Exposure Draft Insurance Contracts Bill

Union Medical Benefits Society Limited

4 MAY 2022

UniMed
YOUR HEALTH INSURER

Wednesday 4 May 2022

Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

By email: insurancereview@mbie.govt.nz

Exposure Draft Insurance Contracts Bill

Thank you for the opportunity to provide a submission on the Exposure draft of the Insurance Contracts Bill Consultation Paper, 24 February 2022. This submission is on behalf of Union Medical Benefits Society Limited (Trading as UniMed).

UniMed is an Incorporated Society registered under the Industrial and Provident Societies Act 1908 in November 1979. Its principal product and service is health insurance within New Zealand. The Society is domiciled and incorporated in New Zealand and is a Public Benefit Entity.

The Society was granted a licence by the Reserve Bank of New Zealand (RBNZ) on 23 May 2013 to operate as an insurer subject to the Insurance (Prudential Supervision) Act 2010 (IPSA). As a consequence of being a licensed insurer, the Society is deemed to be a financial markets conduct reporting entity under Part 7 of the Financial Markets Conduct Act 2013 (FMC Act).

UniMed's key market segment is 'Group' workplace schemes. UniMed manages this via a network of intermediaries and a small, employed sales force that engages with corporate clients. While insureds may be part of a Group scheme, the insurance contract is direct between UniMed and the insured.

UniMed notes it has not responded to every question in the Proposal as have focussed on questions of most relevance to UniMed and the wider health insurance industry.

I can be contacted on Privacy of natural persons to discuss any element of our submission.

Yours sincerely

Privacy of natural persons

Chief Financial Officer
Union Medical Benefits Society Limited

Submission on *Exposure draft Insurance Contracts Bill*

Your name and organisation

Name	Privacy of natural persons
Organisation (if applicable)	Union Medical Benefits Society (UniMed)
Contact details	Privacy of natural persons

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Responses to consultation paper questions

Part 1: preliminary provisions	
1	***Do you have any feedback on Part 1 of the Bill?***
	UniMed supports the reform of New Zealand's insurance contract law to reflect modern provisions and ensure that participants are treated fairly. UniMed notes that the 'purpose' of the Bill is consistent with the recent FSLAA and upcoming COFI regimes. UniMed, and all regulated insurers, are at present actively considering and applying good conduct and client care outcomes throughout all operations, from designing products and communications to complaints, claims and client service. It is not clear whether the Bill has adequately considered the significant differences between the General Insurance, Health Insurance and Life Insurance. As a provider of only Health Insurance, UniMed's submission is focused on the implications of the Bill to the health insurance industry only.
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?***
	In the context of health insurance, UniMed suggests consumer disclosure requirements should be a combination of 'taking care not to make a misrepresentation' ***and*** 'making a fair presentation of risk'. That is, provided the insurer first asks a range of 'specific questions', and provides sufficient guidance, they should ***also*** be able to rely on broad questions to cover any part of a policyholder's health, injury history or personal circumstances that have not been covered within the specific questions. The application of COFI is a key part of this consideration. Within the fair conduct requirements, a health insurer will not be able to disproportionality react to an insurers non-disclosure, whether or not a specific question had been asked. UniMed considers that the introduction of specific questions is an appropriate shift from simply requiring policyholders to disclose all material information that would influence the judgement of a prudent insurer. However, UniMed considers that this should not exclude the ability for an insurer to require a policyholder to make a fair presentation of the risk, by providing any additional information which might be important. Unlike the current law, which places the burden solely on the policyholder to assume what it is important, in this proposal, 'what is important' can be ascertained within the context and the content of the specific questions asked, along with sufficient guidance. A complete shift to the policyholder having to truthfully answer only the questions asked creates a significant risk of an insurer having to meet claims for events which would have been excluded or special terms applied to, should it be found that the insurers questions were not specific enough for that very particular treatment or event. This significantly impacts on the insurers risk management programme and will inevitably be managed with premium increases, higher excesses, increased risk of declining insurance, or the offering of insurance for only limited events. Whilst the current *permitted* consequences for a policyholder failing to disclose all material information can be extremely harsh, UniMed is not aware of any health insurer who apply these

