Submission on discussion document: Insurance contract law review

Your name and organisation

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Responses to discussion document questions

Regarding the objectives of the review

1 Are these the right objectives to have in mind?

The objectives of the review do not adequately acknowledge the unique nature of insurance contracts and insurance business.

2 Do you have alternative or additional suggestions?

Insurance contracts do not fit well with objectives modelled on the main purposes of the Financial Markets Conduct Act 2013 (FMC Act). The FMC Act seeks to address the information asymmetry between market participants and consumers. A consumer will know less about an FMC Act financial product, particularly the risks of that product, than the product provider. To rebalance the information asymmetry between provider and consumer, the FMC Act requires disclosure of information and can impose other protections, such as licensing. Information asymmetry that disadvantages the consumer provides the justification for regulation of securities and is inherent in the purposes of the FMC Act.

When the product being provided is insurance, there is a reversal in the imbalance of the information asymmetry. The customer has significantly more information about the particular person or property to be insured the insurer.

This reversal of the usual direction of imbalance of asymmetry must be reflected in the objectives of the review which should reflect the unique nature of insurance contracts and insurance business. This is particularly important as a central part of the review is to consider the flow of information between the customer and the insurer.

The review must also take into consideration factors inherent in the nature of insurance business which include:

Pure risk insurance is not a savings product

Consumers purchase peace of mind when they buy insurance. Insurance is unique, in that the best outcome for a consumer may be that he or she never claims, and the only benefit is peace of mind. For example, a young parent buys term life insurance so that her family will be cared for if she dies before she reaches the age of 65. The best outcome for her is that she lives beyond the age of 65 and never claims on the insurance.

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Policyholders share risks and share costs

Insurers create "pools" of policyholders (this has been illustrated by the recent announcement that an insurance company has created a new pool for Wellington home owners[1]). Life insurance contracts are generally long-term contracts and dealings with one policyholder can affect other policyholders. For example, if an insurer pays a claim that is not covered by the terms of the insurance contract, the cost of that claim will be reflected in the future premiums paid by the other policyholders in the pool.

Information is costly to review

Costs at the underwriting stage increase the premium for all policyholders, so insurers actively seek to make the underwriting process efficient and minimise costs. Each consumer has the best available information about their own health and life-style. If a consumer provides insurers with the best information he or she has, underwriting will be efficient, and costs kept to a minimum. Obtaining and considering non-material information from consumers at the underwriting stage imposes additional costs on all policyholders.

As set out above, pure risk insurance is not a savings product and the best outcome for many policyholders is that they never claim on the insurance but have peace of mind knowing insurance is in place. Those policyholders are disadvantaged if insurers consider non-material information at the underwriting stage, because they would have to pay more premium for their peace of mind. The benefit of insurers reviewing all medical records would fall to consumers who currently withhold material information. It is not appropriate to imposing additional costs on all policyholders for the benefit of a few consumers who may be careless or deceptive.

Consumers don't like to think about negative situations

Distribution of insurance is supply driven. That means it has to be actively sold, as although people are aware that they need insurance, it deals with negative situations that people would rather not think about. Insurance distribution is usually through an intermediary. Intermediaries are usually paid by commission, causing conflicts of interest which need to be managed to ensure good consumer outcomes. Insurers rely on intermediaries to provide accurate information on the risk.

Insurers want to pay claims

Not paying a claim can damage an insurer's brand. Insurers rely on intermediaries to distribute insurance. Failure to pay a claim can damage the confidence that intermediaries have in the insurer – leading to less insurance policies being sold. However, insurers can't pay claims that are not covered by the terms of the insurance contract. Firstly, the pooled nature of insurance business means that paying invalid claims would increase future costs for other policyholders. Secondly, insurers often seek insurance for particular or aggregated risks through reinsurance.[2] Reinsurers have no relationships with consumers, policyholders or intermediaries. Reinsurers require that an insurer only pay claims that are within the terms and conditions of the insurance cover.

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[1] "People in low-risk areas had previously been subsidising those living in high-risk areas…"
https://www.radionz.co.nz/news/national/360007/insurer-defends-big-quake-risk-insurance-hike

[2] Reinsurance is insurance of insurance risks or of a particular book of insurance business.

