

## Closed Consultation

# The Insurance Act 2015 and consequential changes to the minimum terms and conditions of professional indemnity insurance

8 August 2019

- You can [download this consultation paper](#) [#download], or read it below.
- The deadline for submission of responses to this consultation was **24 March 2016**.
- The information that appears below is for reference purposes only.
- You can [download an analysis of responses](#) [#download] to this consultation paper.
- We issued [related guidance](https://higher-rights.sra.org.uk/solicitors/guidance/insurance-act-2015-consequential-changes-minimum-terms-conditions-professional-indemnity-insurance/) [https://higher-rights.sra.org.uk/solicitors/guidance/insurance-act-2015-consequential-changes-minimum-terms-conditions-professional-indemnity-insurance/] on 6 July 2016.

The SRA is an independent regulator of legal services providers in England and Wales. This consultation has been published in order to seek the views of our stakeholders, including those we regulate, consumers and their representatives.

### Purpose of this paper

1. The Insurance Act 2015 (the Insurance Act) will come into force on 12 August 2016 and will make changes to the law on non-disclosure and misrepresentation in relation, in particular, to commercial insurance contracts.
2. We are proposing to amend the [minimum terms and conditions \(MTC\)](https://higher-rights.sra.org.uk/solicitors/handbook/indemnityins/appendix-1/content) [https://higher-rights.sra.org.uk/solicitors/handbook/indemnityins/appendix-1/content] of professional indemnity insurance (PII) with effect from 12 August 2016 to bring them into line with some aspects of the Insurance Act when it comes into force.
3. The proposed changes will increase the standard of disclosure in relation to the firms we regulate compared to the existing requirements. The new legislation is aimed at achieving a fairer outcome overall between insurers and insured. It is also expected that the changes will encourage both the insurer and the insured to ask more questions of each other.

### Background



4. Our compulsory professional indemnity insurance arrangements for solicitors are set out in the following key documents:
  - a. Participating Insurer's Agreement 2015 (PIA) – this is an agreement between each individual participating insurer and the SRA under which the insurer agrees to issue qualifying insurance policies that comply with the MTC and to amend any non compliant policy to give full effect to the MTC. The PIA includes the SRA Indemnity Insurance Rules 2013.
  - b. SRA Indemnity Insurance Rules 2013 (SIIR) – these rules place an obligation on firms regulated by us to take out and maintain qualifying insurance that comply with the MTC (which form Appendix 1 to the SIIR).
  - c. Minimum terms and Conditions (MTC) – the MTC provide a wide scope of cover for all civil liability arising from private legal practice, with limited permitted exclusions. Under the MTC insurers are currently prohibited from avoiding or repudiating the insurance on any grounds whatsoever, including non-disclosure, misrepresentation and failure to pay premium. However, insurers may have rights of reimbursement against firms on any of those grounds. The reason for setting up the arrangements in this way was to ensure that clients remain protected where firms have breached a term or condition of the policy.
5. From the date the Insurance Act comes into force different tests of what constitutes 'non-disclosure' will apply to consumer and non-consumer contracts.

## **Consumer contracts**

6. The law for consumer insurance contracts is now less onerous and is found in the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). This provides a duty on the insured to take reasonable care not to make misrepresentation to the insurer.

## **Non-consumer contracts**

7. For non-consumer contracts, the Insurance Act requires that insurers make a "fair presentation of the risk" to insurers. This duty replaces the existing duty of disclosure and misrepresentation (under insurance law). Information which would influence the judgement of a prudent insurer in determining whether (or on what terms) to accept the risk or which would put a prudent insurer on notice that it must make further enquiries concerning the risk must be disclosed. Circumstances which diminish the risk, which the insurer knows, ought to know or is presumed to know it, or where disclosure has been waived do not need to be disclosed.
8. The Insurance Act also requires disclosure of circumstances an insured ought to know (i.e. which would be revealed through a reasonable search of information available to them). The Insurance



Act recognises that a fair presentation need not be contained in only one document or oral presentation ([section 7](http://www.legislation.gov.uk/ukpga/2015/4/section/7/enacted) [http://www.legislation.gov.uk/ukpga/2015/4/section/7/enacted]). However, the disclosure of material circumstances must be made in a manner which would be reasonably clear and accessible to a prudent insurer ([section 3](http://www.legislation.gov.uk/ukpga/2015/4/section/3/enacted) [http://www.legislation.gov.uk/ukpga/2015/4/section/3/enacted]). This is likely to require the insured to be more selective about the information provided to the insurer unless the parties agree otherwise.