harsh consequences in the absence of proven fraudulent activity. Should UniMed discover, whether at claims time or any other occasion, that there has been non-fraudulent non-disclosure, UniMed will not cancel or avoid a policy, but will instead consider and apply what the terms of the policy would have been had the disclosure been made. This might mean that a particular treatment is not covered but the policy remains in force. Often, UniMed will still accept and pay the claim as the non-disclosure may not have been excluded or may have been excluded only for a certain period. UniMed understands that this is the approach taken within the health insurance industry.

Within health insurance, underwriting occurs only at the time of policy inception (or when adding an insured and, to a limited extent, when upgrading cover). The proposed duty to *"take reasonable care not to make a misrepresentation*" before the contract is entered or varied creates a significant burden on the insurer upon the policy application, as it will not receive any further opportunity to question the policyholder on their medical history. This will necessitate considerably long application processes, likely including the questioning of every insured directly, rather than accepting answers from, for example, a spouse on the other persons behalf. This would appear inconsistent with the Bill's requirement to utilise clear and concise documents.

The Bill requires policyholders to take care not to make a misrepresentation in the answers given, but specifically (clause 17) cites that failure to answer a question, or failure to provide a complete answer to a question, is not a misrepresentation. This would mean that a policyholder's failure to answer a question on an application form which relates to a condition or injury they hold, cannot later be relied on by the insurer under remedies. UniMed strongly disagree with this position as it will be difficult to prove that the omission was reckless, and an insurer will then have to meet a claim for a clear pre-existing condition.

This could foreseeably lead to an insurer refusing to take the risk of accepting a written application form alone when the insurer has not spoken to an insured directly. The insurer will need to be fully satisfied that all persons insured understand their duty not to make a misrepresentation and understand the meaning of each of the questions being asked.

UniMed also questions how this duty to not make a misrepresentation to specific questions would be applied to existing health insurance contracts. If a health insurer is required to complete an underwriting review of its entire portfolio the practicalities of this are hard to comprehend. A policyholder would be expected to put themselves back in the position of the initial application, which could be decades earlier.

Medical underwriting requires significantly wider disclosure than general insurance which can more readily ask specific questions, for example specific questions for contents insurance relating to any previous claims lodged for loss or damage to personal effects. Adequate medical underwriting requires information beyond previous claims, diagnosed or treated conditions, and injuries such as symptoms of undiagnosed conditions or injuries that a policyholder might have otherwise assumed were unimportant as treatment was not sort. Obtaining medical records is not only hugely time consuming and a burden on resources (not just for the insurer but the provider and the policyholder) and still only provides part of the story as this will not capture any symptoms or injuries for which an insured has not sought medical care.

UniMed is has concern about the implication in section 15 of the Bill that the questions asked must be specific. Medical underwriting requires a combination of specific and broad questions to adequately understand a person's circumstances. UniMed's suggestion of a combination of specific questions, which provide context to the information being sought, along with the ability to ask broader questions to ensure that the policyholder provides a fair presentation of the risk, is a fair solution.

If an insurer is only able to underwrite based on the answers to specific questions, it is likely insurers will tend towards blanket exclusions. This may lead overall to poorer customer outcomes by