Regarding disclosure obligations and remedies for non-disclosure

3	Are consumers aware of their duty of disclosure?
	Without additional support or guidance, consumers are generally not aware of their duty of disclosure. Insurers do provide support through warnings in policy wordings and other collateral. Financial advice should include guidance on the duty disclosure. Poor quality disclosure has significant disadvantages for both the consumer and the insurer. The consequences for the consumers are identified in the issues paper and include: • Claims not paid • Insurance cover withdrawn or cancelled • Difficulty obtaining future insurance cover. Poor disclosure has negative consequences for an insurer including: • Failure to properly price and manage risk • Damage to relationships with customers, distribution network and public • Reputational and brand damage • Administrative and legal costs. There is a risk of non-disclosure inherent in the intermediated distribution of insurance products. Passing information through intermediaries increases the risk that the information will be corrupted, as illustrated by the child's game of Chinese whispers.
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?
	Cases before the dispute resolution schemes suggest that consumers do not always understand that the duty of disclosure goes beyond answering the questions that an insurer may ask. The duty of disclosure is archaic and contrary to the approach taken by modern regulators. Consumers expect to be provided with information as they would if insurance were regulated by the Financial Markets Conduct Act 2013 or Financial Advisers Act 2008. Instead they are bound by duties that developed to protect commercial parties in the insurance market of 18th century London. The duty of disclosure of particular concern because there is no legal requirement to disclose the existence of the duty to a consumer.
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk?
	A consumer usually has the best knowledge of facts about themselves, particularly about aspects of their lives that are relevant to assessing risk. Examples could include facts about who lives in their home, whether there is discomfort in their body or unusual features of their life style. Insurers usually have the best knowledge of risks. Examples could include the risk of earthquakes or flooding at a particular location, how obesity increases the risk of heart attack or whether recreational use of cannabis can cause lung cancer.

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	Most consumers would not understand what a prudent underwriter is, even less, what is the mind of the underwriter. Consumers to have no understanding of the technical features or legal description of many goods or services. What is important is that the consumer understands key features to enable the goods or service to be used appropriately. This is particularly the case if the goods or service could cause the consumer harm. Unless the duty of disclosure is properly explained to the consumer it can cause harm. On that basis there should be a requirement that the duty of disclosure is properly communicated to the consumer. Problems with disclosure may have been exacerbated because in New Zealand there is no regulatory framework for insurers as described in the International Association of Insurance Supervisors (IAIS) Insurance Core Principles, Standards, Guidance and Assessment Methodology (ICP) 19. ICP 19.7.16 states: "Before an insurance contract is concluded, the insurer or intermediary, should inform the customer on matters such as …Obligation to disclosure material facts – including prominent and clear information on the obligation on the customer to disclose material facts truthfully. Ways of ensuring a customer knows what he or she must disclose include explaining the duty to disclose all circumstances material to a policy and what needs to be disclosed, and explaining the consequences of any failure to make such a disclosure. Alternatively, rather than an obligation to disclosure, the customer may be asked clear questions about any matter material to the insurer." We support this review considering insurance contract law together with broader issues of insurer conduct and supervision. Further examination of the law of insurance contracts may show that legislation developed in response to the absence of an regulatory regime that required insurers to treat customers fairly. For example, misrepresentation and non-disclosure have developed separately, when both are about fair presentation of the risk. Misrepresentation was dealt with in the Insurance Law Reform Act 1977 because insurers were using "basis of the contract" clauses. These clauses allowed an insurer to treat its obligations as discharged by a misrepresentation which was not material to the risk. Accordingly, the law for misrepresentation and non-disclosure are separate because of legislative response to a specific problem that related only to written misrepresentations. A regulatory regime that followed ICP 19 could have been an alternative means of preventing the harm caused by "basis of the contract" clauses.
6	Do consumers understand the potential consequences of breaching their duty of disclosure?
	Not all consumers understand the potential consequences of non-disclosure.
7	Does the consumer always know more about their own risks than the insurer? In what circumstances might they not? How might advances in technology affect this?
	In most cases the consumer will know more about the risk than the insurer, but it will depend about the subject of the insurance and the risks insured against. Insurers must be able to assess risk through the underwriting process, or there will be a decline in the quality and availability of insurance in New Zealand. Further, providing information to the insurer may lead to cheaper insurance for a consumer if that consumer is low risk.
8	Are there examples where breach of the duty of disclosure has led to disproportionate consequences for the consumer? Please give specific examples if you are aware of them.

