

Submission on *Exposure draft Insurance Contracts Bill*

Your name and organisation

Name	Privacy of natural persons
Organisation (if applicable)	Privacy of natural persons
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[Insert text]

Responses to consultation paper questions

Part 1: preliminary provisions

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

Yes. See appendix 1 to this submission.

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?*

Yes. See appendices 1 and 2 to this submission.

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

Yes. See appendices 1 and 2 to this submission.

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?*

No, not other than as in appendices 1 and 2 to this submission.

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

Yes. See appendices 1 and 2 to this submission.

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

Yes. See appendices 1 and 2 to this submission.

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?*

Yes. See appendix 1 to this submission.

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?*

Yes. See appendix 1 to this submission.

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

No, not other than as in appendix 1 to this submission.

10	<i>Do you have any feedback on the Bill's provisions relating to information provided by a policyholder to a specified intermediary?</i>
	No.
11	<i>Do you have any other feedback on the drafting of Part 2 of the Bill?</i>
	Yes. See appendices 1 and 2 to this submission.

Part 3: terms of insurance contracts

12	<i>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?</i>
	No comment.
13	<i>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?</i>
	No comment.
14	<i>Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?</i>
	No comment.
15	<i>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)?</i>
	No comment.
16	<i>Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?</i>
	No.
17	<i>Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?</i>
	No.
18	<i>Do you have any comments on not carrying over section 10(1) of the ILRA 1977?</i>
	No.
19	<i>Do you have any other feedback on the drafting in Part 3 of the Bill?</i>
	Yes. See appendices 1 and 2 to this submission.

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?*

No comment.

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

No comment.

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?*

No comment.

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

No.

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 comment.

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.

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

No.

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 comment.

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

No.

Part 6: regulation-making powers and miscellaneous provisions

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

No, not other than as in appendices 1 and 2 to this submission.

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 comment.

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

No comment.

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

No comment.

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

No comment.

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

No comment.

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.*

No, not other than as in appendix 1.4 to this submission, relating to my proposed section 55(e).

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

No, not other than as in appendix 1.4 to this submission, relating to my proposed section 55(e).

Timing and transitional arrangements

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

This Bill's provisions should come into effect as soon as possible.

Also, see appendix 1.4 to this submission, relating to my proposed schedule 2, clause 16.

38

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

No, not other than as in appendix 1.4 to this submission, relating to my proposed schedule 2, clause 16.

Schedule 5: amendments to other Acts

39

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

No, not other than as in appendix 1.4 to this submission, relating to my proposed section 55(e).

Other comments

No comment.

Appendix 1 to the submission

The lawmaker should consider making the following revisions (and any consequential revisions):

Appendix 1.1 to the submission

Replace the following defined terms:

Provision	Exposure-draft wording	My proposed (revised) wording	Comment
Section 5	duty to take reasonable care not to make a misrepresentation	duty of reasonable care not to make a misrepresentation	The proposed wording is shorter. It also grammatically parallel with the phrase “duty of fair presentation”, in that the word “duty” is followed by the preposition “of” and then by a noun phrase.
	material	pertinent	The Bill should avoid using the term “material”. The law relating to the meaning of the term “material” is uncertain, particularly because the courts tend to confuse the (common-law) duty to make disclosure and the (historically equitable) duty not to make a misrepresentation (the corresponding remedy having historically been equitable rescission). ¹
	qualifying breach	actionable unfair presentation	In context, the word “actionable” is much clearer than the word “qualifying”. The word “qualifying” is the word used in the Consumer Insurance (Disclosure and Representations) Act 2012 (UK). This fact is not a reason for this (relatively unclear) word to be used in the Bill. In context, the phrase “unfair presentation” is clearer than the word “breach”. The word “breach” is broad. The reader could interpret it as meaning a breach not only of the duty of fair presentation, but also of other duties.

