RESPONSE BY THE CITY OF LONDON SOLICITORS COMPANY, INSURANCE LAW COMMITTEE, TO THE LAW COMMISSION'S CONSULTATION PAPER - INSURANCE CONTRACT LAW: MISREPRESENTATION, NON-DISCLOSURE AND BREACH OF WARRANTY BY THE INSURED

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The CLLS responds to Government consultations on issues of importance to its members through its 17 specialist committees. This response has been prepared by the CLLS Insurance Law Committee made up of solicitors who are expert in their field. The members of the Committee are Ian Mathers of Allen & Overy (Chairman); Martin Bakes of Herbert Smith; Christian Wells of Lovells; Michael Mendelowitz of Norton Rose; Stephen Lewis of Clyde & Co; Geoff Lord of Kennedys; Kenneth McKenzie of Davis Arnold Cooper; James Bateson of Norton Rose; Martin Mankabady of Lawrence Graham; Maxine Cupitt of CMS Cameron McKenna; Richard Spiller of Kendall Freeman; Paul Wordley of Holman Fenwick & Willan; Glen James of Slaughter & May; Terry O'Neill of Clifford Chance; Catherine Hawkins of Berrymans Lace Mawer; Charles Gordon of DLA Piper; and Anna Tipping of Linklaters.

Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured

RESPONSE SHEET

This document lists the proposals, as set out in Part 12 of the Consultation Paper. It is designed to help you in responding. Please feel free to adapt it as you wish. We are also happy to receive responses in other formats if you would prefer.

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PRE-CONTRACT INFORMATION AND CONSUMER INSURANCE

The case for law reform

12.1 We provisionally conclude that there should be a clear statutory statement of the obligations on consumers to give pre-contract information and the remedies available to insurers if they fail. (3.74)

Agree: ✓ Disagree: Other:

Comment: It is clear that regulatory practice, market practice and the law are out of step. We agree that the law should be reformed and that there should be a clear statement of what the law is. In principle, the same should apply to business insurance.

Defining consumers

12.2 We provisionally propose that the consumer regime should apply where an individual enters into a contract of insurance wholly or mainly for purposes unrelated to his business. (4.11)

Agree:	✓	Disagree:	Other:

Comment: There is always scope for debate about the precise test to be applied. Any test will give rise to difficult cases but our view is that the proposed test is a fair and reasonable one, and there is merit in applying the same test as for the other provisions to which the Commission has referred.

12.3 We ask whether there is a need to exempt insurance of specific high-value items (such as jets and yachts) from the consumer regime. (4.12)

Yes:		No:	✓

Comment: We consider that having decided upon the correct definition, it would be unwise to exclude special cases from that definition. We are not clear that, for example, the purchaser of a yacht should be deserving of less protection or would necessarily be more likely to obtain professional advice than other consumers.

The duty of disclosure

12.4 We provisionally propose that there should be no duty on the consumer proposer to disclose matters about which no questions were asked. (4.31)

Agree:	✓	Disagree:	Other:

Comment: The proposal reflects FOS and market practice. It also reflects what really happens in increasing circumstances, in the practice of contract formation, particularly in cases involving internet and telephone selling. The Consultation Paper makes no reference in this context to Section 3 of the Fraud Act. Our view is that if this proposal was implemented then Section 3 could not apply to a duty of disclosure which was as a result of this proposal removed, but we think that it is a point to which the Law Commission should give consideration. If there is to be no duty of disclosure, we believe that it is important that general questions should be permitted.

12.5 We provisionally propose that where the insurer asks a general question, the insurer should have no remedy in respect of an incomplete answer unless a reasonable consumer would understand that the question was asking about the particular information at issue. (4.32)

Agree: ✓ Disagree: Other:

Comment: There should not in our view be a general prohibition against the asking of general questions and the law should not be so rigid as to permit the asking of general questions only in specified circumstances. We agree that what is proposed is sensible and flexible albeit will necessarily be uncertain. In practice we think that it is likely to enable the courts to penalise insureds who recognise that they ought to give particular information to the insurer but decide not to do so, and in that regard, a general question might effectively bring about a requirement for disclosure through a slightly circuitous route. In the right case, we do not think that that would be a bad thing. However, it is important that the general question should not be abused by insurers and we believe that what is proposed would bring about a healthy balance.

The basic requirements: misrepresentation and inducement

12.6 We provisionally propose that the insurer will not have a remedy for misrepresentation unless the consumer made a misrepresentation which induced the insurer to enter the contract. (4.48)

Agree: ✓ Disagree: Other:

Comment: The requirement for inducement is well-known (albeit in the context of insurance contracts, a requirement which has been recognised only relatively recently). It should be retained.

12.7 We ask whether the rules on what constitutes a misrepresentation and on inducement should be stated expressly in any new Insurance Contracts Act. (4.49)

Yes: ✓ (subject to comment) No:

Comment: We think that in principle it is right that there should be an express statement of the requirement for inducement in any new Insurance Contracts Act. The absence of any clear reference to inducement in the Marine Insurance Act was a matter which, with hindsight, was very strange and a reference to the requirement for inducement would avoid similar difficulties in the future. We question the need to state what constitutes a misrepresentation. This is a concept well-known to the law and a separate category of misrepresentation which is particular to insurance contracts would be undesirable.

Deliberate or reckless misrepresentations: where the proposer acts without honesty

12.8 We provisionally propose that an insurer should have the right to avoid a policy where it has relied on a misrepresentation by the consumer proposer at the pre-contractual stage and the insurer shows that, on the balance of probabilities, the proposer made the representation:

(1) knowing it to be untrue, or being reckless as to whether or not it was true; and

(2) knowing it to be relevant to the insurer, or being reckless as to whether or not it was relevant. (4.96)

Agree: ✓	Disagree:	Other:

Comment: Whilst there has been some expression of concern about the twofold requirement, i.e. that the insurer must establish both (1) and (2), we believe that the practical difficulties will be mitigated by the presumptions of knowledge referred to in the Consultation Paper. The view has been expressed by one member of the Committee that it would be preferable to have only requirement (1) rather than rely on a presumption to satisfy (2).

