

British Insurance Law Association seminar
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The Law Commissions' project on Insurance Contract Law
Hugh Beale¹

*(The views expressed are those of the author, and do not necessarily
represent the views of the Law Commissions)*

Introduction

Yesterday the Law Commission and the Scottish Law Commission published a joint Scoping Paper on Insurance Contract Law.² The paper explains that the two Commissions have started a joint review of the law which could include a wide range of topics. It has already been decided to look at whether reform is needed in the areas that were covered by the Law Commission's report of 1980: non-disclosure, misrepresentation and breach of warranty, including the application of those rules to MAT.³ The purpose of the paper, and of my address today, is to ask what other topics should be covered by the study and also whether, in a second stage, the Commissions should aim to 'codify' either the basic rules that apply to insurance contracts of all types or at least the law applying to consumer insurance contracts.

The role of BILA

I would like to begin by saying how grateful I am to BILA, not just for giving me the opportunity to speak about the project but for all their efforts in getting it onto the Law Commission's agenda. Many of you will know that though the Law Commissions are independent of Government, they cannot take on projects without Government approval. A project must either be referred to them by a Minister or must be included in their programmes of work. The programme requires the approval of the Lord Chancellor, who is naturally reluctant to agree to the inclusion of a project if the government department responsible – in this case, the Treasury – is prepared to agree. Despite calls for reform by the National Consumer Council (NCC),⁴ the City of

¹ Law Commissioner for England and Wales, responsible for the Commercial and Common Law Team.

² The paper is available on the Law Commission's website, www.lawcom.gov.uk

³ I will not in this paper repeat our reasons for this decision. They are summarised in Appendix A to the Scoping Paper.

⁴ National Consumer Council, *Insurance Law Reform: the case for review of insurance law* (May 1997).

London Law Society's Insurance Law Sub-Committee⁵ and Sir Andrew Longmore in his Pat Saxton Memorial Lecture,⁶ the Treasury were hesitant, initially taking the view that there was nothing wrong with the law of insurance contracts that would not be taken care of by the (then) forthcoming FSA rules on conduct of business. I believe that the report of the BILA Sub-Committee chaired by Adrian Hamilton QC⁷ and the subsequent efforts of the members of the sub-Committee were crucial in persuading the Treasury to agree that a review of the law of insurance contracts, to establish whether or not reform is needed, should be included in the Law Commission's Ninth Programme.⁸

Achievements to date and the need for review

I would be very sorry if the decision that insurance contract law is in need of review were to be interpreted as a denigration of the enormous amount that has been achieved over the years by the introduction of the ABI's Statements of Insurance Practice, the establishment of first the Insurance Ombudsman Scheme and now the Financial Ombudsman Service (FOS), and the Financial Services Authority's recent Insurance Conduct of Business rules (ICOB). The position of consumers, and to the extent that they are covered by FOS that of small businesses, has been very significantly improved. But there remain problems. The Statements of Insurance Practice which, though withdrawn, are still taken by the Ombudsman as indicative of good practice and the ICOB rules do not cover all the issues. There are large areas of insurance, particularly business and commercial insurance, that fall outside the schemes and are therefore governed by the common law as embodied in the Marine Insurance Act 1906 or otherwise. We need to review that law to ensure that it still meets modern needs. Consumers are for the most part reasonably protected but there may be gaps. And protection has come at a cost. A body like the Law Commission, which has a statutory duty to

⁵ City of London Law Society's Insurance Law Sub-Committee, *Proposals for reform of the doctrine of utmost good faith in insurance contract law* (2000).

⁶ Delivered on 5 March 2001 ("Longmore"). The text of the lecture is annexed to the BILA Sub-Committee report, see n 7.

⁷ Insurance Contract Law Reform: Recommendations to the Law Commission (2002) ("BILA").

⁸ Law Com No 293.

“review ... the law ... with a view to its systematic development and reform, including in particular ... the elimination of anomalies, ... the reduction of the number of separate enactments and generally the simplification and modernisation of the law”⁹

can only cringe at a situation in which an insurer that exercises its legal rights will be found to have acted improperly, be made to pay compensation to the other party and possibly even be fined.

I will not spend time repeating all the arguments against reform and why we nonetheless think that there should be a review. Most of you will be familiar with the issues and, just in case anyone should think that we haven't considered the arguments, they are summarised in the Scoping Paper.¹⁰ Some of the arguments may be relevant to the question of what issues should be considered in the project. For example, you may think that contract certainty is a matter for voluntary agreement and nothing to do with contract law.