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	The remedy of avoidance is harsh and it is strongly arguable that the avoidance is not appropriate for instances of innocent non-disclosure by a consumer.
9	Should unintentional non-disclosure (i.e. a mistake or ignorance) be treated differently from intentional non-disclosure (i.e. fraud)? If so, how could this practically be done?
	It is important that unintentional non-disclosure is treated differently from intentional non-disclosure to discourage fraud. It is understandable that a consumer can make an innocent non-disclosure as it is hard for people to remember everything about their lives. Although insurance cover generally accepts the risk that consumers make careless mistakes (for example, lack of attention leading to an accident), carelessness in presentation of the risk should be discouraged. it may be appropriate to allow a proportional response to careless non-disclosure. Intentional non-disclosure must be discouraged as it introduces inefficiencies that are costly for other policyholders and damage the efficient functioning of New Zealand's financial markets.
10	Should the remedy available to the insurer be more proportionate to the harm suffered by the insurer?
	There are significant advantages in adopting the proportionate remedies introduced by the UK Consumer Insurance (Disclosure and Representations) Act 2013 for careless misrepresentation. Proportionate remedies are not appropriate where the misrepresentation is deliberate, reckless or innocent. In such cases we would support an approach similar to that in the UK where honest or reasonable misrepresentations are not grounds to deny a claim and deliberate or reckless misrepresentations enable an insurer to avoid the policy, refuse the claim and any subsequent claims.
11	Should non-disclosure be treated differently from misrepresentation?
	There are no longer grounds to maintain a distinction between misrepresentation and non-disclosure. The law of insurance contracts and regulation of insurers should support an fair and accurate presentation of the risk.
12	Should different classes of insureds (e.g. businesses, consumers, local government etc.) be treated differently? Why or why not?
	Consideration should be given to treating small businesses as consumers. Local government or large business entities will have insurance experts to assist tailor an insurance program. Small New Zealand business owners will have similar levels of insurance expertise to a consumer.
13	In your experience, do insurers typically choose to avoid claims when they discover that an insured has not disclosed something? Or do they treat non-disclosure on a case-by-case basis?
	Insurers generally specify alternative remedies for non-disclosure and misrepresentation in contract wordings. Because it is damaging to an insurance business to fail to pay a claim, insurers will often try to make a proportionate response to the non-disclosure. For this

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	reason, changes to the law of utmost good faith may have limited impact on the cost or availability of insurance in New Zealand.
14	What factors does an insurer take into account when responding to instances of non-disclosure? Does this process vary to that taken in response to instances where the insurer discovers the insured has misrepresented information?
	When considering a non-disclosure insurers take into account whether the disclosure is innocent or deliberate. A deliberate non-disclosure will be treated more severely as is risks the sustainability of insurance business and the regulatory status of the insurance company. Insurers are very concerned when a consumer intentionally fails to disclose material information. Research suggests that some consumers see insurance fraud as a "victim-less" crime.[3] This attitude risks the sustainability of insurance business as the business will not be able to continue if there is no money to pay valid claims. Fraud threatens the ability of insurers to carry on business in a prudent manner and so risks insurers entitlement to hold a licence.[4] Accordingly, insurers take a dim view of instances of intentional non-disclosure as it threatens their business model and the welfare and peace of mind of their other customers. Rejecting claims is also bad for the sustainability of insurers business as it often causes negative publicity and associated reputational and brand damage. Insurers rely on intermediaries to distribute insurance policies. Rejecting a claim can mean that intermediaries will not recommend that insurers products to other customers. Insurance businesses rely on reinsurance. which is the insurance of insurance business or risks. Often the primary reason that an insurer rejects a claim is because reinsurers will not follow a settlement unless it is within the terms and conditions of the original insurance policy. Insurers must carry on business in a prudent manner. Paying a claim without reinsurance cover is unlikely to equate to carrying on business in a prudent manner. Reinsurers in turn are insured by retrocession polices. Those retrocession policies will also only respond to valid claims. The global insurance market depends upon insurers getting good information from customers and only paying valid claims.