	removing the opportunity for the insurer and policyholder to discuss a pre-existing condition or injury at the outset and negotiate a particular path of underwriting, ie, covered but with a 3 year stand down period, or covered with a specified excess. In regards representations to specified intermediaries, UniMed considers that there is a difference between an intermediary who completes the policy application with, or on behalf of the policyholder and one who brokers the relationship for a direct application between the policyholder and insurer. Where an intermediary has presented the application to the insurer on behalf of the policyholder, it is acceptable that the representations made by the policyholder to the intermediary should be considered as being made known to the insurer (recognising the intermediaries' duty to pass on all material representations). This is a very different scenario to where the intermediary's involvement has been limited to providing advice or brokering the relationship between the policyholder and the insurer. Where the application is made direct between the policyholder and the insurer, the insurer should be able to rely on the policyholder providing all necessary representations, regardless of whether these had previously been made to the intermediary. In this situation, the insurer should not be considered to know what an intermediary had been advised outside of the application process (provided that the insurer informs the policyholder of their disclosure duty as per clause 55).
3	***Do you have any feedback on the Bill's provisions in relation to remedies for breach of the consumer duty?***
	As noted above, UniMed appreciates the existing remedies *available* can have severe and in some cases disproportionate impacts on policyholders. However, UniMed believes these harsh remedies are used extremely rarely and only in situations of fraud or severe recklessness. UniMed notes that fair conduct provisions within FSLAA and COFI will also guide health insurers in considering remedies for non-disclosure. UniMed agrees with the proposed tiered remedy system but suggest that these should be the *only* remedies available. Alternative remedies should be available at the insurer's discretion, provided that the alternative is in the best interest of the policyholder (and does not substantively affect other policyholders, consistent with obligations under FSLAA and COFI). Consideration should be available that an insurer can propose an alternative remedy to those in the Bill where that alternative provides a better outcome to the policyholder. This could be, for example, an ex-gratia agreement, with the remedies in the Bill available as an alternative. This would allow more adaptable options such as a partial payment, allowing more flexibility and means for client care. This flexibility provides an opportunity for negotiation with the client who may not have chosen to take out a policy on a revised premium had that premium cost been known at the outset. UniMed is concerned with the significant shift where the insurer must establish that the non-disclosure has been the result of a policyholder failing to take 'reasonable care', rather than simply acknowledge that the information was not provided. This is a significant burden on an insurer especially in health insurance where the underwriting is only completed at the time of application. Years may have passed between the application and the discovery of the non-disclosure. It will be virtually impossible for an insurer to establish the original context to verify that the policyholder failed to take reasonable care at that time. The requirement to establish 'reasonable care' is also at odds with the usual application of misrepresentations in contracts. When an insurer is required to pay out for events that it would have otherwise not have met, (through applying remedy 3) this leads to overall poor customer outcomes

	as all policyholder's will be affected by an inevitable increase in claims payments where an insurer finds themselves unable to apply a remedy. UniMed raises the point of commercial sensitivities, privacy issues and good customer outcomes in relation to group insurance. Some employers negotiate an insurance package for eligible employees and pay the premium on the policyholder's behalf, however the policyholder's relationship with the insurer is direct, including application and claims processes. The employers only involvement is negotiating the package that is made available and paying part or all of the premium. If, on the event of a claim, an insurer discovers a non-disclosure and seeks to apply a remedy of reducing the claim payment by the amount of the premium that would have been charged, the policyholder might reasonably question the premium amount. The premium might be based on a commercially sensitive term between the policyholder and the employer, yet the policyholder will need to be informed of the calculation in order to understand the resultant claim payment. The premium increase would then need to be applied on an ongoing basis. This would require the insurer to inform the employer to increase the subsidy for that person, indirectly informing the employer that the policyholder has had a claim or other interaction with their health insurer. This would be a serious conflict of privacy. It is possible that, through the insurer's disclosure a policyholder could be informed of information sharing with their employer being a possible consequence of non-disclosure, however care would need to be taken as to how the Privacy Act applies in this context. If a prescribed disclosure is decided upon through Regulations or other guidance, scenarios like this may need to be considered. UniMed considers that it is in the best interests of all policyholders that the remedy reducing a claims payment should be percentage based. This creates better equality for a person who has held a policy for 1 month against a person who has held a policy for years. UniMed considers it appropriate that actual and reasonable costs incurred by the insurer should be allowed to be deducted before a policy is avoided with premiums returned.
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?***
	UniMed has no comment on this as it does not provide life insurance services.
5	***Do you have any feedback on the Bill's provisions in relation to the disclosure duty for non-consumers?***
	UniMed has no comment on this.
6	***Do you have any feedback on the Bill's provisions in relation to remedies for breach of the non-consumer duty?***
	UniMed has no comment on this.
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?***
	UniMed supports a duty on the insurer to inform the policyholder of their disclosure duties. Clarification would be appreciated whether this needs to be provided to all (adult) insureds or only to the primary policyholder (when the primary policyholder is making the application on behalf).