12.9 Do consultees agree that the definition of “reckless” can be left to the common law? (4.97)

Yes: ✓	No:

Comment: In our view it would be preferable not to define "recklessness" in any statute because it is a concept well known to the common law and the courts are familiar with it. The danger with a statutory definition is that it might at some point in time be found to depart from the common law.

12.10 We ask whether, where an insured has made a deliberate or reckless misrepresentation, the insurer should be entitled to retain the premium. (4.98)

Yes: ✓	No:

Comment: Whilst under the Law Commission's proposals the remedy of avoidance will no longer be generally available, it will continue to be the appropriate remedy in some cases of negligent misrepresentation. We think that the sanction of retention of premium should apply to distinguish deliberate or reckless wrongdoing from negligent wrongdoing.

12.11 We ask whether the statute should provide expressly that:

(1) a proposer would be presumed to know what someone in their position would normally be expected to know; and

(2) if an insurer has asked a clear question about an issue, the proposer would be presumed to know that the issue is relevant to the insurer. (4.99)

(1) Yes: ✓ No: (2) Yes: ✓ No: Comment: We consider that it is better that these presumptions should be dealt with expressly in any statute because it is not entirely clear that they would arise as a matter of common law – and it is better to avoid any doubt on the point. As to the merits of the presumptions, we think that it is better that they should be made although we do foresee a risk that insurers might logically be driven to allege deliberate or reckless wrongdoing more frequently than they do at present. Indeed a presumption that someone knows what someone in their position would normally be expected to know can quickly involve a move from innocent misrepresentation to an allegation of deliberate misrepresentation.

"Innocent" misrepresentations: protecting the insured who acts honestly and reasonably

12.12 We provisionally propose that:

(1) An insurer should not be able to rely on a misrepresentation if the insured was acting honestly and reasonably in the circumstances when they made the misrepresentation.

(2) In assessing reasonableness, the type of policy, the way the policy was advertised and sold, and the normal characteristics of consumers in the market should be taken into account.

(3) The test of whether the consumer proposer acted reasonably should also take into account any particular characteristics or circumstances affecting a consumer insured, so far as these were known to the insurer. It would not take into account individual circumstances which were not known to the insurer. (4.119)

(1) Agree:	✓	Disagree:	Other:
(2) Agree:	✓	Disagree:	Other:
(3) Agree:	✓	Disagree:	Other:

(all subject to comment)

Comment: By (1) above it is proposed that a consumer insured should be excused an "innocent" misrepresentation. This would put insurance contracts into a different position to other contracts and there has been some difference of opinion in the Committee about the merits of such an approach. There may also be room for argument about what should be considered reasonable (for example, what about mere forgetfulness). It has been suggested that the availability of proportionate remedies is a factor to be taken into account in considering whether it is necessary to distinguish between "innocent" and "negligent" misrepresentation. In reality, the real question is how significant the cost of such an approach is likely to be as that is a cost which will have to be borne across the population of insureds. We do not feel that we are in a position to make such an assessment. However, we recognise that the proposal reflects the ABI statement of practice.

Given that one is concerned here with the question of what is reasonable as between the insured and the insurer, we can see the sense in there being an objective test but this should be modified by reference to the insurers' knowledge of particular characteristics affecting the insured. It is easy to foresee, however, that there will be considerable scope for factual disputes about insurers' knowledge in particular cases.

12.13 We ask whether the legislation should specify that the insurer is entitled to a remedy for a misrepresentation only if:

(1) a reasonable insured in the circumstances would have appreciated that the fact which was stated inaccurately or was omitted from the answer would be one that the insurer would want to know about; or

(2) the proposer actually knew that the fact was one that the insurer would want to know about. (4.121)

(1) Yes: ✓ No:

(2) Yes: ✓ No:

Comment: Under the proposals, "relevance" plays an important part and we think that the legislation should highlight its importance.

12.14 We provisionally propose that the burden of showing that a consumer proposer who made a misrepresentation did so unreasonably should be on the insurer. (4.124)

Agree: ✓ Disagree: Other:

Comment: We believe that this is where the burden naturally lies and that the statutory presumptions referred to above will be of assistance in this regard.

Materiality: an end to the test based on a hypothetical "prudent insurer"

12.15 We provisionally propose that insurers should not be required to prove that a misrepresentation is "material" in the sense that it would be relevant to a "prudent insurer". (4.129)

Agree: ✓ Disagree: Other:

Comment: In our view, "materiality" is largely of academic interest given the proposals made in relation to the question of relevance.

Where the policyholder thinks the insurer will obtain the information

12.16 We provisionally propose that in considering whether an insured acted with insufficient care in failing to give information, the judge or ombudsman should consider how far it was reasonable for the insured to assume that the insurer would obtain that information for itself. (4.143)

Agree: ✓ Disagree: Other:

Comment: See answer to 12.17.

12.17 In particular, if the insurer indicated that it may obtain information from a third party (by for example asking the insured for consent to obtain it) it should not be allowed to rely on an honest misrepresentation if the insured reasonably thought that the insurer would obtain the relevant information from the third party before accepting the proposal. (4.144)

Agree: ✓ Disagree: Other:

Comment: We consider that the circumstances described in 12.16 and 12.17 are examples of the practical application of the reasonableness test. We think that it is questionable therefore whether any express reference needs to be made to them but as statements of what the position should be, they are not objectionable.

Disclosure after the proposal has been accepted

12.18 We provisionally propose that:

(1) if before their proposal is accepted a consumer proposer becomes aware that a statement they have made has become incorrect, they should continue to have a duty to inform the insurer, and if the consumer fails to do so unreasonably or dishonestly, the insurer should have a remedy;

(2) There should be no general obligation to inform the insurer of changes that become known to the insured only after the policy has been agreed. (4.152).

(1) Agree:	✓	Disagree:	Other:
(2) Agree:	✓	Disagree:	Other:

Comment: We believe that these reflect the law as it presently stands and should continue to be the position following any reform of the law.

