



Bar Council response to the 'Short Consultation Paper on Draft Bill: Insurable Interest'

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission and Scottish Law Commission's consultation paper entitled Short Consultation Paper on Draft Bill: Insurable Interest.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The proposed Bill is largely uncontroversial. We have commented on certain clauses that need clarification. We generally support the Bill and the repeal of the two 18th Century Statutes and the Marine Insurance (Gambling Policies) Act 1909.

Answers to questions posed by the Law Commissions on 19 April 2016

CLAUSE 1: DEFINITIONS

Question 1- Do consultees agree that personal accident, critical illness, disability and other insurances dependent on human life be subject to the same insurable interest rules as life insurance?

¹ http://www.lawcom.gov.uk/wp-content/uploads/2016/04/accompanying_notes_draft_Insurable_Interest_Bill_2016.pdf

5. Yes. We agree that it is preferable to apply the same insurable interest rules to these types of policies and to life insurance. We think that it is desirable to draw a distinction between such life-related insurance and other non-marine insurance.

6. We suggest that the Law Commissions may wish to reconsider the definition of “a contract of life-related insurance” in Clause 1 of the Bill as arguably it may bring within its scope certain liability policies that the Law Commissions did not intend to come within the ambit of “life-related insurance”.

Question 2- Do consultees consider that the definition of “life-related insurance” works for insurance-linked investment products, and annuities?

7. Yes. We are not aware of all the insurance-linked investment products and annuities that are presently available, but as the definition is so wide presumably they are likely to come within its ambit.

CLAUSE 2: LIFE-RELATED INSURANCE

Question 3- Do consultees consider that this non-exhaustive list is appropriately drawn to cover all the key situations in which an insured should be able take out insurance over another person?

8. Yes, except that we would omit subclause (e). We envisage that there could be argument and litigation about what is meant by (e). The Law Commissions’ Notes seem to envisage subclause (e) being relied on by employers with group schemes but we consider that these may be sufficiently covered by (d) and (f). If subclause (e) was dropped from the draft Bill, it would not close down the possibility of maintaining in a suitable case that there is insurable interest in a person where the contract is for the benefit of the individual or a nominee of the individual. The subclauses are only a non-exclusive list of circumstances where there is an insurable interest.

Question 4- Do consultees agree that the economic loss test is sufficient to ensure that families can insure parents or grandparents in appropriate situations?

9. Yes. We consider that it should be left to individuals and the market to arrange insurance for parents and grandparents in appropriate situations.

Question 5- Are there any negative consequences which this Bill could have on investment linked insurance products compared to the current law?

10. We do not have sufficient knowledge or experience to comment on this.

CLAUSE 3: NON-LIFE INSURANCE

Question 6- Do consultees consider that there are any non-life insurance policies in which the requirement to have an insurable interest at the time of the insured event would be problematic? That is, are there any circumstances in which a non-life policy would, apart

from this requirement, pay out in the absence of an insurable interest at the time of the insured event?

11. We are not aware of any problems regarding this. We would add that we do not have sufficient knowledge or experience of parametric policies and, thus, we have not commented on these.

Question 7- Do consultees consider that this non-exhaustive list is appropriately drawn to cover all the key situations in which an insured should be able take out non-life insurance?

12. Subclauses (a) to (c) are appropriately drafted.

13. We consider that subclause (d) is very widely worded by including circumstances where the insured “will suffer economic loss if the insured event relating to it occurs”. This may lead to arguments about whether someone has suffered economic loss under a contract of insurance or some other financial product, particularly as there is no definition of insurance itself in the draft Bill. In our response to the Consultation in June 2015 we did favour the non-exhaustive list going beyond interests in property and including definitions which covered professional indemnity insurance, d&o insurance, business interruption insurance and construction risks. We suggest that it would be preferable to deal with all or some of these separately in the non-exhaustive list rather than having such a wide subclause as (d).

CLAUSE 4: CONSEQUENCES OF THE CONTRACT BEING VOID

Question 8- Should an exception to the retention of premiums be limited to consumer contracts only, or extended to all cases where it appears that it would be unfair to the insured for the insurer to retain them?

14. We are of the view that the exception to the retention of premiums should be extended to all cases where it appears that it would be unfair to the insured for the insurer to retain premiums.

15. We do not see why insurers should invariably retain the premium in commercial insurance. This appears a disproportionately harsh result for insureds where there may have been some recklessness in relation to how they handled the issue of insurable interest, particularly where a large premium has been paid. If, for example, a company was “gung ho” about insuring something rather than not doing so, why should the insurer have the benefit of the premium when it has not had the risk? If a company recklessly insures someone who has left their employ as a key player why should the insurer keep the money? In any event the insurer has had the benefit of the money and may have earned interest on it. Furthermore, if the insurer is aware of the lack of insurable interest, it seems to us unfair that it should be able to retain the premium in such circumstances.

GENERAL

Question 9- Do consultees foresee any significant difficulties in providing that contracts entered into under the old law are not void for lack of insurable interest if the insured would have an insurable interest under the provisions of the draft Bill?

16. No

Question 10- Do consultees agree that the question of severability is best left to the construction of the contract?

17. We would be in favour of severability rather than non severability, but ultimately we would leave this to the courts to decide.

Bar Council
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