9. Under the Insurance Act, where an insured has deliberately or recklessly failed to make a fair presentation, the insurer will be entitled to avoid the policy and must return premiums paid. In all other circumstances, remedies proportionate to the effect of the failure to present the risk fairly will be applied. For example, where the insured has failed to mention a particular fact the insurer may have a remedy to apply terms or conditions to the contract that they would have applied had the fact been presented to them. Similarly, where the insurer would have required a higher premium to cover the risk, a proportionate deduction will be made to any claims paid under the policy. These remedies will not apply directly to insurance contracts covered by the MTC but they will be relevant to any decision about what is 'just and equitable' if insurers seek reimbursement from firms under MTC where they think an insured has not made a fair representation of risk.
10. Whilst the expected standard of disclosure has been lowered for consumer contracts it will be raised for non-consumer contracts.

### **Which standard should apply to solicitors professional indemnity insurance?**

11. It is possible to contract out of the Insurance Act so we have considered whether the MTC should adopt the consumer or non-consumer standard given the additional obligations in relation to the standard of disclosure that will be placed on small firms in particular.
12. We propose to adopt the non-consumer standard for the following reasons:
  - the contract between a firm and its insurer is a non-consumer contract so we would need compelling evidence that the market was not working to impose the lower consumer standard;
  - under the MTC participating insurers cannot avoid cover so we take the view that they are entitled to expect firms to meet a high standard when presenting the risk; and
  - the proposal will have a neutral impact on the overall level of consumer protection as under the current MTC the only issue is the point at which the insurer's rights of reimbursement against the firm are triggered.



## Question 1

Do you agree that the MTC should adopt the non-consumer standard of non-disclosure once the Insurance Act 2015 comes into effect? If not, please supply any evidence that you have to indicate why we should intervene to impose the consumer standard.

## Proposed changes to the MTC

13. The changes that we propose to introduce on 12 August 2016 to bring the MTC in line with the non-consumer standard of disclosure in the Insurance Act are set out in the Annex. The intention is to maintain the current position that insurers cannot avoid or repudiate cover for "non-disclosure" or misrepresentation, they can seek only reimbursement. The changes will affect all policies of qualifying insurance commencing or renewing on or after 12 August 2016.

## Question 2

Do you have any further comments regarding the proposed changes?

## Assessing impact

14. As from 12 August 2016 the Insurance Act will make changes to the law on non-disclosure and misrepresentation in relation to business insurance contracts including policies of qualifying insurance. These changes will come into effect regardless of any changes to the MTC. The proposed changes are limited to necessary consequential changes in the language of clause 4.1 (No avoidance or repudiation) and clause 7.2 (Reimbursement) to replace references to "non-disclosure" with "failure to make a fair presentation of the risk". The MTC changes of themselves should have little or no impact on stakeholders.
15. Whilst there will be a higher standard of disclosure expected of solicitors firms when seeking insurance, this is as a result of the wider changes to insurance law. The changes to the MTC are intended to maintain the status quo where insurers cannot avoid or repudiate cover for "non-disclosure" or misrepresentation, they can only seek reimbursement.
16. There will be no direct impact on the overall level of consumer protections made by these changes.

## Question 3

Do you have any views about our assessment of the impact of these changes and, are there any impacts, available data or evidence that we should consider in developing our impact assessment?