Negligent mispresentations: a compensatory remedy

12.19 We provisionally propose that, in consumer cases, where the policyholder has made a negligent misrepresentation, the court should apply a compensatory remedy by asking what the insurer would have done had it known the true facts. In particular:

(1) where an insurer would have excluded a particular type of claim, the insurer should not be obliged to pay claims that would fall within the exclusion;

(2) where an insurer would have imposed a warranty or excess, the claim should be treated as if the policy included the warranty or excess;

(3) where an insurer would have declined the risk altogether, the policy may be avoided, the premiums returned and the claim refused;

(4) where an insurer would have charged more, the claim should be reduced proportionately to the under-payment of premium. (4.186)

Agree:	✓	Disagree:	Other:

Comment: We think that the principle of a compensatory remedy is sensible and will avoid much of the harshness of the present law. In some instances it may operate as a relatively crude form of justice. For example, the proportionate approach in relation to underpayment of premium might be said to operate harshly on insureds because the amount of "additional" premium that would have been payable may be relatively small and yet it might have a significant impact on the sum recoverable in respect of the claim under the policy. It is also not clear whether the examples given might operate cumulatively. Thus, an insurer might say that it would have imposed a greater excess and would have charged more premium. We assume that in such a case both points would be taken into account in determining the appropriate

compensatory remedy. Overall, however, we agree with the proposal.

We have a further query in relation to the proposals made in respect of misrepresentation which we should raise here. It is our understanding that the division of wrongdoing into "innocent", "negligent" and "deliberate/reckless" misrepresentation will leave no scope in future for the application of the decision of the Court of Appeal in Economides. If so, we think that this should be made clear. We would support such a proposal.

12.20 We ask whether there is a case for granting the courts or ombudsman some discretion to prevent avoidance where the insurer would have declined the risk but the policyholder's fault is minor, and any prejudice the insurer has suffered could be adequately compensated by a reduction in the claim. (4.187)

Yes: No: ✓

Comment: Our view is that in these particular circumstances such a proposal might burden the courts with disproportionate amounts of evidence – assuming such evidence might be available – about the behaviour of other insurers.

12.21 We provisionally propose that where a consumer proposer has made a negligent misrepresentation, the insurer should be entitled to cancel the policy on that ground only where it would have declined the risk. (This proposal would not affect any contractual right to cancel upon notice.) (4.188)

Agree: ✓ Disagree: Other:

Comment: No comment.

12.22 We provisionally reject the proposal that a consumer who has acted negligently should be entitled to enforce any claim unrelated to the risk. (4.189)

Agree: ✓ Disagree: Other:

Comment: No comment.

Negligent misrepresentations in life policies: should the law impose a cut-off period?

12.23 We ask whether in consumer life assurance the insurer should be prevented from relying on a negligent misrepresentation after the policy has been in force for five years. (4.204)

Yes: ✓, subject to comment No: Comment: We are not clear about the effect of the evidence regarding likelihood of an increase in fraud, or in costs at inception. However if as the Commission indicates a 5-year cut-off would reflect current industry practice, it seems likely that any increase is likely to be offset by an improvement in consumer trust. We have noted the proposal in Germany for a general cut-off and perhaps the ambit of the proposal needs consideration. It seems that the Commission is not proposing that it would extend to accidental death.

Mandatory rules

12.24 We provisionally propose that it should not be possible to contract out of the new rules governing misrepresentation and non-disclosure in consumer insurance except in favour of the consumer. (4.218)

Agree: ✓ Disagree: Other: Comment: We agree with the Commission's reasons.

Statements of past and present fact

12.25 We provisionally propose that an insured's statement of past or current facts made before a contract is entered into should be treated as a representation rather than a warranty. (4.229)

Agree: ✓ Disagree: Other: Comment: We agree with the Commission's reasons.

PRE-CONTRACT INFORMATION AND BUSINESS INSURANCE

Retaining the duty of disclosure

12.26 We provisionally propose that a duty of disclosure should continue to apply to business insurance contracts. (5.30)

Agree: ✓ Disagree: Other:

Comment: The Consultation Paper identifies a number of reasons why the duty of disclosure should be retained in respect of business insurance. We think that there are a number of additional arguments both in favour of and abolishing the duty of disclosure. It seems to us that the duty of disclosure is often resorted to where there has been poor underwriting but because of the strength of the insurers' position at law, the consequences of the poor underwriting might be avoided. In other words, we think that it is possible that abolishing the duty of disclosure will enable the more able underwriters to distinguish from the less able ones. It might also reasonably be said that the duty of disclosure does not reflect practice in the market. Underwriters sometimes actively seek out risks and often will make detailed enquiries about risks. On the other hand, one of the strengths of the London market is said to be the ability for major insurance transactions to be underwritten without an enormous amount of due diligence being carried out with underwriters relying on insureds and their professional advisers to provide the material information. One consequence of abolishing the duty of disclosure might be to lose that strength; insurers might produce very long lists of questions and requests for information. Whilst on balance we favour retaining the duty of disclosure, we question whether something might be done to put more onus on the insurer so that an insurer might only be able to complain of non-disclosure where the information which was not disclosed is something peculiar to that particular risk. We think that there is much to be said for insurers being expected to know information about types of risks and market sectors which they underwrite. This might perhaps be achieved by adding more weight to arguments that an insured might have based on waiver so that if an insurer does not ask for information which he would be expected to know as part of his underwriting skills (perhaps judged by the standards of a reasonable insurer) he must be taken to have waived the obligation to disclose that information.

12.27 We provisionally propose to simplify the test in section 18(1) of the Marine Insurance Act 1906 ("that the insured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him"). The duty of disclosure should be limited to facts which the business insured knew or which it ought to have known. (5.44)

Agree: ✓ Disagree: Other:

Comment: In principle we agree with the idea of simplifying the test so as to require an insured to disclose what it ought to know. However the precise impact of the proposed change is unclear. As we understand the position, the proposal is not intended to change the law so far as attribution of knowledge is concerned. The proposal relates only to the scope of the obligation to disclose information and where an insured says that it did not know the information and was not therefore obliged to disclose it, it is intended that the insurer should be able to say that the

insured ought to have known the information. However the position is still not clear. For example, in relation to an insurance taken out by a company, would reasonableness be judged by reference to the company's systems, or of employee A who was responsible for operating them, or of employee B who failed to pick up the information in question or picked it up but failed to report it to A?. It would be helpful if the position could be clarified.

