Submission on *Exposure draft Insurance Contracts Bill*

Your name and organisation

Name	Susan Taylor
Organisation (if applicable)	Financial Services Complaints Limited
Contact details	0800 347 257

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Responses to consultation paper questions

Part 1: preliminary provisions	
1	*Do you have any feedback on Part 1 of the Bill?*
	No comments.
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?*
	Part 2, section 16 relating to insurers needing to have regard to the particular characteristics or circumstances of the policyholder could potentially fit better under section 15. It appears the factors in section 16 have deliberately been separated from the list in section 15, presumedly due to their importance. The only potential issue with this approach is that rather than give these factors prominence, when one undertakes a review of whether a policyholder has taken reasonable care, the factors that must be taken into account under section 16 may not be considered (missed) as they are not part of the main list of matters included under section 15.
3	*Do you have any feedback on the Bill's provisions in relation to remedies for breach of the consumer duty?*
	The formula included in Schedule 2, ss 5(1) and 14(1) could potentially be confusing for some to follow. The remedy involves deducting (from a claim settlement) the difference between the actual premium paid and the premium that ought to have been paid had there been no misrepresentation. Perhaps there could be a short accompanying sentence that explains the overall effect the formula produces. We note that in the UK, the remedy for a careless misrepresentation (where the insurer would have still offered a policy but with an increased premium) involves paying a claim on a proportionate basis. For example, if a consumer paid a premium of $50 but the premium would have been $100 but for the misrepresentation, then the insurer still needs to accept the claim but is entitled to only pay 50% of the claim value. We support the approach in the current Bill, but are mindful that some insurers might advocate for the approach taken in the UK.
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?*

	This is difficult because if an insurer would not have offered the policy in the absence of the breach, but the contract cannot be avoided due to the timespan, it is hard to say what other remedy should be available. The ability to vary the terms is an idea, but what would the variation look like if the insurer would never have offered the policy to begin with? One suggestion may be to apply a general reduction of say 20% to any claim paid out under these circumstances. Or alternatively, to apply a 50% premium increase retrospectively from the date of the qualifying misrepresentation (and then to deduct the additional premium cost from the claim settlement).
5	*Do you have any feedback on the Bill's provisions in relation to the disclosure duty for non-consumers?*
	No comments.
6	*Do you have any feedback on the Bill's provisions in relation to remedies for breach of the non-consumer duty?*
	It was not immediately clear that the remedies outlined in Schedule 2 apply to both *qualifying misrepresentation*s in consumer insurance contracts as well as *qualifying breaches* in non-consumer insurance contracts. The duties are dealt with separately in Part 2 of the Bill ('reasonable care' and 'fair presentation') which gives the impression that the remedies may also be dealt with separately in Schedule 2.
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?*
	We think the possibility of prescribed wording in relation to the insurer's duty to inform policyholders of their disclosure duty should be considered. Insurers will be required to inform consumers of their disclosure duty before entering into all new contracts or variations, so standardised wording could be a simple way to ensure this is done satisfactorily and consistently. We appreciate that an insurer might inform a policyholder of their duty verbally, but do not think this should prevent the creation of standardised wording – the 'scripted' wording could be read out on a telephone call or face-to-face.
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?*

	This is hard to follow. If the insurer breaches either of these duties (above) and the policyholder goes on to make a qualifying misrepresentation, a remedy is only available to the insurer if the policyholder knew that the misrepresentation was untrue or misleading (ie deliberate). Under Part 2, section 58, it initially appears that there might be an automatic consequence for the insurer for breaching the duties in the subpart. However, section 58 only applies when the insurer breaches their duty *and* the policyholder makes a deliberate qualifying misrepresentation. We think this 'two-fold' element could be clarified in the clause.
9	*Do you have any feedback on how the Bill codifies the duty of utmost good faith?*
	The codification of this doctrine appears to modify it to the extent that insurers still have a duty of utmost good faith, but a consumer's duty is one to take reasonable care not to make a misrepresentation.
10	*Do you have any feedback on the Bill's provisions relating to information provided by a policyholder to a specified intermediary?*
	Part 2, section 20 establishes that a representation made to a specified intermediary must be treated as having been made to an insurer. In practice, this will mean that an insurer will need to indemnify a consumer for a loss that they would not have insured, or would have insured on different terms (had the intermediary passed on the representation). There are two consequences we foresee in relation to this change in the law: 1. We may see fewer complaints about intermediaries because insurers will need to pay each claim on the basis that they had all the relevant information prior to incepting the policy. 2. We will see more complaints about insurers due to a potential for misunderstanding on their part. Where an intermediary has not passed on a material representation and the omission comes to light during the claims process, insurers might apply one of the remedies for a qualifying misrepresentation before paying the claim (rather than paying the claim in full and seeking compensation from the intermediary for any loss their omission caused).
11	*Do you have any other feedback on the drafting of Part 2 of the Bill?*
	No comments.
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?*

	Yes, we consider 60 days is a generous increase from what is currently standard (28-30 days).
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?*
	Yes, this will act as another safeguard to ensure policyholders are aware that they need to provide the necessary notifications before the time-limit expires.
14	*Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?*
	No comments.
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)?*
	The rule in section 71(1) appears to carry over the rule in section 11 of the ILRA 1977. The factors in section 71(3) are exceptions to the rule that were not found in section 11 of the ILRA 1977. We are not in support of the exceptions. We do not see the justification for treating an 'increased risk exclusion' that includes one of the factors outlined in section 71(3) differently to any other 'increased risk exclusion'.
16	*Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?*
	We think that you could consider whether complaints about this type of third-party claim are something that the Dispute Resolution Schemes should be able to look at. The class of third-party claimants this Subpart of the Bill identifies does not fit into any category of eligible complainants under our scheme rules, so the ability for a scheme to consider these complaints (if this is considered appropriate) would need to be included in legislation.
17	*Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?*
	No comments.
18	*Do you have any comments on not carrying over section 10(1) of the ILRA 1977?*

