New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Reserve Bank of New Zealand | Te Pūtea Matua
Wellington

By email: ipsareview@rbnz.govt.nz

Tēnā koe,

Feedback on the exposure draft of the Insurance (Prudential Supervision) Amendment Bill

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide the Reserve Bank of New Zealand | Te Pūtea Matua (**RBNZ**) with feedback on its exposure draft of the Insurance (Prudential Supervision) Amendment Bill consultation paper (**consultation paper**).

1.2 This submission has been prepared with input from the Law Society's Commercial and Business Law Committee.[1]

2 General Comment

2.1 The Law Society agrees the Insurance (Prudential Supervision) Act 2010 (**the Act**) needs modernisation and supports the intention to implement findings from previous reviews of the Act, including closer alignment with international best practice. We note, however, that caution is needed to ensure any amendments carefully consider both current and future implications and required safeguards.

2.2 The Law Society's submission does not question the policy of effective prudential supervision. It instead focuses on issues of drafting and practical workability of the exposure draft, to ensure clarity, proportionality and certainty, and that workable safeguards apply. We also note that industry participants are likely best placed to provide detailed feedback, especially on the proposals not previously consulted on, and should inform the final content of the Bill. That said, we provide the following comments below.

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1 More information about our Commercial and Business Law Committee is available on the Law Society's website: https://www.lawsociety.org.nz/professional-practice/law-reform-and-advocacy/law-reform-committees/commercial-li/.

3 Regulatory scope

3.1 The consultation paper clarifies that Cabinet has now decided to exclude all overseas captive insurers and reinsurers from the licensing requirements in the Act.[2]

3.2 In an earlier submission on the review of the Act, the Law Society noted that some overseas captive insurers and reinsurers are likely to have some level of administrative support in New Zealand, and queried whether a blanket exclusion would be appropriate in such circumstances.[3] The consultation paper does not address this particular point, and we invite officials to carefully consider whether the proposed blanket exclusion would remain appropriate in circumstances where overseas captive insurers and reinsurers receive administrative support in New Zealand.

4 Standards

4.1 Clause 27 sets out the proposed amendments to the RBNZ's authority to issue standards (secondary legislation). New section 55(1) provides that RBNZ may issue standards if the RBNZ is satisfied that the standards are necessary or desirable for one or more of the purposes of the Act.

4.2 This provides RBNZ with a much broader standard-making power than current settings allow. We note that the consultation paper indicates that, in the short to medium term, non-operating holding companies (**NOHCs**) will not be required to be licensed but may be subject to prudential requirements under standards.[4]

4.3 We acknowledge proposed section 56B(1)(c) requires RBNZ to "consult the persons, or representatives of the persons, that the Bank considers will be substantially affected by the issue of the proposed standard." We suggest that where a proposed standard is likely to affect NOHCs this should include targeted consultation with NOHCs.

4.4 We also note that despite the Act's current principles requiring RBNZ to avoid unnecessary compliance costs, the Bill appears to impose significant new compliance costs on insurers via the new enforceable standards regime. These include:

(a) **Proposed sections 137ZF – 137ZL** – a new banning order whereby the District Court may ban persons from participating in an insurance business, with fines for breaches reaching up to $1.5 million. Insurers will need new processes to check the ban register before they proceed with any appointments or engagements.

(b) **Proposed sections 44, 46 – 48** – the Bill introduces prior approval requirements for obtaining significant influence over an insurer (section 44), changes of corporate form (section 46), entering into significant transactions including material business transfers or acquisitions (section 47), and amalgamation (section 48). The approval process requires reports and potentially extensive information gathering (per section 53B), with fines of up to

2 Reserve Bank of New Zealand *Insurance (Prudential Supervision) Amendment Bill: Exposure draft: Consultation paper* (15 April 2026) (**Consultation paper**) at p 8.

3 Law Society *Review of the Insurance (Prudential Supervision) Act 2010 – omnibus consultation* (12 December 2023) at pages 2-3 (available [here]).

4 Consultation paper, at p 5.

$1.5 million for a breach. This means that every corporate transaction will now require regulatory engagement, reporting, and potentially independent reports.

(c) **Proposed sections 34, 39, and 40** – insurers must also obtain prior approval when appointing any new director or relevant officer, and provide fit and proper certificates in support of such appointments. Fit and proper certificates may also be required at any time, and there is an ongoing duty to disclose fit and proper concerns. Offences for non-compliance carry fines of up to $500,000. This pre-approval requirement is more onerous than the current requirements and is likely to add cost and delay to every senior appointment.