12.28 We provisionally propose that the burden of proving that a business insured should have known a particular fact should be on the insurer. (5.48)

Agree: ✓ Disagree: Other:

Comment:

Honest and reasonable misrepresentations

12.29 We provisionally propose that if a business insured has made a misrepresentation but the proposer honestly and reasonably believed what it said to be true, the insurer should not be able to refuse to pay any claim or to avoid the policy, unless the parties have agreed otherwise. (5.58)

Agree: ✓ (subject to comment) Disagree: Other:

Comment: We think that on balance an insured who has behaved honestly and reasonably should have its claim paid under the policy. Members of the Committee however expressed some concern that the financial impact of this proposal – which is likely to lead to payment of claims which would not otherwise have been payable – may be more significant than will be the case with consumer contracts. Otherwise, please see our response to 12.12 above for the views of some members.

12.30 We provisionally propose that the burden of showing that the insured did not have reasonable grounds for believing that what it said was true should be on the insurer. (5.60)

Agree: ✓ Disagree: Other:

Comment:

Modifying the test of materiality

12.31 We provisionally propose that the current test of "materiality", namely what may influence the judgement of a prudent insurer, should be replaced by a "reasonable insured" test. This would ask what a reasonable insured in the circumstances would think was relevant to the insurer. This should apply to all business insurance, as part of a general principle that an insured who was both honest and careful in giving pre-contract information should not have a claim turned down on the basis that the information was incorrect or incomplete. (5.83)

Agree:	✓	Disagree:	Other:

Comment: We agree that the prudent underwriter test is no longer the appropriate test. We recognise that so far as matters of evidence are concerned the reasonable insured test will not be as straightforward to apply but we think that in practice insurers can assist themselves by alerting insureds to information that they would regard as important.

12.32 We provisionally propose that, in order to be entitled to a remedy for the insured's non-disclosure or misrepresentation, the insurer must show that:

(1) had it known the fact in question it would not have entered into the same contract on the same terms or at all; and

(2) it must also show either:

(a) that a reasonable insured in the circumstances would have appreciated that the fact in question would be one that the insurer would want to know about; or

(b) that the proposer actually knew that the fact was one that the insurer would want to know about. (5.84)

Agree:	✓	Disagree:	Other:

Comment:

Should the law distinguish between dishonest and negligent conduct?

12.33 We invite views on whether the law should distinguish between dishonest and negligent misrepresentation/non-disclosure. For negligent conduct, should the law provide a remedy which (unless the parties have agreed otherwise) aims to put the insurer into the position it would have been in had it known the true circumstances? (5.107)

Yes:	✓	No:	

Comment: Whilst we do believe that the law should distinguish between dishonest and negligent conduct, a number of the members of the Committee believe that that distinction can be achieved by (a) preserving the right to avoid for negligence and (b) preserving insurers' right to retain the premium if the insured has been guilty of deliberate/reckless wrongdoing. Those members of the Committee who were of that view felt that businesses were in a different position to consumers because they were more likely to be aware of what was required of them and it was felt that stronger incentives would be justified to discourage negligence. Other members of the Committee felt that it would be preferable for the default regime to provide for a compensatory remedy (as with consumers) and that if insurers wanted to enjoy a stronger position it would be open to them to bargain for such a position by the terms of the contract.

12.34 If so:

(1) Should there be a rebuttable presumption that the insured knew any fact that in the ordinary course of business they ought to have known?

(2) Do respondents agree that where the insurer would have declined the risk, the insurer should be entitled to avoid the policy, and the court should have no discretion to apply a proportionate solution?

(3) Do respondents agree that negligent misrepresentation or non-disclosure should be a ground on which the insurer may cancel the policy after reasonable notice, without prejudice to claims that have arisen or arise within the notice period? (5.108)

(1) Yes: ✓ No:

(2) Yes: ✓ No:

(3) Yes: ✓ No:

Comment: We note that the Consultation Paper does not refer to there being a rebuttable presumption that where an insured was asked a clear question about a fact or matter, the insured knew that the fact or matter was something that the underwriter would wish to know about. We would be grateful if the Law Commission could clarify whether this is intended to be the case.

Basis of the contract clauses

12.35 We provisionally propose that a warranty of past or present fact must be set out in a specific term of the policy or an accompanying document. The law should not give any effect to a term on a proposal form or elsewhere which converts answers into warranties en bloc. (5.116)

Agree:	✓	Disagree:	Other:

Comment: We agree with the Commission's reasons; and indeed wondered whether a court might currently give effect to the proposal.

Contracting out of the default regime

12.36 We provisionally propose that the parties to an insurance contract should be free to contract out of the default regime we have proposed in two ways. The policy or accompanying document could contain a written term that

(1) the insurer would have one or more specified remedies for misrepresentation even if the proposer was neither dishonest nor careless in giving the information; or

(2) the proposer warrants that specified statements are correct. (5.131)

Agree:	✓	Disagree:	Other:

Comment:

12.37 Liability for breach of a warranty of fact should remain strict but, unless the contract provides otherwise, the insurer should not be able to rely on the breach of warranty

(1) if it was not material to the contract; or

(2) as a defence to a claim for a loss that was in no way connected to the breach of warranty. (5.132)

Agree:	✓	Disagree:	Other:

Comment: Whilst we agree in principle with this proposal it is not clear to us what is intended, in this context, by the concept of materiality and we would appreciate clarification about this point. Is it that it was relevant to the loss but could have had no effect on the insurer's decision to enter into the contract because, for example, it was not commercially significant?

Controlling the use of standard terms

12.38 We provisionally propose that special controls should apply where

(1) the insured contracts on the insurer’s written standard terms of business; and

(2) one such term purports to give the insurer greater rights than the default regime would allow to refuse claims on the basis of the insured's failure to provide accurate pre-contract information. (5.146)

Agree: ✓, subject to comment	Disagree:	Other:

Comment: We agree that there may be difficulty in determining when a contract was on the insurer's standard terms, and recognise that since the proposal at 12.39 deals only with "procedural fairness" it may have a fairly limited effect.

