

12 January 2015

Handwritten initials "B" and the date "13/1/15" are written in blue ink to the left of the recipient's address.
Mr Dale Boucher
Legal Services Commissioner
Legal Services Council
Level 11, 170 Phillip St
SYDNEY NSW 2000

Dear Sir

Legal Profession Uniform General Rules – Professional Indemnity Insurance

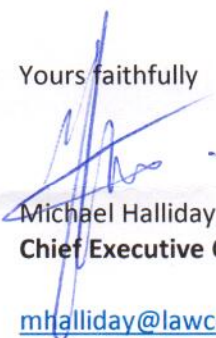
I am writing in relation to the Legal Services Council's consultation draft of the proposed Uniform General Rules so far as they relate to professional indemnity insurance.

Lawcover Insurance Pty Limited (**Lawcover**) is an APRA regulated insurer and is currently the only professional indemnity insurer approved to provide a policy of professional indemnity insurance to solicitors in NSW. Lawcover also provides primary layer insurance to a number of national firms which will be covered by the new *Legal Profession Uniform Law*.

Lawcover's submission on the consultation draft Rules is in the attached table, which sets out Lawcover's preferred wording for each proposed rule, along with an explanation of the reason for the difference between the proposed version and the Lawcover version.

I would welcome an opportunity to clarify any aspect of Lawcover's submission if that would assist you.

Yours faithfully

A blue ink signature of Michael Halliday is written over the closing and name.
Michael Halliday
Chief Executive Officer

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Legal Profession Uniform Law

Draft Uniform Rules

Legal Services Council consultation draft Minimum Standards	Lawcover proposed draft Minimum Standards
<p>(2) Professional indemnity insurance may be underwritten on the basis of:</p> <p>(a) coverage of a law practice, including all the legal practitioner associates of the law practice; or</p> <p>(b) coverage of an individual Australian legal practitioner.</p> <p>(3) Professional indemnity insurance must provide indemnity for the private legal practice of the insured in relation to the provision of legal services within Australia.</p> <p>(4) Professional indemnity insurance must extend to civil liability incurred in connection with the legal services of the insured and persons engaged by the insured in the provision of legal services.</p>	<p>The approved insurance policy must cover any civil liability in connection with the private legal practice of the practitioner or law practice other than a liability the subject of an express exclusion.</p>

Lawcover currently provides coverage both for individuals and law practices incorporating more than one individual, through professional indemnity insurance policies issued to a law practice. Issuing a policy to an individual legal practitioner may have the danger of claims against employees of that practitioner (not being, themselves, legal practitioners requiring insurance) to be uninsured. Policies issued to law practices (including those trading as sole practitioners) avoid this problem.

It is more accurate for the draft rules to specify the type of liability covered by the policy than to refer to "indemnity" which is an undefined term. Solicitors insured under the Lawcover policy currently have no jurisdictional limit, and the LPUL does not contain any reference to insurance being restricted only to the provision of legal services within Australia.

The Lawcover proposed draft wording recognises that certain types of liability are expressly excluded under an insurance policy.

Legal Services Council consultation draft Minimum Standards	Lawcover proposed draft Minimum Standards
<p>(5) Professional indemnity insurance must provide indemnity for claims actually made during the period of insurance that arise from the insured's law practice and for claims made in respect of circumstances notified during the period of insurance.</p>	<p>The policy must operate on a 'claims made' basis.</p>

The Lawcover policy does not specifically provide for the notification of circumstances. All insureds have the right to notify circumstances under s 40(3) of the *Insurance Contracts Act 1984*.

Legal Services Council consultation draft Minimum Standards	Lawcover proposed draft Minimum Standards
(6) Professional indemnity insurance must provide minimum coverage of \$1.5 million for each and every claim, or each and every loss, inclusive of the claimant's costs and defence costs.	The limit of the insurer's liability for any one claim under the policy, inclusive of defence costs and claimant's costs, must be not less than \$2 million.

Professional indemnity claims can be extremely complex and long running, making defence costs and claimant's costs expensive. In Lawcover's view, \$1.5 million is insufficient cover for professional indemnity claims against solicitors.

Legal Services Council consultation draft Minimum Standards	Lawcover proposed draft Minimum Standards
(7) Professional indemnity insurance must provide indemnity for any former principals of, or those formerly engaged by, the insured and by any prior law practice of the insured.	The policy for a law practice must cover all current and former principals and employees engaged in the private legal practice of that law practice.