	As long as a policyholder has recourse to refer a complaint to a dispute resolution scheme about either the insurer or intermediary where there has been an alleged mis-sale, then we do not see any issues with not carrying over 10(1) of the ILRA 1977.
19	*Do you have any other feedback on the drafting in Part 3 of the Bill?*
	No comments.
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?*
	Current rules allowing brokers to invest premium money and negotiate longer timeframes for passing on payments to insurers appear to create certain risk for insurers. As there does not appear to be a risk to policyholders, who have paid their premiums to their intermediary, we do not have strong views on whether or not this area should be tightened. Requiring brokers to hold premium funds in a trust account or similar could be a safer way for these funds to managed.
21	*Do you have any feedback on the proposed penalties for non-compliance with Part 4 of the Bill?*
	Of most interest to us is section 106. A broker needs to pay to a policyholder any money received from an insurer within 7 days, or this will give rise to civil liability under s449 of the Financial Markets Conduct Act 2013. As a dispute resolution scheme, we may look to apply the remedy outlined in the Act. We do not fine or punish our scheme participants, so would not apply a pecuniary penalty but may look to apply late-payment interest to any sum due to a policyholder.
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?*
	Yes, we think clause 102 should be retained. If a policyholder pays their premium via a broker, then it seems fair to impose a duty on the broker to inform the insurer if payment has not been received. We support the consequence for breaching clause 102 that is outlined in clause 103 – the payment of interest on the amount of premium not received.

23	*Do you have any other feedback on Part 4 of the Bill?*
	No comments.
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.*
	No comments.
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?*
	No comments.
26	*Do you have any feedback on the Bill's requirements relating to assignments and registrations generally?*
	No comments.
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?*
	No comments.
28	*Do you have any other feedback on Part 5 of the Bill?*
	No comments.
Part 6: regulation-making powers and miscellaneous provisions	
29	*Do you have any feedback on Part 6 of the Bill?*
	No comments.
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?*
	No comments.
31	*In relation to unfair contract terms: which option do you prefer and why?*
	We prefer option B.

	Option B means that policy limitations and exclusions that affect the scope of cover would be considered part of the main subject matter and would not be open to review for unfairness. We consider that policy limitations and exclusions are so fundamental to the way insurance contracts function that opening these terms up for 'unfair contract term' scrutiny would be too onerous for insurers. Policyholders who have claims declined due to policy limits or exclusions can already challenge the insurer's application of the policy terms via the insurer's internal complaints process, and subsequently refer an unresolved complaint to a dispute resolution scheme for review. Insurers already have the onus of proving a policy exclusion applies if they seek to rely on one. During our review of complaints that involve an insurer relying on a policy exclusion, we can and occasionally do find that the exclusion was not applicable - without any analysis as to whether the exclusion is inherently 'unfair'. We consider that with the new obligation on insurers to ensure that insurance contracts are presented in a clear and concise manner, policy limitations and exclusions should already be clear to consumers, so it should not be necessary to open up these particular clauses to further UCT scrutiny as option A would do.
32	*Do you have any feedback on the drafting of either of the options?*
	No comments.
33	*Do you have any comments on the obligation that consumer insurance contracts be worded and presented in a clear, concise and effective manner?*
	We consider this a welcome obligation on insurers. Insurance contracts are complex so clear wording will assist consumers in reading and understanding the policy's terms and conditions. As the experts and drafters of insurance contracts, insurers have the technical knowledge and understanding of the underwriting intentions behind their policy wordings. Whilst this obligation may create more work for insurers in terms of time spent considering the drafting of their policies, we believe this this will serve to assist consumers in understanding their rights and obligations under each contract. Having more well-informed consumers should ultimately lead to a reduction in unmeritorious claims and complaints as room for misunderstanding will be reduced.
34	*Do you have any comments on the regulation-making powers in clause 184?*
	No comments.
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.*
	Yes. Insurance contracts can be found in varying lengths, specificity, layout, style, and content. For the average consumer, the application of different policy clauses can be

	confusing and hard to follow. Vital information may not necessarily be identified as such, and navigating a more complex policy can be near-impossible for a non-expert. Regulations that specify form and presentation requirements should ultimately lead to policy documents that are more easily navigated and digested by consumers. This should lead to more consistency in document presentation which we anticipate will have the effect, over time, of assisting consumer understanding of these contracts.
36	*Do you think regulations specifying publication requirements for insurers would help consumers to make decisions about insurance products? If so, please explain.*
	Yes. Consumers weigh many factors when deciding to take out an insurance policy, so the more information made available to them, the more helpful it will be to them in making their decisions. Different consumers have different priorities so will naturally attribute different weight to different factors, so the more information that is published, the more use it will have to consumers at large. Regulations specifying publication requirements would also contribute to transparency which should lead to higher rates of consumer trust in the industry members.
Timing and transitional arrangements	
37	*Do you have any initial feedback on when the Bill's provisions should come into effect?*
	Given how long we've been waiting for insurance contract law reform, we suggest within 6 months of the Bill passing into law.
38	*Do you have any feedback on the transitional provisions in Schedules 1 or 4, or other proposed transitional arrangements?*
	No comments.
Schedule 5: amendments to other Acts	
39	*Do you have any feedback on Schedule 5 of the Bill?*
	No comments.

Other comments