12.39 The insurer should not be permitted to rely on such a term if it would defeat the insured's reasonable expectations. (5.147)

Agree: ✓, subject to comment	Disagree:	Other:

Comment: See 12.38 above.

Marine, Aviation and Transport insurance

12.40 We provisionally propose that the proposals made to the law for business insurance should apply equally to marine, aviation and transport insurance. (5.152)

Agree: ✓	Disagree:	Other:

Comment:

Reinsurance

12.41 We provisionally propose that amendments made to the law for business insurance generally should apply equally to reinsurance. (5.156)

Agree: ✓	Disagree:	Other:

Comment: We are not confident that reinsurance can be treated always in the same way as direct insurance but on balance we think that the proposal is acceptable given that this will only be a default regime and that it will be open to reinsureds and reinsurers to bargain for something different.

Third party claims

12.42 Our provisional view is that we should not extend the existing rights of third parties as part of the current project, but we welcome views on this issue. (5.161)

Agree:	✓	Disagree:	Other:

Comment: We agree with the reasoning in 5.160.

Small businesses

12.43 We would welcome views on whether there is a case for greater protections for smaller businesses. (5.177)

Yes:		No:	✓

Comment: We believe that in practice the application of the statutory controls regime referred to in proposals 12.36 to 12.39 will be of considerable assistance to small businesses. Given the difficulties in identifying what is a small business and the potential complexity involved in having several different regimes, we agree that it would be best not to provide separately for small businesses at this stage but to see what happens in practice in relation to the statutory controls and how the market responds to them.

GROUP INSURANCE, CO-INSURANCE AND INSURANCE ON THE LIFE OF ANOTHER

12.44 We provisionally propose that in group insurance for employees, a misrepresentation made by a group member should be treated as if the group member were a policyholder who had arranged insurance directly with the insurer. This means that:

(1) it would have consequences only for the cover of that individual;

(2) as the insurance is such that if the policyholder had arranged it directly it would be consumer insurance, any dispute concerning a misrepresentation by the group member would be determined in accordance with our proposals for consumer insurance. (6.39)

Agree:	✓	Disagree:	Other:

Comment: This proposal would substantially reflect the position for "composite" general insurance policies as discussed in 6.44 – 47.

12.45 We ask:

(1) Where a member has made a deliberate or reckless misrepresentation, but the insurer would have given a certain level of "free cover" without that information, should the insurer be entitled to refuse all benefits in respect of that member? Alternatively, should the insurer be obliged to provide the free cover that would have been provided in any event, provided the basic eligibility criteria for the scheme are met?

(2) Do consultees agree that a non-disclosure or misrepresentation by the policyholder, that is the employer, should provide the insurer with the same rights to avoid a policy as would apply to other business insurance? (6.40)

(1) Yes: No: ✓, subject to comment

(2) Yes: No: ✓, subject to comment

Comment: As to (1), the alternative proposal appears to reflect current practice, which we would support: i.e. the free cover should be provided. As to (2), we think that the position resembles that of third parties under a liability policy and we have supported the Commission's proposal not to amend the law in that respect. However, the nexus between an employer and his policyholders under a group insurance policy seems to us much closer and there is a case for requiring the insurer to pay out and recover from the employer. But it should be clarified that this would not prejudice the tax position. We should also add that we are not clear how far the insurer under such arrangements typically obtains representations from the employer, so the question may not be very significant in practice.

12.46 We ask consultees if they have experience of problems in other types of group insurance, other than those written by employers in respect of employees. For these types of policy, should a misrepresentation or non-disclosure by a group member be treated as if the group member were the policyholder and had arranged the insurance directly with the insurer? (6.41)

Yes: ✓, subject to comment No:

Comment: We are familiar with construction policies and agree that where appropriate in the case of a policy issued to the prime contractor the interests of sub-contractors can be protected by a severability clause. There may be a case for this to be translated into a default rule, but we probably do not have a wide enough view of the insurance market to be confident that the rule could be described in terms which would be appropriate for all insurance scenarios.

Co-insurance

12.47 We ask whether consultees are aware of any problems concerning the law of co-insurance in relation to issues of non-disclosure and misrepresentation. (6.52)

Yes: No: ✓ Comment: Again, we suspect that the inclusion of severability clauses is sufficiently common practice that a default provision is unnecessary.

Consumer life-of-another policies: misrepresentations by the life insured

12.48 We provisionally propose that in consumer life-of-another policies, representations by the life to be insured should be treated as if they were representations by the policyholder. If the insurer can show that either the life insured or the policyholder (or both) behaved deliberately, recklessly or negligently, it will have the remedy that is appropriate for that kind of conduct. (6.63)

Agree: ✓ Disagree: Other: Comment:

12.49 We ask whether parallel issues arise in other consumer contexts and, if so, whether the same solution is appropriate. (6.64)

Yes: No: Comment: We are not aware of any parallel issues

Consumer insurance: "joint lives, first death" policies

12.50 We ask whether in a "joint life, first death" policy, consultees agree that the insurer should be entitled to refuse claims where either the deceased or the beneficiary has made a deliberate or reckless misrepresentation. (6.70)

Yes: ✓ No: Comment:

12.51 We welcome views on whether, if a claim is refused following the death of a guilty party, the court or ombudsman should have discretion to order the insurer to continue the policy as a single life policy, payable on the death of the innocent party. (6.71)

Yes: ✓, subject to comment No:

Comment: We suggest that the court or ombudsman should have the alternative of ordering a return of the premium or the policy value to the survivor, subject to any tax implications.