¹ See e.g. John Birds and Norma J Hird “Misrepresentation and Non-Disclosure in Insurance Law: Identical Twins or Separate Issues?” (1986) 59:2 Mod L Rev 285.

	qualifying misrepresentation	actionable misrepresentation	In context, the word “actionable” is much clearer than the word “qualifying”. The word “qualifying” is the word used in the Consumer Insurance (Disclosure and Representations) Act 2012 (UK). This fact is not a reason for this (relatively unclear) word to be used in the Bill.
Section 71	increased risk exclusion	coincidence-based exclusion	In practice, almost <i>every</i> exclusion set forth by a contract of insurance will be an “increased-risk exclusion”, in the ordinary sense of these words. The increase in risk arising from the event excluded will tend to be the <i>very reason</i> for the insurer setting forth the exclusion in the first place. The lawmaker should make clear that the term refers to a “temporal” or “non-causative” exclusion. ² In more-ordinary language, the temporal exclusion is indeed an exclusion based on a coincidence, in that it is an exclusion applicable where two events or circumstances co-occur in time but are not causally connected.

² See e.g. Law Commission *Some Insurance Problems* (NZLC R46, 1998) <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R46.pdf> at para 42.

Appendix 1.2 to the submission

Insert the following defined terms:

Provision	Exposure-draft wording	My proposed (revised) wording	Comment
Section 5	declaration	includes any pre-reform declaration or any reform declaration	<p>The Bill should use the term “declaration” rather than the term “disclosure”. In theory, the term “disclosure” refers to disclosure under the (common-law) duty to make disclosure but not under the (historically equitable) duty not to make a misrepresentation.³</p> <p>See also appendix 1.4 to this submission (relating to my proposed wording for schedule 2, clause 16).</p>
	pre-reform declaration	<p>includes a declaration that a person must make under:</p> <ul style="list-style-type: none"> (a) the common-law duty of utmost good faith as the duty relates to the relevant contract of insurance; or (b) the common-law duty to make disclosure as the duty relates to the relevant contract of insurance; or (c) the duty not to make a misrepresentation as referred to in sections 35 and 37 of the Contract and Commercial Law Act 2017; or (d) the historically equitable duty not to make a representation as the duty relates to the relevant contract of insurance. 	<p>The law relating to these and other similar duties is uncertain, in particular with regard to how the duties interact with one another.⁴</p> <p>See also appendix 1.4 to this submission (relating to my proposed wording for schedule 2, clause 16).</p>

³ Birds and Hird, above n 1.

⁴ Birds and Hird, above n 1.

	reform declaration	means a declaration that a person must make under: (a) the duty [of] reasonable care not to make a misrepresentation; or (b) the duty of fair presentation.	See appendix 1.4 to this submission (relating to my proposed wording for schedule 2, clause 16).
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Appendix 1.3 to the submission

Delete the following wording:

Provision	Exposure-draft wording	Comment
Section 29(2)(b) ⁵	<p>[However, it is presumed, unless the contrary is proved,—]</p> <p>that the policyholder knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer.</p>	<p>The exposure-draft wording is even more unfair to the policyholder, insured, or beneficiary than is the current law. The current law (relating to the duty to make disclosure, for example) is that it is the insurer that must prove that the relevant information is “material”, not the policyholder, insured, or beneficiary that must prove that the relevant information is “immaterial”. The law is fair in this respect. It is the insurer that establishes the underwriting policy and therefore knows what information is or is not material. The policyholder, insured, or beneficiary is in no position to know what information is or is not material.</p>
Section 71(2)(b) ⁶	<p>[In this section, [a coincidence-based] exclusion is a provision in a contract of insurance that—]</p> <p>defines the liability of the insurer in that manner, in the view of the court or arbitrator determining the matter, because the happening of those events or the existence of those circumstances was, in the view of the insurer, likely to increase the risk of loss occurring.</p>	<p>The exposure-draft wording makes the <i>conditions</i> in which the insurer defines its liability as it does (and, more specifically, its motivation) relevant to the court or arbitrator determining the matter. However, the purpose of the reform is to “ensure that the provisions included in contracts of insurance, and the practices of insurers in relation to those contracts, operate fairly”. The conditions in which the insurer defines its liability as it does are irrelevant to how the court or arbitrator determines the matter. Here, all that is relevant is the <i>effect</i> on the policyholder, insured, or beneficiary.</p>

⁵ Making this revision would involve renumbering section 29(a) as section 29.

⁶ Making this revision would involve renumbering section 71(2)(b) as section 71(2).

