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Financial Markets Policy  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
**Wellington**

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### **Insurance Contract Law Review – Options Paper**

The New Zealand Law Society welcomes the opportunity to comment on MBIE's April 2019 *Options Paper: Insurance Contract Law Review* (options paper). The Law Society's responses to consultation questions within its expertise and mandate are set out below.

#### **Part 2: Objectives of the Review**

*Q1: Do you have any feedback regarding the objectives for the review?*

Changes have been made to the objectives since MBIE's May 2018 issues paper, to acknowledge the unique nature of insurance contracts and insurance business. The Law Society supports the amended objectives of the review as set out in the options paper.

#### **Part 3: Duties to disclose information**

*Q2: What is your feedback in relation to the options for disclosure by consumers? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?*

- *Option 1: duty to take reasonable care not to make a misrepresentation (p13)*
- *Option 2: duty to disclose what a reasonable person would know to be relevant (p14)*

Option 1 would abolish the duty of disclosure for consumer insureds and replace it with a duty to take reasonable care not to make a misrepresentation.

The Law Society considers Option 1 is likely to produce the fairest outcome for consumers and insurers. Option 1 would enable New Zealand to maintain equivalent provisions to other common law jurisdictions:

- it is equivalent to the UK Consumer Insurance (Disclosure and Representations) Act 2012, and
- the final report of the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry<sup>1</sup> recommended that "Part IV of the Insurance Contracts Act should be amended, for consumer insurance contracts, to replace the duty of disclosure with a duty to take reasonable care not to make a misrepresentation to an insurer ..."<sup>2</sup>

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<sup>1</sup> <https://financialservices.royalcommission.gov.au/Pages/reports.aspx#final>.

<sup>2</sup> Note 1, at Recommendation 4.5, Volume 1, page 302.

Option 2 would take New Zealand's law in a different direction from that of other common law jurisdictions, leading to potential uncertainty and the need for the courts to intervene to provide guidance on the meaning of the terms.

### ***Design options for all consumer disclosure options***

*Design option 1: requirement to inform consumers of the duty to disclose*

*Q3: Should insurers be required to warn consumers of the duty to disclose? Why/why not? Should insurers be required to warn all insureds of the duty to disclose, including businesses?*

Yes, insurers should be required to warn consumers of the duty to disclose. Consumers are often not aware of their duty of disclosure, as evidenced by the number of disputes between insurers and their customers relating to the duty of disclosure (examples of such disputes can be found in the case studies on the Insurance & Financial Services Ombudsman (IFSO) website).<sup>3</sup> Many small businesses may also not be aware of the duty to disclose.

### ***Options in relation to disclosure remedies***

*Q8: What is your feedback in relation to the disclosure remedy options? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?*

- *Option 1: remedies based on intention and materiality (p19)*
- *Option 2: remedies based on intention and materiality; no avoidance for non-fraudulent material non-disclosure (p19)*
- *Option 3: disclosure remedies based on materiality only*

The Law Society considers there would be significant advantages to adopting the proportionate remedies that were introduced by the UK's Consumer Insurance (Disclosure and Representations) Act 2012 for careless misrepresentation.

Unintentional non-disclosure should be treated differently from intentional non-disclosure to discourage poor conduct. For this reason, Option 1 and Option 2 should be considered ahead of Option 3.

### ***Design options for disclosure remedies***

*Design option 4: clarify interaction with general contract law*

*Q12: Do you agree that section 35 the Contract and Commercial Law Act should not apply to insurance contracts? Are there any other sections of the Contract and Commercial Law Act that should not apply to insurance contracts?*

In the Law Society's view, neither sections 34 nor 35 of the Contract and Commercial Law Act 2017 should apply to insurance contracts.

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<sup>3</sup> <https://ifso.site.secure.force.com/casenotesearch> (using the search term "duty of disclosure"). Also discussed in the options paper at [28] – [32].

## **Part 6: Miscellaneous Issues**

The options paper discusses a number of miscellaneous issues.<sup>4</sup> The Law Society has previously commented, in response to MBIE's May 2018 issues paper,<sup>5</sup> on potential solutions to these miscellaneous issues. The Law Society's further comments are set out below.

### ***Duty of utmost good faith***

Q25: *What is your feedback on the options in relation to the duty of utmost good faith? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?*

As identified in the options paper,<sup>6</sup> codification could limit the flexibility of the courts to develop the duty of utmost good faith through case law. Further, conduct regulation of insurers has been proposed in the recent *Conduct of Financial Institutions: options paper*.<sup>7</sup> Including a codified duty of utmost good faith in separate legislation could lead to unintended consequences.

### ***Legislative drafting issues: Consolidation of insurance statutes***

Q26: *What is your feedback on the proposal to consolidate non-marine insurance statutes into a single statute?*

The Law Society supports the proposal to consolidate non-marine insurance statutes into a single statute.

### ***Legislative drafting issues: Amendments to Marine Insurance Act 1908***

Q27: *What is your feedback on our proposed approach in relation to the Marine Insurance Act 1908?*

The Law Society agrees with the proposal that the legislative provisions governing marine-specific insurance should remain separate from the provisions governing other insurance.

This submission has been prepared with the assistance of the Law Society's Commercial and Business Law Committee. If you wish to discuss the submission further, the committee convenor Rebecca Sellers can be contacted via the Law Society's Law Reform Manager, Vicky Stanbridge ([vicky.stanbridge@lawsociety.org.nz](mailto:vicky.stanbridge@lawsociety.org.nz) / 04 463 2912).

Yours faithfully



Tiana Epati  
President

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<sup>4</sup> Options paper at pp34 – 49: Insurer deemed to know matters known by its representatives; Exclusions with no causal link to loss; Failure to notify claims within time limits; Third party claims for liability insurance money; Duty of utmost good faith; Legislative drafting issues; Other miscellaneous issues.

<sup>5</sup> NZLS submission 16.7.18, available at [http://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0006/124197/I-MBIE-Insurance-Contract-Law-Review-16-7-18.pdf](http://www.lawsociety.org.nz/_data/assets/pdf_file/0006/124197/I-MBIE-Insurance-Contract-Law-Review-16-7-18.pdf).

<sup>6</sup> See p46 at [160].

<sup>7</sup> <https://www.mbie.govt.nz/have-your-say/financial-institutions-conduct-review/>.