	UniMed encourages a standardised statement for the protection of all policyholders and insurers that this duty has been fulfilled, ensuring remedies are able to be applied where appropriate. UniMed generally supports the requirement for the insurer to inform the policyholder, before the contract is entered into, that access to third party records may be relied on. UniMed are unsure whether '*the extent to which*' can be ascertained at the time of application; this will depend on how specific this is expected to be. UniMed would suggest that the insurers obligations under the Privacy Act offers the necessary protections that information will not be sought or provided unnecessarily. Provided that the obligations under the Privacy Act are included, a broad disclosure about the possibility of accessing third party information where this is necessary for policy / claim administration, should be acceptable at the time the contract is entered into.
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?***
	The consequences on an insurer who fails to inform the policyholder of their disclosure duties, (or simply fails to prove that this was provided) are disproportionality severe. UniMed suggests that whether the insurers failure to disclose contributed to the policyholder's nondisclosure should be taken into account. UniMed strongly disagrees that the failure of an insurer to inform a policyholder of the access to third party information should prevent the insurer from accessing remedies. Provided the policyholder has been informed of their disclosure duties, the failure to inform about third party access should be irrelevant when it comes to a policyholder misrepresentation. UniMed considers the possible consequences an insurer would face under the FMCA and Privacy Act are sufficient protections.
9	***Do you have any feedback on how the Bill codifies the duty of utmost good faith?***
	UniMed suggests that the fair conduct and client care principles imposed through FSLAA and COFI already provide duties that keep an insurer accountable to the duty of utmost good faith. Should this duty be codified in the Bill it should be given considerably more context than the succinct clause 59 to minimise the subjectivity of what is 'good faith'. It is important that there is no conflict or ambiguity with the obligations and principles under FSLAA And COFI. UniMed does not consider it appropriate that duty of utmost good faith does not extend to a policyholder's duty to take care not to make a misrepresentation.
10	***Do you have any feedback on the Bill's provisions relating to information provided by a policyholder to a specified intermediary?***
	UniMed supports the requirement for an intermediary to pass on material information to the insurer. As the information is limited to that which is material, UniMed suggests that the duty needs to extend beyond 'reasonable steps'. This is particularly important against clause 20, where the insurer is deemed to know all representations made to an intermediary. As already discussed, the potential consequences on an insurer being unable to apply a remedy are significant. An insurer should be afforded reasonable protections to avoid being placed in this position. UniMed does not agree that an intermediary should be able to withhold from the insurer information that it believes to be a misrepresentation. This would appear inconsistent with the duty of utmost good faith and may deprive the insurer of material information it would have relied on when assessing whether to accept the risk and on what terms.

	A balance should be struck where an intermediary is required to notify the policyholder that they believe a misrepresentation has been made and allow the policyholder to reconsider the content of its application. Should the intermediary remain concerned that a misrepresentation remains, having given the policyholder an opportunity to reassess, they should be required to pass this concern to the insurer. As discussed in question 2, UniMed considers that the Bill should acknowledge the difference between an intermediary involved in the application process and one who simply brokers the relationship.
11	***Do you have any other feedback on the drafting of Part 2 of the Bill?***
	UniMed have no additional feedback on this part.
Part 3: terms of insurance contracts	
12	***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?***
	UniMed does not provide claims-made policies and so has no comment on questions 12 through 14.
13	***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?***
14	***Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?***
15	***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)?***
	UniMed is unsure whether this clause, along with clause 70, are expected to apply for health insurance. UniMed requests that this is made clear in the Bill.
16	***Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?***
	UniMed has no comment on this Subpart of the Bill.
17	***Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?***
	UniMed has no comment on this Subpart of the Bill.
18	***Do you have any comments on not carrying over section 10(1) of the ILRA 1977?***