## Next steps and implementation timetable

17. This formal consultation is open for six weeks, closing on Thursday 24 March 2016. This shorter than normal period reflects the limited scope of the changes and the fact that the changes are consequential on a implementation of the Insurance Act. The consultation is in line with our recently published '[Our approach to consultation](https://higher-rights.sra.org.uk/sra/consultations/consultation-approach/) [<https://higher-rights.sra.org.uk/sra/consultations/consultation-approach/>].' document.
18. We have already engaged with insurers and the Law Society and we will be seeking feedback from our small firms virtual reference group and other key stakeholder groups.
19. Our forward timetable is set out below

Formal consultation on our proposals	12 February to 24 March 2016
Rule changes to be made by the SRA Board	1 June 2016
Changes to the SRA's regulatory arrangements approved by the LSB	July 2016
Changes come into effect	12 August 2016

## Consultation questions

Question 1: Do you agree that the MTC should adopt the non-consumer standard of non-disclosure once the Insurance Act 2015 comes into effect? If not, please supply any evidence that you have to indicate why we should intervene to impose the consumer standard.

Question 2: Do you have any further comments regarding the proposed changes?

Question 3: Do you have any views about our assessment of the impact of these changes and, are there any impacts, available data or evidence that we should consider in developing our impact assessment?

## Annex

### Amendments to the MTC (Appendix 1 of the SRA Indemnity Insurance Rules 2013)

- **4.1 No avoidance or repudiation**
  - The insurance must provide that the insurer is not entitled to avoid or repudiate the insurance on any grounds whatsoever including, without limitation, any breach of the duty to make a fair presentation of the risk, ~~non-disclosure~~ or any? misrepresentation, in each case whether fraudulent or not.
  
- **7.2 Reimbursement**
  - The insurance may provide that each insured who:
    - (a) committed or condoned (whether knowingly or recklessly):
      - (i) any breach of the duty to make a fair presentation of the risk, ~~non-disclosure~~ or misrepresentation; or
      - (ii) any breach of the terms or conditions of the insurance; or
      - (iii) dishonesty or any fraudulent act or omission; or
    - (b) undertakes, either itself or by any of its principals, employees, consultants or agents or any person on its behalf, any activity during the cessation period in connection with private legal practice save to the extent that the activity is undertaken to discharge any of its obligations within the scope of its existing instructions or is necessary in connection with the discharge of any such obligation,
  - will reimburse the insurer to the extent that is just and equitable having regard to the prejudice caused to the insurer's interests by such failure to make a fair presentation of the risk, ~~non-disclosure~~, misrepresentation, breach, dishonesty, act or omission, provided that no insured shall be required to make any such reimbursement to the extent that any such breach of the terms or conditions of the insurance was in order to comply with any applicable rules or codes laid down from time to time by the Society, or in the Society publication Your Clients - Your Business, as amended from time to time.
  - The insurance must provide that no failure to make a fair presentation of the risk, ~~non-disclosure~~, misrepresentation, breach, dishonesty, act or omission will be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company, or in the case of an LLP, all members of that LLP.

- The insurance must provide further that any right of reimbursement contemplated by this clause 7.2 against any person referred to in clauses 1.3(d), 1.5(d) or 1.7(d) (or against the estate or legal personal representative of any such person if they die or become legally incapacitated) is limited to the extent that is just and equitable having regard to the prejudice caused to the insurer's interests by that person having committed or condoned (whether knowingly or recklessly) the failure to make a fair presentation of the risk, non-disclosure, misrepresentation, breach, dishonesty, act or omission.

## Downloadable document(s)

- [Insurance Act 2015 consultation \[https://higher-rights.sra.org.uk/globalassets/documents/sra/consultations/insurance-act-consultation.pdf\]](https://higher-rights.sra.org.uk/globalassets/documents/sra/consultations/insurance-act-consultation.pdf)
- [Insurance Act 2015 consultation - analysis of responses \[https://higher-rights.sra.org.uk/globalassets/documents/sra/consultations/insurance-act-2015-analysis-responses.pdf\]](https://higher-rights.sra.org.uk/globalassets/documents/sra/consultations/insurance-act-2015-analysis-responses.pdf)

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