4.5 The Law Society suggests that, whilst ensuring oversight remains effective, consideration should be given to the impact some of the proposed compliance costs are likely to have on insurers – particularly smaller insurers – and whether the proposed proportionality framework discussed in the consultation paper will be able to effectively take account of these increased compliance costs as a whole package of costs.

5 Supervisory, enforcement powers

Information and investigation powers

5.1 Clause 40 replaces sections 121 to 129, relating to the supply of information and on-site inspections. Clauses 41 and 42 relate to investigations and offences in relation to investigations.

5.2 The proposed section 121(1) requirement to "give to the Bank any information or class of information, that is specified in the notice" and to produce documents, raises a concern about the potential for self-incrimination or passing over of privileged information. Proposed sections 129F and 131, which require the provision of information during on-site inspections and investigations, also raise similar concerns.

5.3 This engages section 14 of the New Zealand Bill of Rights Act 1990, which has been interpreted as including the right not to be compelled to say certain things or provide certain information.

5.4 We consider that more rights-consistent drafting would be preferable for proposed sections 121(1), 129F and 131. For example, section 133(3) of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 is preferable in this regard. It provides that, during an on-site inspection:

(a) A person is not required to answer a question asked by an AML/CFT supervisor under this section if the answer would or could incriminate the person.

(b) Before an AML/CFT supervisor requires a person to answer a question, the person must be informed of this right.

(c) Nothing in section 133 requires any person to disclose privileged communications.

5.5 The Law Society recommends that proposed sections 121, 129F, and 131 include similar provisions to ensure there is sufficient clarity and certainty about the protection of legal professional privilege and the privilege against self-incrimination. Uncertainty regarding these matters could otherwise cause delays, disputes and litigation. We further recommend considering how disputed claims of privilege would be resolved. This could be modelled on section 159A of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

5.6 Clarity about these protections is particularly important where criminal conviction, and even potential imprisonment, could result from failing to answer questions or provide other information and documents (per proposed sections 122 and 129G).

Offences and penalties

5.7 The Law Society notes, but does not have a view on, the substantial lift in penalties for offences in the Bill. However, we make the following comments about the apparent discrepancies between the use of strict liability and mens rea offences, in relation to their penalties.

5.8 The Bill introduces several new strict liability offences accompanied by sizeable penalties. For example, clause 12, proposed section 17(4), exposes an applicant to a fine of up to $1.5 million without the prosecution needing to establish any mental element, and without a reverse onus 'reasonable excuse' defence as included in some of the other offences (for example, clause 18, proposed section 24(3)). By contrast, other offences with a similar penalty require proof of intention, 'knowing', or reckless conduct (for example, clause 24, proposed section 51(2)). The rationale for drawing the line in this way is unclear. Imposing similar penalties for offences which have quite different thresholds for liability is contrary to principle, and will be likely to cause serious practical difficulties for any sentencing judge should there be a successful prosecution.

5.9 The distinction between offences requiring a mental element and those that do not should be principled and proportionate to the penalty imposed because culpability remains a central justification for criminal punishment. Where the State seeks to impose significant penalties or the stigma associated with criminal conviction, it should generally be required to prove some degree of fault on the part of the defendant.

5.10 Strict liability has a role in achieving effective regulatory enforcement, particularly where public welfare objectives are at stake, and breaches are relatively minor. However, its use should be limited to circumstances where the penalties are modest, and the public interest in efficient enforcement clearly outweighs the usual expectation that criminal liability is based on blameworthy conduct.[5]

5.11 Given the seriousness of the penalties involved in the Bill, there is a strong argument that liability should more closely reflect culpability, with strict liability reserved for lower-level regulatory breaches attracting less severe sanctions. The Law Society recommends reviewing the balance of the offences and penalties to ensure there is consistency and strict liability offences remain confined to offences with modest penalties (i.e. "criminal – low level" offences[6]).

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5 Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (2021) at Chapter 24.

6 Per the offence table in the consultation paper at 16.

6 Distress management

6.1 Part 4 of the Act and clauses 48 to 62 and Schedule 2 of the Bill set out the distress management framework. Proposed section 199C in clause 62 of the Bill provides that the insurer, its directors, and its employees do not have the right to be consulted, informed, or heard in relation to the exercise of any distress management powers under Part 4 of the Act.