The Treasury did not accept that there definitely is a case for reform, and certainly they did not offer to ensure that Parliamentary time should be made available to implement any recommendation the Law Commissions might make. Their agreement was simply that the Law Commissions might review the law to see whether or not reform is needed. This reflects the Law Commissions' approach, particularly on the further topics for review that the Scoping Study asks about. We are not going into the project with the assumption that the law on these topics has to be changed. Nor are we at that stage. The question posed in the Scoping Study is not, “is reform in each of these areas definitely needed?” but only: “should the Commissions review the topic to see whether reform is desirable?”

On the topics on which we recommended reforms in our 1980 report, we inevitably start with a presumption that the law is out-of-date; but even here we will consider whether the work of the FOS and the ICOB rules mean that change is no longer worthwhile. Further, we will not necessarily assume that the precise reforms recommended in 1980 are still the best way forward.

⁹ Law Commissions Act 1965, s 3.

¹⁰ Scoping Paper paras 1.13-1.15.

Personnel

Having thanked BILA, I also have to offer an apology and an explanation. The apology is for having “poached” Peter Tyldesley, who at the time of the report provided the Secretariat to BILA, to be the lawyer in charge of the project. We are very pleased to have recruited not just an able lawyer but one with a knowledge of the industry and excellent contacts. Perhaps I could take this opportunity to introduce Peter to anyone who does not know him; and also to introduce Saira Paruk, the research assistant who will be working with Peter and me.

Why not implement the 1980 report immediately?

The explanation is as to why we are not following an important recommendation made in the BILA Report. This was that the recommendations made in the Law Commission’s 1980 report should be implemented without waiting for further work on other topics.¹¹ Instead our plan is to re-consider the topics covered in the 1980 Report, plus such other topics as the response to the Scoping Paper indicate require examination.

One reason is that it is not feasible to implement the 1980 report without further investigation. That Report made recommendations to Government, which rejected them on the grounds that self-regulation by the industry was a better way forward.¹² A fresh case has to be made.

Secondly, even if the Report’s recommendations had been accepted but - like a number of Law Commission recommendations – simply never implemented, further work would be needed for at least three reasons. First, Government now requires that before a Bill of the kind required is introduced, a Regulatory Impact Assessment is carried out. This is to establish that the costs of change are justified by the benefits. Currently it is done by the Department responsible¹³ but our aim is that as much of the work as possible should be done by the Law Commission before its final report is issued. Where a fixed number of fairly precise proposals are in issue - which I would hope will be the case with any reforms to insurance law we provisionally propose –

¹¹ BILA para 10.

¹² The fate of the Report is described in Longmore, paras 8-13.

¹³ See the consultation recently carried out by the DTI on the Law Commissions’ separate recommendations on registration of company charges: Law Com No 296.

we think this should be possible at the consultation paper stage of the project. The 1980 recommendations would have to be put to this test, and the question would be, as it will be for any proposals we make, are they justified in the light of the FOS scheme and the ICOB rules?

Secondly, since 1980 the context has changed and industry, its regulators and insurance lawyers have experience that was not available in 1980. We may need to reconsider some of the 1980 recommendations. BILA itself, for example argued that the remedies for non-disclosure or misrepresentation where there was no fraud should adopt the ‘proportionality’ principle. The 1980 report had rejected this as unworkable but it is used by the FOS and, as the BILA Report points out, has been recommended by the Australian Law Reform Commission.¹⁴

Similarly, Sir Andrew Longmore suggested that the test should not be, as at present, whether the matter is one of common knowledge or something the insurer ought to know.¹⁵ He proposed that there should only be a duty to disclose a material matter if it is one which the reasonable insured would realise was within the knowledge only of himself rather than a matter that could have been independently investigated and verified by insurers. The large amount of information about risks such as flooding now readily available to insurers makes this a good question.

So it seems that the main champions of the 1980 reforms may want them tweaked; and we have the task of consulting on the tweaks. We have also decided that at the same time that we re-consider the 1980 recommendations, we should consult on whether any changes should extend to MAT, which were excluded from the 1980 recommendations. Many of those who have complained about the current law, and in particular those who have argued that the current state of English law is actively deterring potential insureds from buying insurance policies governed by English law, have been concerned principally with MAT.

It might still be argued that we should deal first just with the topics covered in the 1980 report and leave everything else until later. We do not agree, principally because we think it is most unlikely that Parliamentary time and, which is even more problematic, Departmental resources in the form of the Bill Team that is usually

¹⁴ Review of the Marine Insurance Act 1909, report 91 (2001), recommendation 25; see BILA para 17.3.4.