Appendix 1.4 to the submission

Insert the following wording:

Provision	My proposed (revised) wording	Comment
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<p>Sections 14(3), 21(2),⁷ 25(2),⁸ and 30(2)⁹</p>	<p>This subpart is subject to schedule 6.</p>	<p>The Bill should address the difficulties for any individual that are associated with being “uninsurable” because of “moral hazard”.¹⁰ Information relating to the moral hazard presented by him/her may appear in the Insurance Claims Register (ICR).¹¹ It is unfair for any individual to be uninsurable <i>for the rest of his/her life</i>. His/her uninsurability may also adversely affect his/her spouse and dependants (if any), by preventing him/her from insuring his/her own person or property, particularly if shared with others. For example, if an individual is unable to contract home and contents insurance, it is not only the individual who is over-exposed to the associated risk of harm to the property, but also his/her spouse and dependants (if any). The relevant risks include being unable to become a homeowner (if a mortgage lender requires the home to be insured) or even a tenant (if a landlord/-lady requires the home to be insured).</p> <p>Moreover, this phenomenon of uninsurability is racialised and contrary to the spirit of the Treaty of Waitangi. The number of Māori who have a criminal conviction is proportionately much higher than the number of Pākehā who do.¹² In other words, uninsurability is a problem that, in statistical terms, affects Māori much more than Pākehā.</p> <p>For proposed wording for schedule 6, see appendix 2 to this submission.</p>
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⁷ Making this revision would involve renumbering 21 (as it appears in the exposure draft) as 21(1).

⁸ Making this revision would involve renumbering 25 (as it appears in the exposure draft) as 25(1).

⁹ Making this revision would involve renumbering 30 (as it appears in the exposure draft) as 30(1).

¹⁰ See Robert Merkin and Chris Nicoll (eds) *Colinvaux’s Law of Insurance in New Zealand* (2d ed, Thomson Reuters, Wellington, 2017) at 217. See also Andrew Hooker “Opinion: Being accused by your insurer of dishonesty can turn your life up-side-down” interest.co.nz (13 October 2010)

<<https://www.interest.co.nz/insurance/50933/opinion-being-accused-your-insurer-dishonesty-can-turn-your-life-side-down>>.

¹¹ See Insurance Council of New Zealand (ICNZ) “Insurance Claims Register”

<<https://www.icnz.org.nz/industry-leadership/insurance-claims-register>>.

¹² See New Zealand Ministry of Justice “Safe and Effective Justice” <<https://www.justice.govt.nz/justice-sector-policy/key-initiatives/hapaitia-te-oranga-tangata/>>.

<p>Section 55(e)</p>	<p>Subsection (1) applies only if the Governor-General, by Order in Council, makes regulations for the purposes of specifying what wording (a) and (b), as referred to in subsection (2), must contain.</p>	<p>The lawmaker should take care to be <i>highly specific</i> as to the documentation that it requires the insurer to supply to the customer. In fact, the lawmaker should probably publish <i>specific wording</i>. In my experience, the practice of requiring the insurer to supply “information” documentation of this type does little to nothing to help the policyholder, insured, or beneficiary. Rather, the practice causes the insurer to duplicate (considerable) information that it has already supplied elsewhere. For example, in the UK, it is typical for the so-called “key facts” document, which is intended as a “policy summary”,¹³ to read much as the insurance policy document does. The insurer will attempt to avoid liability for not supplying the information required. If the purpose of the exposure-draft wording is to make a contract of insurance easy to understand or easy to compare with other contracts of insurance, then the lawmaker should consider requiring or incentivizing insurers to use standard insurance policy documents and related documents.</p> <p>This comment is also relevant to the Financial Markets Conduct Act 2013, subpart 6B (“Duties to assist policyholders to understand insurance contracts”), as inserted by the Bill.</p>
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¹³ FCA Handbook, ICOBS 6, annex 2, para 2.