Business life-of-another policies

12.52 We provisionally propose that in business life-of-another policies, the default rule should be the same as for consumer insurance: representations by the life to be insured should be treated as if they were representations by the policyholder. However, this would be subject to the terms of the contract. (6.75)

Agree: ✓ Disagree: Other:

Comment:

WARRANTIES AS TO THE FUTURE AND SIMILAR TERMS

A written statement

12.53 We provisionally propose that a claim should only be refused because the insured has failed to comply with a warranty if the warranty was set out in writing. It should be included in the main contract document or in another document supplied either at or before the contract was made, or as soon as possible thereafter. (8.12)

Agree: ✓ Disagree: Other:

Comment: See our comment on 12.38.

Bringing warranties to the attention of insureds

12.54 In consumer insurance, we provisionally propose that an insurer may only refuse a claim on the grounds that the insured has broken a warranty if it has taken sufficient steps to bring the requirement to the insured's attention. In deciding whether the insurer has taken sufficient steps, the court should have regard to FSA rules or guidance. (8.19)

Agree: ✓	Disagree:	Other:

Comment: This adds yet another form of protection to consumers in relation to warranties (in addition to the proposal at 12.53 above and the Unfair Terms in Consumer Contracts Regulations). It might be said that there is already sufficient protection but we recognise that warranties are sufficiently prone to misunderstanding and might still have a considerable impact on coverage that this further protection is justified.

The causal connection test

12.55 We provisionally propose that in both consumer and business insurance the policyholder should be entitled to be paid a claim if it can prove on the balance of probability that the event or circumstances constituting the breach of warranty did not contribute to the loss. (8.45)

Agree: ✓	Disagree:	Other:

Comment: We support the proposal that it should be open to an insured to prove the lack of a causal connection and we think that the test of contribution, whilst not as wide as the test used in other jurisdictions, is a reasonable one. We note that the proposal applies only to warranties and it is to be hoped (but cannot be guaranteed) that such terms will not be regarded by the courts as core terms under the Unfair Terms in Consumer Contracts Regulations; there must be a risk that in some contracts such terms will be considered to be core terms. We comment on the proposed statutory controls in relation to business insurance under 12.59 below.

12.56 We provisionally propose, in relation to both consumer and business insurance, that if the insured can prove that a breach contributed only to part of the loss, the insurer may not refuse to pay for the loss that is unrelated to the breach. (8.48)

Agree: ✓	Disagree:	Other:

Comment:

A mandatory rule for consumers

12.57 We provisionally propose that the causal connection rules should be mandatory in consumer insurance. (8.50)

Agree: ✓	Disagree:	Other:

Comment: We agree with the reasons given by the Commission.

A default rule for businesses

12.58 We provisionally propose that in business insurance the parties should be free to vary the rules on the effect of a breach of warranty by agreement. However, where the insured contracts on the insurer's standard terms, there should be safeguards to ensure that the term does not make the cover substantially different from what the insured reasonably expected. (8.53)

Agree: ✓	Disagree:	Other:

Comment: We agree with the general principle. The detail is contained in 12.59 below.

Reasonable expectations approach

12.59 We provisionally propose that in business insurance an insurer should not be permitted to rely on warranties, exceptions or definitions of the risk in its written standard terms of business if the term renders the cover substantially different from what the insured reasonably expected in the circumstances. (8.79)

Agree: ✓	Disagree:	Other:

Comment: We note that it is proposed that the reasonable expectations approach is intended to deal with procedural unfairness rather than substantive unfairness. We think that on balance this correct although it might be said that as a result the proposal will "lack teeth". We note also that the list of types of terms does not refer to conditions precedent (either to cover or to liability). We think that it should and that this should be made clear.

Terminating the contract for the future

12.60 We provisionally propose that a breach of warranty or other term should give the insurer the right to terminate the contract, rather than automatically discharging it from liability, but (unless otherwise agreed) only if the breach has sufficiently serious consequences to justify termination under the general law of contract. (8.89)

Agree: ✓	Disagree:	Other:

Comment: We assume that this proposal and the other proposals made in 12.61, 12.62 and 12.63 should, so far as consumer insurers are concerned, be mandatory.

12.61 Do consultees agree that if the insurer accepts the insured's breach of warranty, so as to terminate future liability, the insured should cease to be liable for future premiums? (8.96)

Yes: ✓	No:

Comment:

12.62 We ask whether an insurer who terminates a policy following the insured's breach of warranty should normally provide a pro-rata refund of the outstanding premium, less any damages or reasonable administrative costs. (8.100)

Yes: ✓	No:

Comment: We see the logic of this. A member of the Committee has suggested that this might, in practice, operate unfairly where the insurer has made significant claims payments and that the liability to make a pro-rata refund should not arise in those circumstances.

Waiver and affirmation

12.63 We provisionally propose that loss by waiver of the insurer's right to repudiate the contract should in future be determined in accordance with the general rules of contract. We welcome views on whether it is necessary to include a specific provision on this point in any new legislation. (8.110)

Agree: ✓	Disagree:	Other:

Comment: We doubt that any specific provision is required.

Marine, aviation and transport insurance

12.64 We provisionally propose that the causal connection test outlined above should also apply to express warranties in marine insurance. They should also apply in aviation and transport insurance. (8.115)

Agree: ✓	Disagree:	Other:

Comment:

12.65 We ask whether the implied marine warranties in the Marine Insurance Act 1906 continue to serve a useful function or whether they should be abolished. (8.125)

Yes:	No:

Comment: We understand that, as regards sections 39(1) and (3), there are unlikely to be many voyage or voyage/stage policies written under current market conditions; however, there may be merit in retaining section 39(5) (time policies) and section 41(on the basis that it may operate with a greater degree of certainty than the general doctrine of illegality).

12.66 If the marine warranties are to be retained, we provisionally propose that they should be subject to the same causal connection test as express warranties. (8.126)

Agree: ✓	Disagree:	Other:

Comment: The reference in section 39(5) to "loss attributable to seaworthiness" appears to have a similar effect.

12.67 We ask consultees whether there are good reasons to retain the implied voyage conditions contained in sections 43 to 46 of the Marine Insurance Act 1906. (8.131)

Yes:	No: ✓

Comment: It is not clear to us that these sections would be likely to affect the normal operation of the insurance policy. As noted above, we understand that in any event voyage policies are nowadays rare.

