

8 Do you have any feedback on the consequences in the Bill if an insurer breaches duties to inform policyholders of the disclosure duties, and insurer access to third party information?

9 Do you have any feedback on how the Bill codifies the duty of utmost good faith?

10

Do you have any feedback on the Bill's provisions relating to information provided by a policyholder to a specified intermediary?

11

Do you have any other feedback on the drafting of Part 2 of the Bill?

Part 3: terms of insurance contracts

12

For claims-made policies, do you consider that 60 days after the end of the policy term is an appropriate period for allowing the policyholder to notify relevant claims or circumstances that might give rise to a claim?

No, this is patently inadequate and unrealistic in practice.

13

Do you consider that insurers should be required to notify policyholders in writing no later than 14 days after the end of the policy term of the effect of failing to notify a claim or circumstances that might give rise to a claim before the end of the 60 day period?

This should be an irrelevant question, because this law change should not proceed – see next comments

14

Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?

In practice, Section 9 of the Insurance Law Reform Act 1977 does not cause problems for claims-made policies. We understand that this has been introduced because insurers have claimed that s9 creates a liability 'risk' of indefinite duration, making it hard to quantify reserves. In reality, this 'risk' is not really of much practical consideration or concern for insurers.

In any event, the focus of the legislation should be on enabling an insured to benefit from an insurance policy that they **bought and paid for**, not a desire by multi-national insurance companies to remove an inconvenient accounting entry in their financial statements (by cutting off potential claims a short time after the insurance period has expired, to the severe detriment of insureds).

Professional Indemnity insurance, Directors & Officers Liability insurance and other policies are 'claims made' policies. There are often delays in notification of claims covered by these types of policies. Considerable time may pass (sometimes several years) before the insured becomes aware of circumstances that may give rise to a claim. There is often debate and uncertainty about what constitutes a 'notifiable circumstance' as well.

Currently, Section 9 provides important protection to insured consumers (with no actual prejudice to insurance companies, who have been paid in full to insure the relevant 'risk') by ensuring that the insured is covered by the prior-period policy as long as the delay has not caused the insurer to 'suffer prejudice'.

Section 9 currently gives protection to both insurers and insured for late notifications. Section 9 means an insurer is unable to decline a claim for late notification unless that delay has caused the insurer prejudice, which fairly balances the rights and interests of both parties to the insurance contract.

Clause 69 of the Bill proposes amending Section 9 of the Insurance Law Reform Act 1977 so that it does not apply to late notifications made after a policy expires. Without the protection of Section 9, delays in notification can result in claims being declined by insurers, leaving insureds in a situation where they may end up with no insurance cover (even though they paid for it, and the insurer has suffered no prejudice through the late notification). This is fundamentally unfair to the insured, and an unjustified windfall for insurers (who can then decline claims for prior periods even though the insured paid a full premium for insurance cover for that period).

The Cabinet Paper (Insurance Contract Law Reforms, 4 December 2019) records:

"Note if the policyholder was not aware of the relevant circumstances until after the end of the policy term, the policyholder should be able to claim under their next policy (if any)."

This comment is seriously misguided and incorrect.

If an insured **changes** their insurance provider, then the terms of their new cover will often exclude risks that arose from conduct prior to the commencement of the new cover (e.g. *"There is no liability for a Claim from such conduct occurring or committed prior to the Retroactive Date."*)

This makes sense and is fair to both the former and current insurers: The former insurer has been paid for the 'risk' covered in the prior period. The new insurer has (usually) not been paid to assume that risk.

If the insured instead **ceases** their insurance cover altogether (e.g. if they retire, or join another business, or change professions etc) then the insured loses the insurance protection they had already paid for (and the former insurer gets a windfall benefit of avoiding liability for a risk that they had been paid to insure against). This is grossly unfair.

If the changes to Section 9 were to occur, it would also make it more risky for insureds to change insurers. Due to the common occurrence of late notifications, many insureds may consider it safer to stay with the same insurer to avoid the risk of a claim not being covered. This will effectively remove competition from the market and result in higher premiums/costs to insureds.

In summary, Section 9 is necessary to maintain protection for the insured (with reasonable protection for the insurer also). It is not realistic to require notification in all circumstances within 60 days from expiry, because claims often take much longer to arise. However, from a position of fundamental fairness, if (i) an insured and an insurer agree a contract of insurance for a set period (e.g. 1 January – 31 December 2022), and (ii) the insured pays the premium for that policy, then (iii) the insured should be entitled to the protection of that policy, regardless of when the claim arises and is notified (unless the insurer has suffered prejudice due to the delay).

In addition, Section 9 is necessary to maintain a competitive market from the insured/consumer's point of view.

15

Do you have any feedback on the exclusions listed in clause 71(3), which are not subject to the rule for increased risk exclusions in clause 71(1)?

16

Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?

17 Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?

18 Do you have any comments on not carrying over section 10(1) of the ILRA 1977?

19 Do you have any other feedback on the drafting in Part 3 of the Bill?

Part 4: payment of monies to insurance intermediaries

20 Do you consider that changes should be made to requirements for how insurance brokers must hold premium money such as restrictions on brokers' ability to invest or more stringent requirements in line with the client money and property rules in the FMC Act?

21 Do you have any feedback on the proposed penalties for non-compliance with Part 4 of the Bill?

22 Is it necessary to retain clause 102 (broker to notify insurer within 7 days if a premium has not been received by the broker), and if so, what should be the consequence for breach of clause 102?

23 Do you have any other feedback on Part 4 of the Bill?

Part 5: contracts of life insurance

24 If you consider that change needs to be made regarding interest payable from 91st day after date of death, please provide any further reasons and provide feedback on whether interest should only begin accruing after 90 days if the insurer has been notified of the death claim and (where relevant) letters of administration or probate have been obtained.

25 Do you have any feedback on the proposal that any mortgaging of life insurance policies under new policies be dealt with under the Personal Property and Securities Act 2009?

26 Do you have any feedback on the Bill's requirements relating to assignments and registrations generally?

27 *Are section 75A of the LIA (relating to a policy entered into by a person for the benefit of the person's spouse, partner or children) or section 2(1) of the Life Insurance Amendment Act 1920 (relating to the reversion or vesting of life policy assigned to a spouse or partner) still necessary?*

28 *Do you have any other feedback on Part 5 of the Bill?*

Part 6: regulation-making powers and miscellaneous provisions

29 *Do you have any feedback on Part 6 of the Bill?*

Part 7: unfair contract terms and presentation of consumer policies

30 *Do you see any unintended consequences from removing sections 18-20, 34-39 and 42 from the MIA?*

31 *In relation to unfair contract terms: which option do you prefer and why?*

32 *Do you have any feedback on the drafting of either of the options?*

33 *Do you have any comments on the obligation that consumer insurance contracts be worded and presented in a clear, concise and effective manner?*

34 *Do you have any comments on the regulation-making powers in clause 184?*

35 *Do you think regulations specifying form and presentation requirements for consumer, life and health insurance contracts (eg a statement on the front page that refers to where policy exclusions can be found) would be helpful? If so, please explain.*

36 *Do you think regulations specifying publication requirements for insurers would help consumers to make decisions about insurance products? If so, please explain.*

Timing and transitional arrangements

Do you have any initial feedback on when the Bill's provisions should come into effect?

Do you have any feedback on the transitional provisions in Schedules 1 or 4, or other proposed transitional arrangements?

Do you have any feedback on Schedule 5 of the Bill?

Other comments

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