	UniMed has not comment on this.
19	***Do you have any other feedback on the drafting in Part 3 of the Bill?***
	UniMed has not comment on this.
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?***
	All premium and claim payments within UniMed are direct between UniMed and its policyholders. UniMed is not directly affected by this Part 4 of the Bill and has no comments to make.
21	***Do you have any feedback on the proposed penalties for non-compliance with Part 4 of the Bill?***
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?***
23	***Do you have any other feedback on Part 4 of the Bill?***
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.***
	As a health insurer UniMed has no comment on Part 5 of the Bill as this pertains to life insurance.
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?***
26	***Do you have any feedback on the Bill's requirements relating to assignments and registrations generally?***
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?***

28	***Do you have any other feedback on Part 5 of the Bill?***
Part 6: regulation-making powers and miscellaneous provisions	
29	*Do you have any feedback on Part 6 of the Bill?*
	UniMed has no comment on this.
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?***
	As a health insurer, UniMed has no comment on this.
31	***In relation to unfair contract terms: which option do you prefer and why?***
	UniMed prefers option B. Maintaining sustainable and affordable health insurance requires insurers to carefully consider both general and specific policy terms. A health insurance policy is made up of a significant number of benefits, most of which with relevant limitations and exclusions. The policy limitations and exclusions are fundamental for the insurer's pricing and risk management programmes, which in turn influence solvency calculations. Option A will hold these limitations and exclusions, amongst most other general and certain specific policy terms, open for continuous scrutiny. This will cause significant and ongoing uncertainty for insurers, which will have to be accounted for within product pricing. UniMed considers that the combination of option B along with the fair conduct principles of COFI, which extend to product development, offer sufficient policyholder protection in respect fair policy terms.
32	***Do you have any feedback on the drafting of either of the options?***
	UniMed has no further comment on this.
33	***Do you have any comments on the obligation that consumer insurance contracts be worded and presented in a clear, concise and effective manner?***
	UniMed supports efforts to promote and enhance consumer understanding of insurance products and agree that, wherever possible, clear, concise, plain English documentation should be required in all documentation and communication from an insurer. Contracts of health insurance require relatively complex medical terms. The simplification of these terms is likely to create ambiguity as to the policy intent. UniMed would encourage that the duty to ensure contracts are worded in a 'clear concise and effective manner' should be subject to caveats such as 'reasonable steps', 'wherever possible' and 'having regard to the subject matter'.

34	***Do you have any comments on the regulation-making powers in clause 184?***
	UniMed has no comment on this.
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.***
	UniMed does not see there being significant policyholder benefit from regulations specifying form and presentation requirements of insurance contracts in addition to the duty for these to be clear concise and effective. Should regulations proceed UniMed suggests that these should be less prescriptive and more guiding.
36	***Do you think regulations specifying publication requirements for insurers would help consumers to make decisions about insurance products? If so, please explain.***
	UniMed does not necessarily agree that publication requirements will help consumers make decisions about insurance products. There is a risk that this information will be taken out of context and / or set unreasonable expectations, for example publishing the average time to complete a claim does not make it clear whether this is an expectation for a claim as simple as reimbursement of a GP consult, as complex as major surgery, or somewhere in between.
Timing and transitional arrangements	
37	***Do you have any initial feedback on when the Bill's provisions should come into effect?***
	UniMed notes that a considerable amount of time will be required for insurers to review and update all contracts, implement new disclosure processes, and prepare for and implement all things required by the Regulations. UniMed asks that the implementation date takes into consideration the impact, particularly with regard to smaller, less resourced insurers, of preparing for and implementing other regulatory changes, including COFI.
38	***Do you have any feedback on the transitional provisions in Schedules 1 or 4, or other proposed transitional arrangements?***
	UniMed has no comment on this.
Schedule 5: amendments to other Acts	
39	***Do you have any feedback on Schedule 5 of the Bill?***
	UniMed has no comment on this.