12.68 If the voyage conditions are to be retained, we provisionally propose that they should be subject to the same causal connection test as express warranties. (8.132)

Agree: ✓	Disagree:	Other:
Comment:		

Reinsurance

12.69 We provisionally propose that the reforms proposed in relation to warranties should apply to reinsurance as well as to direct insurance. (8.138)

Agree: ✓	Disagree:	Other:
Comment:		

PRE-CONTRACT INFORMATION AND INTERMEDIARIES: CONSUMER INSURANCE PROPOSALS

Clarifying the agent's role

12.70 In consumer insurance, we provisionally propose that an intermediary should be regarded as acting for an insurer for the purposes of obtaining pre-contract information, unless it is clearly an independent intermediary acting on the insured's behalf. (10.29)

Agree: ✓ , subject to comment	Disagree:	Other:

Comment: We broadly support the idea that an insurer should not be able to avoid a consumer's claim as a result of the mistakes of an intermediary who might be regarded as less than wholly independent.

One point to note, however, is that making the intermediary the agent for the insurer in the limited manner proposed is that, arguably, it creates an incentive for the intermediary to support the insurer in arguing non-disclosure/misrepresentation points. If the intermediary is no longer the consumer's agent for the purpose of gathering pre-contract information, there is a incentive (so that the intermediary does not face a claim from the insurer) for the intermediary to maintain that the consumer's version of events is not true, that the consumer has either deliberately or recklessly misrepresented at the pre-contractual stage (or even negligently misrepresented in a manner such that the insurer would have declined the risk altogether (paragraph 12.19(3)), such that the policy should be avoided against the consumer. This may dissuade the consumer from pursuing the claim and, if the intermediary is no longer his agent for the purpose of obtaining pre-contract information, leave the consumer without remedy. It is not difficult to foresee that where errors have been made in the gathering of pre-contract information the insured's and the intermediary's recollection of who said what to whom may well differ.

12.71 We ask if the test for whether an intermediary is independent and acts as the consumer's agent should depend on whether the intermediary searches the market and conducts "a fair analysis", as defined by the Insurance Mediation Directive. (10.32)

Yes: No: ✓

Comment: The predominant risk, it seems to us, lies where the intermediary has a relationship with one or more insurers which results in a lesser standard of care being paid to insureds than would perhaps otherwise be paid if the intermediary were purely serving the interests of the insured. In other words, because the intermediary is serving both the insured and the insurer, he does not focus his full efforts on the insured in the same way that a truly independent broker might. It is not necessarily the case that where an intermediary has conducted a "fair analysis" of the market that he is much different position to that of a "tied" agent. It is perfectly possible for an intermediary to conduct a "fair analysis" of a niche market, whilst having a binding authority from each insurer (or at least the main providers) in that market. Indeed, it is perhaps likely that the "standard product" consumer market will continue to be dominated by direct writers and "white-labelled" providers. Niche intermediaries could have an important role, but are also likely to have close ties to insurers.

We suggest that the more appropriate approach is to have a rebuttable presumption that the intermediary is the insurer's agent where either:
the intermediary has the power to issue cover on behalf of the insurer without reference, in general (that is ignoring specific risks or limits that require reference to the insurer), to the insurer; or
the intermediary is a tied agent.

12.72 We ask whether any additional protection is necessary when consumers have been given bad advice about completing proposal forms by intermediaries who are not subject to FSA regulation? (10.34)

Yes: No: ✓

Comment: We do not see any need for additional protection because consumers will be adequately protected under our proposed approach in paragraph 3. Whether travel agents and retailers should be subject to some or all of the FSA's rules is a separate issue.

No more transferred agency

12.73 We provisionally propose that an intermediary who would normally be regarded as acting for the insurer in obtaining pre-contract information should remain the insurer's agent while completing a proposal form. (10.38)

Agree: ✓, subject to comment Disagree: Other:

Comment: In principle, we agree with this proposal. However, our comments in paragraph 12.70 regarding the potential detriment to consumers apply equally here.

The effect of a signature on a proposal form once basis of the contract clauses are abolished

12.74 We provisionally propose that a consumer insured's signature on a proposal form that has been completed incorrectly by a third person should not be regarded as conclusive evidence that the insured knew of or adopted what was written on the form. (10.44)

Agree: ✓, subject to comment Disagree: Other:

Comment: We would not seek to change the law in relation to this issue. We do not believe that a signed proposal form is, as the law currently stands, conclusive evidence as to the insured's knowledge or state of mind. We would allow the ordinary rules of evidence to continue to establish:

(a) whether statements made in a proposal form are in fact attributable to or known to the insured; and

(b) if that is established, the state of mind (i.e. whether innocent, negligent or fraudulent) of the insured in making those statements.

Section 19(b)

12.75 We welcome views on whether there are any reasons to preserve section 19(b) for consumer insurance. If so, should a breach grant the insurer a right in damages against the intermediary? (10.48)

Yes: ✓ No:

Comment: We support the retention of section 19(b) with insurers having a sole remedy of damages against the intermediary.

Section 19(a)

12.76 We ask whether section 19(a) of the Marine Insurance Act 1906 should cease to apply in consumer cases, so that the agent to insure would have no duty to disclose matters other than those which the consumer is bound to disclose in response to the questions asked by the insurer. (10.51)

Yes: ✓ No:

Comment: We support the position that section 19 (a) should cease to apply in consumer cases.

12.77 If there are reasons to preserve an extended duty under section 19(a):

(1) Should the remedy lie in damages against the intermediary, rather than in avoidance against the insured?

(2) Should any information given in confidence by a third party be excepted from the scope of the duty?

(3) Should the duty be curtailed to information received in the course of the relevant transaction? (10.52)

(1) Yes: No:

(2) Yes: No:

(3) Yes: No:

Comment: We have no comments on the basis of our response to paragraph 12.76.

PRE-CONTRACT INFORMATION AND INTERMEDIARIES: BUSINESS INSURANCE PROPOSALS

12.78 We provisionally propose that, in a business context, an intermediary should be regarded as acting for an insurer for the purposes of obtaining pre-contract information, if it deals with only a limited number of insurers and does not search the market on the insured's behalf. (10.59)

Agree: ✓, subject to comment Disagree: Other:

Comment: We support this proposal but make the same suggestions as to when an intermediary should be deemed to be the insurer's agent as set out in paragraph 12.71.