6.2 The Law Society is concerned about the lack of appropriate safeguards in this Part. What is proposed are very broad triggering thresholds, and broad purposes involving a significant degree of regulatory judgement, without proper checks and balances and safeguarding of procedural rights.

6.3 We note there may be some circumstances where this is justified: for example, in a fast-moving resolution scenario, advance notice could undermine the effectiveness of the intervention, accelerate a loss of confidence, or increase risks to policyholders and the wider financial system. However, where legislation confers broad distress management powers (as proposed in the Bill), procedural safeguards are necessary to promote transparency and accountability, and ensure there are adequate checks and balances on the exercise of any powers.

6.4 The Law Society recommends amending the Bill to delete proposed section 199C and insert appropriate safeguards relating to the distress management framework. The inclusion of these safeguards would ensure the powers remain effective, while ensuring appropriate accountability and adherence to rule of law principles. The safeguards we would recommend inserting include requirements to:

(a) Provide reasons for RBNZ's decisions, in writing, to the affected insurer(s);

(b) Give notice where practicable and consistent with the purpose of the intervention;

(c) Provide for prompt review of urgent actions once the immediate risk has passed; and

(d) Preserve access to the courts where legal rights are materially affected.

7 Other matters

Minor drafting errors

7.1 The Law Society notes that some minor drafting errors were identified in the process of reviewing the Bill. We list these below:

(a) **Clause 12, proposed section 17(2A)** – proposed section 17(2A) reads: "See sections 233 to 236B (which *provides* for the Bank's power to specify the manner in which an application is made)." The relative clause refers to "sections 233 to 236B" (plural) so "provides" should be "provide." (emphasis added).

(b) **Clause 16, proposed section 21(2)(f)** – proposed section 21(2)(f) reads: "a condition that requires licensed insurer or the directors of the insurer..." It should read "*the* licensed insurer or the directors of the insurer..." (emphasis added).

(c) **Clause 23, proposed section 43A(2)** – "director or manager" should likely be "director or relevant officer." Proposed section 43A(2) cross-references an offence under section 42 whereby the term "director or relevant officer" is used. To ensure consistency, this term should carry over to proposed section 43A(2).

(d) **Clause 26, proposed section 54B(c)** – "relevant manager" should likely be "relevant officer." The Bill consistently uses the term "relevant officer" throughout, so this may be a typographical error.

(e) **Clause 27, proposed section 56M(3)** – proposed section 56M(3) reads: "If a provision of this Act applies to a New Zealand holding entity under a standard, the *provisions applies* with.." This should read "the *provision applies*".

(f) **Clause 47, proposed section 137ZD(1)** – proposed section 137ZD(1), which lists offences to which the general defence applies, cross-references section 129D. However, section 129D is titled 'Purposes' and sets out the purposes of the on-site inspections' subpart. It does not create an offence. We therefore recommend deleting this reference to section 129D.

(g) **Clause 55, proposed section 150(4)** – potentially incorrect cross-reference: Clause 55(1) amends section 150(4) by replacing "section 144(1)(f)" with "section 144(f)." Proposed section 144 as amended by clause 51 retains a subsection (1) structure, so the correct reference may still require a "section 144(1)(f)."

(h) **Clause 64, proposed section 201(4)** – proposed section 201(4) provides that Lloyd's commits an offence if it provides information "that false or misleading in a material particular." There is a missing "is" prior to the word false. It should read "that *is* false or misleading in a material particular".

Transition provisions

7.2 The Law Society notes that clause 2 identifies that general commencement is set for 1 July 2028, while the consultation paper confirms that provisions in the Act that will be replaced by obligations in standards will continue in force until the relevant standard comes into effect. The consultation paper also provides that standards are intended to be completed by 2032.

7.3 We consider it will be important for transitional provisions, when drafted, to be explicitly clear about what obligations (and penalties) apply in the intervening period between the commencement of the Bill and the completion of the standards. This means clearly identifying a specific list of obligations that are due to be replaced in the standards, and whether the obligations and penalties in the current Act or the Bill would apply in the intervening period between commencement of the Bill and completion of the standards.

8 Next steps

8.1 We hope this feedback is useful. Please feel free to get in touch with Shelly Musgrave, Law Reform and Advocacy Advisor (shelly.musgrave@lawsociety.org.nz) if you have any questions or wish to discuss this feedback further.

Nāku noa, nā

Name
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