The Lawcover proposed wording makes it clear that the policy provides coverage for both current and former principals and employees. The Lawcover policy does not include coverage for independent contractors who would have their own policy but which could, arguably, be included in the phrase "those formerly engaged by" used in the LSC consultation draft.

Legal Services Council consultation draft Minimum Standards	Lawcover proposed draft Minimum Standards
(8) Professional indemnity insurance must provide indemnity for a minimum of seven years for run-off liabilities in the event that the insured dies or ceases to exist or to provide legal services for any reason.	<p>Unless the practitioner or law practice is covered by a scheme of run-off insurance provided by the insurer or other provider approved under, or selected in accordance with, applicable legislation of the jurisdiction, the policy must provide for the cover under the policy to continue (but in run-off) for a minimum of seven years from:</p> <ul style="list-style-type: none"> (a) the date (during the period of insurance) that the practitioner or law practice ceases to practise; or (b) the date of expiry of the period of insurance, if the practitioner or law practice is not covered from that date by a further policy which complies with these minimum standards, including the requirement for run-off cover under this rule.

The Lawcover proposed draft wording is more specific about how run-off cover can be provided to legal practices which have ceased. At present, Lawcover does not provide run-off cover under each individual policy of insurance, but instead provides a policy of run-off cover to the Law Society of NSW which covers all practices which have ceased, unless cover is provided by the policy of a successor practice.

Legal Services Council consultation draft Minimum Standards	Lawcover proposed draft Minimum Standards
(9) In the case of a claim arising from dishonesty or fraud, professional indemnity insurance must not exclude indemnity of a principal of, or person engaged by, the insured who was not knowingly connected with any dishonesty or fraud related to the claim.	The policy may exclude liability arising from fraud or dishonesty, but not the liability of any insured who was not knowingly connected with such fraud or dishonesty.

Under the Lawcover policy, an 'insured' includes principals, employees, incorporated legal practices and the estates of those people. The LSC consultation draft appears to assume that some entity other than a principal or an employee is 'the insured'. This is confusing.

The Lawcover proposed draft wording makes clear two things: that liability for fraud can be excluded, and that insureds not knowingly connected with fraud still receive cover under the Lawcover policy.

Legal Services Council consultation draft Minimum Standards	Lawcover proposed draft Minimum Standards
(10) Professional indemnity insurance need not but may provide indemnity to the extent that the subject matter of the claim entitles a claimant to claim and receive compensation from a fidelity fund, guarantee fund or similar cover provided under jurisdictional legislation.	Notwithstanding the previous rule, the policy may exclude all liability for a defalcation or default, irrespective of whether a claim lies against any fidelity fund.

The LSC consultation draft does not impose a requirement that cover be provided for claims also covered by the fidelity fund.

Legal Services Council consultation draft Minimum Standards	Lawcover proposed draft Minimum Standards
(11) Professional indemnity insurance must not provide the insurer with a right to avoid or cancel cover because of any innocent or non-fraudulent non-disclosure or misrepresentation by the insured.	<p>The policy must provide that the insurer is precluded from avoiding the policy or reducing its liability under the policy by reason of any failure to comply with the duty of disclosure or by reason of any misrepresentation (whether fraudulent or not).</p> <p>The policy must provide that the insurer will not refuse or reduce its liability under the policy by reason of a breach of the terms and conditions of the policy or by reason of late notification of a matter or claim, but it may provide for the practitioner or the principals of the law practice to indemnify the insurers to the extent of any prejudice.</p> <p>The policy must provide that it cannot be cancelled other than with effect from the date that the practitioner or law practice ceases to practise.</p> <p>The policy must provide that the insurers cannot set-off against any amount payable to or on behalf of a claimant any amount payable to the insurer by the practitioner or law practice.</p>

The Lawcover draft wording mirrors on the provisions of the *Insurance Contracts Act 1984* in relation to innocent non-disclosure and misrepresentation.

The Lawcover draft wording also differentiates between cancellation and avoidance: cancellation should be permissible in circumstances where a practitioner ceases to practice.

The Lawcover draft wording also contemplates a situation where an insurer may seek to set-off unpaid premium against the amount of indemnity provided for a claim.

Legal Services Council consultation draft Minimum Standards	Lawcover proposed draft Minimum Standards
(12) Professional indemnity insurance must provide retroactive cover except for claims arising out of fraud or dishonesty.	The approved insurance policy must provide retroactive cover.

The LSC consultation draft may have the effect of excluding liability of innocent insureds (those not 'knowingly connected with' fraud) by operation of this exception to the requirement for retroactive cover.