12.79 For businesses using other intermediaries, the issue of whom the intermediary is acting for in respect of disclosure issues should be left to the common law. (10.60)

Yes: ✓ No:

Comment: We support this proposal.

The distribution of commercial insurance is a dynamic industry and our tentative view is that the law must retain its flexibility to address the relationships that develop. The fact that an intermediary may in one and the same transaction be agent for insured and insurer is a matter which reflects the commercial reality of the market place and whilst it may result in uncomfortable, conflicting duties, those conflicts are perhaps best resolved or managed, in non-small business insurance at least, through intermediaries, insureds and insurers contracting on a basis freely agreed amongst themselves.

12.80 We provisionally propose that in the business context, an intermediary who would normally be regarded as acting for the insurer in obtaining pre-contract information remains the insurer's agent while completing a proposal form. (10.62)

Agree: Disagree: ✓ Other:

Comment: In business insurance we do not, on balance, consider that any express statutory provision should be made in the context of the position of the intermediary in relation to completion of the proposal form. We would leave that issue to be decided by the common law. Prudent insureds, insurers and intermediaries will, no doubt, seek to provide for this issue in their contractual relationships.

12.81 We provisionally propose that a business insured's signature on a proposal form that has been completed incorrectly by a third person should not be regarded as conclusive evidence that the insured knew of or adopted what was written on the form. However, this should not reduce the effect of a warranty of fact given by a business insured. (10.64)

Agree: ✓, subject to comment Disagree: Other:

Comment: Our comments (at 12.74 above) in relation to the application of the ordinary rules of evidence apply equally to business insurance.

12.82 We provisionally propose that where a broker breaches section 19(a), the insurer should no longer be entitled to avoid the policy against the insured. Instead a remedy in damages should lie against the broker. (10.73)

Agree: ✓, subject to comment Disagree: Other:

Comment: The crux of this issue is whether the commercial insurance market is better served by allowing insurers to pursue intermediaries for breach of a statutory obligation or preserving the current position which, assuming insurers have successfully avoided the policy, requires insureds to pursue their agents for breach of duty. On the one had, it seems to us (in theory at least) that shifting the burden of pursuing the intermediary might cause insurers to increase premium rates: their financial risk would be increased by the proposal, as they could not be certain to recover in damages the full amount of the claim that they would have already paid. Further, it might be argued that there is no reason why insurance should be treated differently from any other agency situation where the agent causes his principal loss as a result of his acts or omissions.

On the other hand, it could be argued that insurers are better placed to sue intermediaries and the commercial risk facing insureds is significantly greater than that facing insurers. The whole rationale for insurance is to provide indemnity when it is most needed (to enable, for example, a building to be rebuilt) and that insureds should not be financially prejudiced due to the acts or omissions of their agents.

On balance, we agree that there should be a sole remedy of damages available to insurers against the broker.

12.83 We ask whether:

(1) The right to damages should apply whenever insurance contracts are placed within the UK, or only where the contract is subject to the law of a part of the UK?

(2) Producing brokers should be obliged to pass relevant information up the chain to the placing broker?

(3) The law should specifically state that an intermediary is not required to disclose information given to it in confidence by a third party? (10.74)

(1) Yes: No:

(2) Yes: ✓ No:

(3) Yes: ✓, subject to comment No:

Comment: As to (1), this is a difficult issue. On balance, we are of the view that the right to damages should apply where the insurance contract is subject to the law of a part of the UK. It may leave an insurer who agrees to a "non-UK" governing law clause without remedy, but that is likely to be a preferable outcome (insurers will after all be able to take advice on a case by case basis) to the extra-territorial effect (and potential conflicts of law issues) that are likely to result from the other alternative.

As to (2), The disclosure of material facts is critical to the underwriting of insurance risk and underpins pricing. However, the placing broker should not be liable for the default of a producing broker.

As to (3), On the face of it this appears to be correct and attractive. Our concern though is that intermediaries may turn to it all too frequently as a defence.

Further, such a blanket approach could result in inappropriate outcomes. Suppose, for example, that a proposed insured, in the course of providing his broker, A, with information necessary to get insurance for his building and his business, tells broker A that he pays a weekly fee to the local Mafia for protection, and broker A's response is: You'll never get cover; forget it. So having learnt his lesson, the proposed insured goes to broker B but says nothing about the protection money. But A learns that B is placing the risk and tells him in confidence about the protection money. Should B not have a duty to disclose the information he has received in confidence? There are difficult conflict issues that present themselves in these types of situations, but that does not necessarily mean that the broker should not have a duty to disclose.

Accordingly, we would wish to see a more detailed review of the kinds of information which might be at issue, as well as other cases where the law

might be taken to be a bar to disclosure.

ASSESSING THE COSTS AND BENEFITS OF REFORMS

12.84 We ask whether the economic analysis of our reforms should look separately at firms that follow FSA rules and FOS practice (Type 1) and those that follow the law (Type 2). We welcome views on the numbers and type of firms that do not currently follow FOS practice. (11.16)

Yes: No:

Comment: We do not have the expertise to offer a view.

12.85 We ask whether the economic effect of our reforms should be assessed using the model commissioned from London Economics, which is set out at Appendix B to this Consultation Paper. (11.34)

Yes: No: Comment: We do not have the expertise to offer a view.

12.86 We ask whether consultees are able to provide us with further data to enable us to carry out this assessment. (11.35)

Yes: No: Comment: No.

12.87 We propose that the effect of a five year cut-off period for negligent misrepresentations should be costed separately from the costs of our other proposals. (11.40)

Agree: Disagree: Other: Comment: This sounds reasonable, but we do not have the expertise to offer a considered view.

12.88 We ask whether consultees who are reinsurers in the life insurance sector are able to provide us with data to enable us to carry out this assessment. (11.41)

Yes: No: Comment: We do not have the expertise to offer a view.

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