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Regarding conduct and supervision

15	What do you think fair treatment looks like from both an insurer's and consumer's perspective? What behaviours and obligations should each party have during the lifecycle of an insurance contract that would constitute fair treatment?
	Fair treatment for insurers involves a fair presentation of the risk and fair and predictable dispute resolution mechanisms. Generally the fair treatment of customer standards of ICP 19 appear to be appropriate. The Financial Markets Authority guide to conduct is a good place to start when considering

[3] *https://www.thetimes.co.uk/article/third-of-customers-commit-insurance-fraud-775r2djwg*; *https://www.thebalancesmb.com/insurance-fraud-not-a-victimless-crime-462438*; *https://www.aviva.com/newsroom/news-releases/perspectives/insurance-fraud-is-a-victimless-crime/*

[4] Insurance (Prudential Supervision) Act 2010, sections 19 and 20

	regulatory expectations - ***https://fma.govt.nz/compliance/guidance-library/a-guide-to-the-fmas-view-of-conduct/***
16	To what extent is the gap between ICP 19 and the status quo in New Zealand (as identified by the IMF) a concern?
	The gap between ICP 19 and the status quo in New Zealand is a concern and it is appropriate that it is investigated further. If the ICP 19 standards are not to be followed, the reason why a particular standard is not appropriate for the New Zealand context should be clearly articulated and recorded. The Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) has uncovered significant mis-conduct in the Australian market. The Royal Commission is authorised to submit an interim report no later than 30 September 2018, and will provide a final report by 1 February 2019. It is too early to judge content of the report, but we anticipate that one of the issues to be considered is the effectiveness of prescriptive regulation in ensuring good outcomes for consumers. Australian financial institutions were subject to detailed rules, but this did not prevent the outcomes identified by the Royal Commission.
17	Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to purchasers of insurance?
	Much of the lifecycle of the insurance policy is subject to oversight. But that oversight is fragmented and unconnected. Insurance is a unique industry. Only a well-resourced regulator with specialist insurance skills would be able to properly oversee the insurance industry.

18	What has your experience been of the claims handling process? Please comment particularly on:
	• timeliness the information from the claims handler about:
	  ○ timeframes and updates on timeframes
	  ○ reasons for declining the claim (if relevant)
	  ○ how you can complain if declined
	• The handling of complaints (if relevant)

	There are risks in tailoring legislative response to particular circumstances. The Canterbury earthquakes created unique issues for consumers and insurers which were exacerbated by the involvement of the EQC in claims handling and the complexities caused by multiple events, occurring over different policy periods. Any regime to regulate insurance business should take a broader view of insurance conduct.
19	Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.
	Insurers may feel pressure from reinsurers to settle claims. Reinsurers need to quantify and accurately manage reserves for a particular loss, or they in turn will feel pressure from their retrocessionaires. Generally, it is to all parties advantage to resolve claims as quickly as possible after an insured event.

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20	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
	The mis-selling of personal protection insurance in the UK[5] and the evidence presented to the Royal Commission in Australia shows that financial services is susceptible to pressure sales. In part this is due to the inherent nature of insurance. The IAIS Issues Paper on Conduct Risk describes that insurance is "supply driven" and that consumers are not included to buy insurance. "Most of the population is to a greater or lesser degree aware that it needs some sort of insurance protection; however, the benefit of insurance is not immediately obvious for the consumer."[6] It may be appropriate for a New Zealand regulator or government department to carry out thematic reviews to gather better information about the sale of insurance products. Focus should be given to areas that have been vulnerable to mis-selling in other jurisdictions, for example where products are targeted at vulnerable people or are bundled with other products.
21	What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?
	It is important that there is a clear understanding of which regulator "owns" insurance in New Zealand. Currently oversight of insurance conduct is provided by a number of regulators. Insurance is a valuable service that protects consumers and enables commerce. Because of New Zealand's isolated location and exposure to seismic risk, insurance plays a vital role in our economy. Without properly resourced oversight and appropriately targeted investigations, response to this question would be speculation.
22	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.
	The following papers suggest that incentives may cause poor outcomes for purchasers of insurance: • *http://www.mbie.govt.nz/info-services/business/business-law/financial-advisers/review-of-financial-advisers-act-2008/options-paper/options-paper-submissions/RBNZ.pdf* • *https://fma.govt.nz/assets/Reports/_versions/8923/160322-Replacing-life-insurance-who-benefits.2.pdf* • *https://fma.govt.nz/assets/Reports/_versions/10637/180322-FMA-update-on-inquiries-into-insurance-replacement-business.2.pdf* • *https://fma.govt.nz/assets/Reports/151117-Sales-and-advice-report.pdf*
23	Does the insurance industry appropriately manage the conflicts of interest and possible flow on consequences that can be associated with sales incentives?

