The PII countdown begins (Pt 3)

Professional indemnity insurance: Frank Maher issues a call to action

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This is the third of three articles on professional indemnity insurance (PII). We look at the SRA's proposals for reform of the compulsory cover required by the SRA minimum terms and conditions (MTC) announced earlier this month. Their discussion paper, "Protecting client's financial interests", proposes sweeping reform and massive reductions in the protection provided to clients—and solicitors and their staff.

The agenda for change is driven by the SRA, but is there a risk of throwing away (not even selling) the family silver?

As noted in the last article, we have the most comprehensive cover of any profession in the world (see Pt 2, *NLJ,* 17 July, p 21). This can come at a price. We have seen some years when firms, particularly the smaller ones and those with a significant conveyancing practice, have had difficulty obtaining cover. This was largely a product of the exposure to lender claims which followed the global financial crisis.

The result was that many firms were driven to obtain cover from unrated insurers, several of which later collapsed—Quinn, Lemma, Balva and ERIC. A significant number of firms closed because they were unable to obtain cover at a price they could afford. Some accused insurers of overcharging, but the collapse of the unrated insurers which charged lower premiums, and the departure of dozens of other insurers from the market over the past 15 years, suggests that was not the case.

A difficulty has been that when insurance markets harden, as they do on a cyclical basis, there is no flexibility in the MTC. In the 1990s, when valuers had extreme difficulty obtaining cover to satisfy the RICS requirements, the RICS was prepared to grant waivers which enabled firms to obtain insurance on less demanding terms and continue in practice. One Australian solicitors' statutory scheme varies the cover when market conditions necessitate it. These options might propose a more proportionate response to the perceived problem.

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Last year, the SRA proposed a number of changes which resulted only in the new outcome 7.13 requiring firms to consider the adequacy of PII cover, with further consultation deferred. It is hard to see the value of this, as disciplinary action years after the event will not help to ensure that clients are paid their damages by firms which were underinsured. In any event, are law firm partners necessarily sufficiently well informed on the total cost of professional liability claims to make the necessary assessment?

The discussion paper again suggests a possible reduction in the compulsory limit of cover to £500,000 from the current £3m for recognised bodies and ABSs and £2m for partnerships and sole practitioners. It is critical to note, and this was overlooked last year, that the limit of indemnity includes claimants' costs. When the costs of a trial on a contested claim are taken into account, that level of cover would be pitifully low for most firms doing quite ordinary work. Remember, too, that multiple, similar claims may be aggregated and subject to one policy limit.

While other branches of the legal profession, such as the Bar and CILEX, have a £500,000 minimum, solicitors have far more bargaining power as they pay approximately £250m in premiums. The saving in cost from such a reduction would be minimal. If cover were reduced, smaller firms in particular would not generally be able to buy back the difference in cover for a premium equal to the reduction.

The lower level of cover would almost certainly apply to run-off insurance as well, and would put at risk the houses and pensions of not only lawyers, but their staff, who have no say in the level of cover. Similar concerns apply to the SRA's proposal to reduce run off cover from six years to three where a firm closes without a successor practice.

Other proposals included limiting compulsory cover in effect to private clients and perhaps small businesses; that would create a huge gap in client protection for most firms.

A highly significant proposal is the removal of the provision by which insurers are prevented from denying cover for policy breaches and non-disclosure. At present they have to meet a claim come what may, and their only redress is to seek reimbursement against the individual responsible, which may be worthless.

Partner fraud cover could also be removed. At present there is protection for the innocent partners. The paper assumes that such a change would encourage a greater focus on risk management. In the writer's experience, however, fraudsters are often devious and find their way round even elaborate controls.

Other proposals for possible change include defence costs cover, which would be subject to the policy excess, and abolishing the extended indemnity period, but space does not permit review of these here.

This is a debate which affects all members of the profession and it is critical that everyone is involved in the response—your livelihood, your home and your pension may be at risk. Any saving in insurance cost is likely to result in claims being uninsured. The writer's firm has acted for many solicitors facing coverage disputes and claims over the indemnity limit, and it imposes a strain which few would wish to endure. So, don't let anyone throw away the family silver unchallenged, and instead, respond to the SRA's discussion paper. NLJ

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