<p>Schedule 2, clause 16</p>	<p>(1) Despite anything to the contrary, this schedule applies even if a person breaches a pre-reform declaration duty.</p> <p>(2) To avoid doubt, if a person breaches a pre-reform declaration duty:</p> <p>(a) the person’s liability will be determined according to the law relating to the pre-reform declaration duty; but</p> <p>(b) the effect of this liability, including any remedies, will be determined according to this schedule, as if the relevant breach of the pre-reform declaration duty were a breach of a reform declaration duty.</p>	<p>In the context of this consultation, both MBIE and many insurance-sector actors have stated that the remedies corresponding to the pre-reform declaration duties (as I term them) are disproportionate.</p> <p>Moreover, in the context of this consultation, many insurance-sector actors have stated that they already avoid applying the remedies (available to them) disproportionately.</p>
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Appendix 2 to the submission

The lawmaker should consider inserting the following schedule 6 (or similar):

Schedule 6

Discrimination against a rehabilitated individual by reason of the individual's adverse history

1 Application

- (1) This schedule applies if an individual is a rehabilitated individual.
- (2) An individual is a **rehabilitated individual** if the individual:
 - (a) has an adverse history; and
 - (b) has been rehabilitated.

2 Adverse history and rehabilitated defined

- (1) In this schedule, an individual:
 - (a) has an **adverse history** if what is described in column A of the table set out in subclause (2) ("**table**") is the case; and
 - (b) has been **rehabilitated** if the individual:
 - (i) has an adverse history; and
 - (ii) what is described in column B of the table and in the same row of the table is the case.
- (2) The table is the following:

Row	Column A	Column B
1	A court (" relevant court ") has imposed a sentence on the individual for a conviction for an offence.	Either: <ul style="list-style-type: none">• 7 consecutive years have passed since the relevant court did what the relevant court is described (in column A) as having done; or• no court would have had any legal basis for doing what the relevant court is described (in column A) as having done.

2	Both:	Either:
	<ul style="list-style-type: none"> • an insurer (“relevant insurer”) has, in whole or in part, refused a proposal for a contract of insurance; and • the policyholder had proposed the individual as a policyholder, an insured or a beneficiary under the contract. 	<ul style="list-style-type: none"> • 7 consecutive years have passed since the relevant insurer did what the relevant insurer is described (in column A) as having done; or • the relevant insurer had no legal basis for doing what the relevant insurer is described (in column A) as having done.
3	Both:	Either:
	<ul style="list-style-type: none"> • an insurer (“relevant insurer”) has, in whole or in part, refused a claim under a contract of insurance in whole or in part; and • the individual was at any time or is a policyholder, insured or beneficiary under the contract. 	<ul style="list-style-type: none"> • 7 consecutive years have passed since the relevant insurer did what the relevant insurer is described (in column A) as having done; or • the relevant insurer had no legal basis for doing what the relevant insurer is described (in column A) as having done
4	Both:	Either:
	<ul style="list-style-type: none"> • an insurer (“relevant insurer”) has, in whole or in part, avoided a contract of insurance, cancelled a contract of insurance or otherwise caused a contract of insurance to end either retrospectively or prospectively; and • the individual was at any time an actual or purported policyholder, insured or beneficiary under the contract. 	<ul style="list-style-type: none"> • 7 consecutive years have passed since the relevant insurer did what the relevant insurer is described (in column A) as having done; or • the relevant insurer had no legal basis for doing what the relevant insurer is described (in column A) as having done.
5	The individual:	Either:
	<ul style="list-style-type: none"> • allegedly or actually committed an offence; but • no court has convicted the individual for it. 	<ul style="list-style-type: none"> • 7 consecutive years have passed since the relevant individual allegedly committed the offence (referred to in column A); or • the relevant individual did not actually commit the offence (referred to in column A).

3 Discrimination

- (1) An insurer may discriminate against a rehabilitated individual by reason of the individual's adverse history only as set out in this clause.
- (2) The premium that an insurer charges an individual who is a rehabilitated individual may be twice as high (but no more than twice as high) as the premium that the insurer would have charged the individual if the individual had no adverse history.
- (3) Nothing in this clause relieves an individual of:
 - (a) any duty [of] reasonable care not to make a misrepresentation; or
 - (b) any duty of fair presentation.

4 [Coincidence-based] exclusion

To avoid doubt, a policyholder is not bound by [a coincidence-based] exclusion if:

- (a) the [coincidence-based] exclusion is a provision in a contract of insurance that defines the circumstances in which the insurer is bound to indemnify the policyholder against loss so as to exclude or limit the liability of the insurer to indemnify the policyholder in the circumstance where an individual has an adverse history; and
- (b) the policyholder proves that the loss for which the policyholder seeks to be indemnified was not caused, or contributed to, by the individual having an adverse history.