¹⁵ Marine Insurance Act 1906, s18(3)(b).

necessary to get even Law Commission Bills prepared for and through Parliament, will be made available for a series of insurance reform Bills. We think it better to deal with at least all the reforms in one go. It should not add a great deal of time to the project. (The question of a “codifying Bill” is a separate issue that I deal with later.)

Additional topics for review

Nature of the question

In Part 2 of the Scoping Paper we ask whether we should review 17 additional topics. They are all ones that have been suggested by commentators or those we have consulted so far. As I have indicated, at this stage we are not asking consultees whether they think the law on each topic is definitely in need of reform, but merely whether it is worth reviewing each of the topics. This is not because we doubt the word of those who have suggested them but because time and resources are limited. We do not think it is sensible even to review questions that do not seem to give rise to any significant problems in practice.

So at this stage answers we are seeking may be quite short. Part 4 of the Scoping Paper is a questionnaire that can be copied, filled in and returned to us. Alternatively a copy of the questionnaire can also be downloaded from our website¹⁶ and then be filled in on screen and emailed to us. We do not want respondents to feel they must spend a great deal of time on their replies, or institutional respondents to feel they must organise series of committee meetings in order to prepare a response. Everyone’s time is limited and, to be quite honest, we would rather consultees put their real effort into answering the detailed consultation paper that we hope to publish in a year or so. At this stage impressionistic answers will suffice.

That said, if consultees are aware of problems with the particular area of law, it would be very useful to have concrete examples. These can either be included in the response or sent to us separately. We would also be glad to have suggestions of how any problems might be solved; respondents may have ideas that would not occur to us.

¹⁶ www.lawcom.gov.uk

Consumer, small business and larger business insureds

One of the difficulties of reviewing the law of insurance contracts is that there is such a range of contracts. What may be not be an issue in one field may be a substantial problem in another. In particular we would ask those responding to have in mind the distinction we draw in the paper between consumers and small businesses (“CSB”), on the one hand, and larger businesses (“MLB”) on the other.¹⁷ There are at least two reasons for distinguishing the two. On the one hand, consumers face problems that larger insureds do not – they lack specialist knowledge of insurance, they may not have the resources to seek outside advice and they do not have the bargaining power to agree special terms. We suspect that many small businesses face broadly the same problems as consumers, which is why the paper provisionally treats the two together. On the other hand the current regimes are different, since many of the ICOB rules and the compensation for breach of statutory duty rules apply by and large only to consumer insurance whereas the FOS is able to consider complaints from small businesses as well as from consumers. It would be useful to know whether a particular problem is thought to affect just one of CSB or MLB, or both groups. We expect that any proposals we may make are likely to distinguish between the two groups for some purposes at least.

Improvements that would help insurers

That may suggest that we think the problems are all on one side – that the law is too favourable to the insurer. There is no point in disguising the fact that most of the criticisms we have read are in that direction. However we suspect that there are issues on which insurers might welcome change, for example if a change to the requirement of insurable interest enabled them to write a wider range of legally-valid policies or if we can find a way to clarify the definition of fraud and its effects. They may also see an advantage in changes that on the face of it benefit the insured if they result in the insured having greater confidence in the products on offer.

¹⁷ Scoping Paper para 1.12.

The additional topics

The main topics about which views are sought are as follows.¹⁸

Insurable Interest. Here there are in effect two questions. The issue raised most commonly is whether the definition of insurable interest is too narrow. Should unmarried cohabitants not be able to insure each other's life even in the absence of financial dependency? Should the requirement of a proprietary interest be retained? The more radical issue is whether it is necessary to retain the doctrine of insurable interest at all. In Australia it seems to have been abolished for certain types of business.¹⁹ The question will have to be considered in the light of concerns about moral hazard and, at a legal level, the possible effect of the Gambling Act 2005, which makes gambling contracts enforceable. Although the 2005 Act has not affected section 4 of Marine Insurance Act,²⁰ which says that a contract where there is no insurable interest is a gaming contract and void, that provision could hardly survive an abolition of the requirement for an insurable interest. The distinction between an (enforceable) insurance contract and a (void) gaming contract would disappear.

A statutory definition of insurance. Is it worth trying to develop a statutory definition of insurance? What purposes would it have to serve, and can any single definition serve the various purposes?