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[5] https://www.fca.org.uk/ppi/ppi-explained

[6] *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj2uan7nvPbAhWRQpQKHaZNC_8QFggpMAA&url=https%3A%2F%2Fwww.iaisweb.org%2Ffile%2F57927%2Fissues-paper-on-conduct-of-business-risk-and-its-management&usg=AOvVaw1hfXxoFelBHtQq9S4_rUxZ*

	Please see answer to question 22 above. There are grounds for considering whether this information should be held by an appropriately resourced regulator of insurance business.

Regarding exceptions from the Fair Trading Act's unfair contract terms provisions

24	Are you aware of instances where the current exceptions for insurance contracts from the unfair contract terms provisions under the Fair Trading Act are causing problems for consumers? If so, please give examples.
	No. The unfair contract terms provisions of the Fair Trading Act only took effect on 17 March 2015. Sufficient time should be given to assess the effectiveness of the changes before further reviewing the legislation. It would be useful if this review could release figures as to action taken by the Commerce Commission since introduction of this section.
25	More generally, are there terms in insurance contracts that you consider to be unfair? If so, why do you consider them to be unfair?
	Insurance contracts are complex and a review of insurance contract wording may find that contract terms are not as transparent as they could be. Although, insurance contracts fall within the definition of "standard form contracts" in section 46J Fair Trading Act, consideration should be applied to whether this is appropriate as (unlike in other standard form contracts) the scope of an insurance contract is substantially set by disclosure made by the consumer.
26	Why are each of the specific exceptions outlined in the Fair Trading Act needed in order to protect the "legitimate interests of the insurer"?
	The Fair Trading Act unfair contract terms provisions do not apply to any term in any standard form contract that is reasonably necessary to protect the legitimate interests of a contracting party. The Commerce Commission may apply to court to seek a declaration that a contract term is unfair. The court may not declare a term to be an unfair contract term to the extent that it: • Defines the main subject matter of the contract; or • Sets the upfront price payable under the contract. Upfront price means the consideration (including any consideration that is contingent upon the occurrence or non-occurrence of a particular event) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent. A term is not unfair if the court is satisfied that the term is not reasonably necessary to protect the legitimate interests of the party who would be advantage by the term. The partial exemption for insurance in s46L, appears to us to be an acknowledgement that certain provisions of insurance contracts are reasonably necessary to protect the legitimate interests of the insurer. The following terms could reasonably be described as defining the subject matter of the contract: 46L(4)(a) a term that identifies the uncertain event or that otherwise specifies the subject matter insured or the risk insured against

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	46L(4)(b)a term that specifies the sum or sums insured or assured 46L(4)(c) a term that excludes or limits the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances 46L(4)(f) a term relating to the duty of utmost good faith that applies to parties to a contract of insurance: 46L(4)(g) a term specifying requirements for disclosure, or relating to the effect of non-disclosure or misrepresentation, by the insured. A term that provides for the payment of the premium is a term that set the upfront price payable under the contract. The final aspect of the exclusion relates to claims. The court cannot declare a contract term to be unfair where: 46L(4)(d) a term that describes the basis on which claims may be settled or that specifies any contributory sum due from, or amount to be borne by, an insured in the event of a claim under the contract of insurance. Such a term goes to the heart of an insurance contract because it determines the process or costs associated with managing and handing claims. If these contracts were deemed unfair, there would be significant uncertainty for insurers which could impact the cost of insurance.
27	What would the effect be if there were no exceptions? Please support your answer with evidence.
	Consideration should be given to the effectiveness of the unfair contract terms provisions of the Fair Trading Act 1986. Research on the number of actions taken by the Commerce Commission under section 46I may illustrate how useful this section is in protecting consumers. If the section 46I is not being used to protect consumers, taking away the exemption may have little practical effect. However, such a change may have an indirect effect on the pricing of insurance and reinsurance contracts. On that basis, if the reason for considering these provisions is to give good outcome for consumers, there may be grounds for considering protecting consumers with a properly resourced insurance regulator, rather than relying on the unfair contract terms provisions.

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Regarding difficulties comparing and changing providers and policies

28	Is it difficult for consumers to find, understand and compare information about insurance policies and premiums? If so, why?
	It is difficult for consumers to find, understand and compare insurance policies, because they are complex agreements. The scope of cover depends on the terms of the policy document, the schedule and information disclosed by the customer. It is easier for customers to compare premiums. But deciding which cover to choose based on premium alone, does not help the consumer understand the advantages and disadvantages of the insurance. To understand what insurance covers it is necessary to examine the insuring clause (which broadly sets out the scope of cover), then consider any exclusions (which take away cover). Benefits and claims conditions will control the amount a consumer can claim if the insured event occurs. The scope of cover is set by material facts disclosed by a particular consumer.

	Depending on what is disclosed, the insurer may limit cover or impose a stand-down period or other restrictions, to help manage the risk. IAIS ICP 19.7 requires that "The supervisor requires insurers and intermediaries to provide timely, clear and adequate pre-contractual and contractual information to customers." The standard goes on to set out how appropriate information about a product can be provided, to ensure that the consumer can make an informed decision about the arrangements proposed. Disclosure is not generally seen as adequate to protect consumers from the risk of financial products and services. In advising the Australian Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry, Profession Pamela Hanrahan stated: "Mandatory pre-sale disclosure is the main legal mechanism used to protect or empower retail clients acquiring financial products in Australia. The rationale for mandatory disclosure is that providing clients with all relevant information will allow them to compare and choose products that meet their needs and are competitively priced. Whether disclosure is a useful regulatory strategy has been questioned. Recent work in the field of behavioural economics supports the long-held intuition of many that mandatory disclosure is not particularly effective, at least outside its original securities law context where the purpose is to inform the market to ensure that all relevant information is captured in the price of securities in the secondary markets, rather than to support consumer choice." [7] The provision of pre-contractual disclosure by insurers should be considered in the part of this review considering regulation of conduct and supervision of insurance business.
29	Does the level of information about insurance policies and premiums that consumers are able to access and assess differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	No comment.
30	What barriers exist that make it difficult for consumers to switch between providers?
	Reasons it may be difficult for consumers to switch between providers include when: • They have got older and their health has deteriorated; • The terms of the new policy do not cover the same conditions that would be covered by the old policy; • They are not interested in insurance; • It is difficult to compare insurance policies. There are advantages for consumers in not switching between providers, because of the risks associated with pre-contractual disclosure. As set out in answer to question 14, fraud is a risk to the sustainability of insurance business and insurers are rightly cautious about fraud. Frequent switching between insurance companies does not engender a trusting relationship between a consumer and its insurer.

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[7] Legal Framework for the Provision of Financial Advice and Sale of Financial Products to Australian Households, Background Paper 7, Professor Pamela Hanrahan, April 2018

31	Do these barriers to switching differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	Generally life insurance contracts are long term contracts and this restricts a consumers ability to move, while ensuring a continuation of equivalent benefits.
32	What, if anything, should the government do to make it easier for consumers to access information on insurance policies, compare policies, make informed decisions and switch between providers?
	No comment.

Regarding third party access to liability insurance monies

33	Do you agree that the operation of section 9 of the Law Reform Act 1936 (LRA) has caused problems in New Zealand?
	Yes. We accept the issues set out in paragraph 118 of the issues paper and comment that the uncertainty caused by section 9 is costly and has been disadvantageous to New Zealanders.
34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?
	See above
35	What has been the consequence of the problems with section 9 of the LRA?
	See above.
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	As recommended by the New Zealand Law Commission section 9 of the Law Reform Act 1936 should be replaced. Since publication of the Law Commissions report "Some Insurance Law Problems" in 1998 there has been significant judicial consideration of this provision and international review of similar provisions. That new evidence should also be considered changing this section. We would support a change to replace the statutory charge provisions with provisions giving third parties the right to bring proceedings against the insurer directly.

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Regarding failure to notify claims within time limits

37	Do you agree that the operation of section 9 of the Insurance Law Reform Act 1977 (ILRA) has caused problems for "claims made" policies in New Zealand?
	Yes.
38	What has been the consequence of the problems with section 9 of the ILRA?

	The consequences are accurately described in the Issues paper.
39	If you agree that there are problems with section 9 of the ILRA, what options should be considered to address them?
	We support the Law Commission proposal to amend section 9 so that the section does not apply in certain instances involving time limits under "claims made" policies. If a result of this review is that the conduct of insurance companies is to be regulated by a dedicated supervisor, consideration should be given to whether the contractual restrictions in the Insurance Law Reform Act 1977 are still appropriate, or should form part of the detail of a regulatory framework that requires insurers to treat customers fairly.

Regarding exclusions that have no causal link to loss

40	Do you consider the operation of section 11 of the Insurance Law Reform Act 1977 (ILRA) to be problematic? If so, why and what has been the consequence of this?
	Yes. The consequences of this are accurately described in the issues paper.
41	The Law Commission proposed reform in relation to exclusions relating to the characteristics of the operator of a vehicle, aircraft or chattel; the geographic area in which the loss must occur; and whether a vehicle, aircraft or chattel was used for a commercial purpose. Do you agree that these are the areas where the operation of section 11 of the ILRA is problematic? Do you consider it to be problematic in any other areas?
	Yes. We are not aware of other areas where it is problematic, however insurers should be given an opportunity to establish if there are other areas where circumstances make a loss statistically more likely, even if those circumstances do not cause the loss.
42	If you agree that there are problems with section 11 of the ILRA, what options should be considered to address them?
	We support the Law Commission proposal to remove certain types of exclusions from the operation of section 11, being exclusions relating to the characteristics of the operator of a vehicle, aircraft or chattel; the geographic area in which the loss must occur; and whether a vehicle, aircraft or chattel was used for a commercial purpose.

Regarding registration of assignments of life insurance policies

43	Do you agree that the registration system for assignment of life insurance policies still requires reform?
	Yes.
44	If you agree that there are problems with the registration system for assignment of life insurance policies, what options should be considered to address them?

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	A notice of assignment of life insurance received by the insurer electronically or in writing should be sufficient to establish the assignee's rights.

Regarding responsibility for intermediaries' actions

45	Do you consider there to be problems with the current position in relation to whether an insurer or consumer bears the responsibility for an intermediary's failures? If possible, please give examples of situations where this has caused problems.
	Yes. This section is ambiguous as to the scope of the purpose of the agency and the scope of persons caught as agents. If this section is necessary after reform of the duty of disclosure, it should specify that the agency is only in respect of disclosure of information. As currently drafted, the section could be used to argue that insurers are responsible for financial advice provided by an intermediary. Secondly, insurers pay incentives to a wide range of organisations, some of whom may hold information on the consumer, but play no part in completing the insurance application. It is not appropriate to imply that knowledge to insurers when it is held by parties who play no part in completing the insurance application.
46	If you consider there to be problems, are they related to who the intermediary is deemed to be an agent of? Or the lack of a requirement for the intermediary to disclose their agency status to the consumer? Or both?
	Disclosure of agency would assist, but the drafting of the section itself needs to be revisited now that financial advice is regulated by the Financial Advisers Act 2008. Any modification of the agency provisions must be consistent with that act, or replacement legislation. Generally we comment that the law of agency is complex. There may be circumstances where an intermediary can act as a dual agent for the consumer and the insurers. Any legislative intervention in the law of agency should be carefully crafted to reflect the practices of insurance business.
47	If you consider there to be problems, what options should be considered to address them?
	If it is necessary to keep this provision, it should be redrafted to better reflect commercial practices and ensure consistency with the financial advice regime.

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Regarding insurance intermediaries – Deferral of payments / investment of money

48	Do you agree that the current position in relation to the deferral of payments of premiums by intermediaries has caused problems?
	Payment technology and accounting software has significantly advanced since the Insurance Intermediaries Act 1994 came into force. There is no reason to delay the payment of premium to insurers. Such delay introduces conflicts of interest and the risk of fraud.
49	If you agree that there are problems, what options should be considered to address them?

	Insurers should establish why they require legislative intervention in an area that they can control by contract terms. Many of the arrangements between insurers and intermediaries may be undocumented. This issue should be considered as part of the wider review of insurer conduct and supervision.

Other miscellaneous questions

50	Are there any provisions in the six Acts under consideration that are redundant and should be repealed outright? If so, please explain why.
	No comment.
51	Are there elements of the common law that would be useful to codify? If so, what are these and what are the pros and cons of codifying them?
	No comment.
52	Are there other areas of law where the interface with insurance contract law needs to be considered? If so, please outline what these are and what the issues are.
	No comment.
53	Is there anything further the government should consider when seeking to consolidate the six Acts into one?
	No comment.

Other comments

	We welcome any other comments that you may have.

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