Agency and insurance. The most commonly cited problems seem to relate to non-disclosure: the intermediary, who is the insured's agent, fails to pass on material information to the insurer. The insured may have a claim against the intermediary, but is that adequate? Other possible problems relate to conflicts of interest; intermediaries becoming involved in the claims handling process; and payments not passed on to the insurer.

Subrogation. The type of problem taken care of by the "Lister v Romford Ice Agreement" could, as the NCC point out, re-occur in the family context. A subrogation issue that has caused practical problems relates to mortgage guarantee insurance, which the borrowers may find is written in favour of the creditor, even though they have paid for it.

¹⁸ The others relate to four statutory provisions that may need review: Marine Insurance Act 1906 ss 22 and 53, Marine Insurance Act 1788 and Fire Prevention (Metropolis) Act 1774, s 83.

¹⁹ Insurance Contracts Act 1984, ss 16-18.

²⁰ See Chitty on Contracts, Second Cumulative Supplement to the 29th edition (2005) para 40-A003.

Joint policy holders. The Insurance Ombudsman has referred to a case in which a husband burned down the family home, which was jointly owned and insured. Should a joint policy sometimes be construed as containing separate contracts between the insurer and each co-insured, as distinct from a single indivisible policy, at least in the consumer context?

Post-contractual good faith. As was shown by Sir Bernard Rix's address to the BILA President's lunch in 2001,²¹ the last few years have seen a number of significant cases on post-contractual good faith. The BILA report suggested that, with the exception of refusal to pay a valid claim, there should be 'no statutory interference with the law as it is developing.'²² Others, including judges, have urged that we should at least review the law. That is not that same as saying that we should necessarily replace it by statute: a review might well conclude that the issue is better left to the judges. It has even been suggested that a review, which can take into account wider issues than are likely to emerge in any single case, might assist the courts in developing the law.

Fraud. Fraudulent claims are clearly a matter of great concern, and it seems there may be a case for considering whether a definition of fraud and a statement of its effects would help insurers and others.

Unjustifiable delay. There seems no need to remind this audience of the significance and difficulty of this issue. Many of you will have attended the "mock trial" of The Case for Bad Faith Damages in English Insurance Law held by BILA on 30 June 2005. There it was argued that compensatory damages, if not punitive damages, should be available for unjustifiable delay. I think it is unlikely that we would recommend punitive damages against an insurer even if it deliberately refused to pay a valid and properly-authenticated claim, but whether there should be liability to pay compensatory damages seems an issue worth exploring.

Re-insurance. Here the question is whether consultees agree that, in general, the review of general principles of insurance law should include their application to re-insurance. If it does not, there is a danger that risks faced by the insurer will not be matched under any re-insurance contract.²³

²¹ "Good faith: to be or not to be". The text is appended to the BILA report, Appendix B.

²² BILA para 23.

²³ See *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852.

At the end of the Scoping Paper we ask if there are other issues of contract law that should be considered.

Those of you who have seen the Scoping Paper may have noticed that I have skipped over two topics: “Worthless policies” (such as a mortgage protection policy covering loss of employment being sold to a self-employed person) and “Contract certainty”. I have done so because they raise a general issue for the project. This is that there are some issues relating to insurance contracts that are clearly of concern to those involved with insurance but which may not be best solved by a reform of contract law.

Worthless policies. If the selling of worthless policies is a real problem, it should certainly be addressed, but it is doubtful whether it would be adequate to give the individual policy-holder a remedy. Most cheated insureds would probably not do anything, even if they realised that they could, so there would be little incentive on those mis-selling to stop doing so. It seems to be a case calling for the exercise of preventive powers. (For consumer cases, the new Unfair Commercial Practices Directive²⁴ will need to be taken into account.) However, there seems to be a case for looking at the issue and recommending how it might be dealt with, even if it would not be via legislation on insurance contracts. But in fact this case straddles contract and regulation. It might be appropriate to ensure that the cheated consumer also has a remedy that does not depend on proof of fraud, for example by means of a warranty that the policy sold will be reasonably fit for the consumer’s purposes as far as they are known to the insurer.

Contract certainty is a potentially misleading phrase. It suggests that when insurance is arranged without a policy document being provided at the time (for example, when it is done over the phone or when a slip is signed) the question is whether there is sufficient certainty for there to be a contract at all. That may occasionally be a problem, but the real issue seems to be different: there is a contract but the parties are not sure what its terms are. The FSA has identified three issues:

policyholders do not have certainty as to the details of the cover they have bought;

²⁴ 2005/29/EC of 11 May 2005, OJ L 149/22.

brokers face considerable reconciliation issues and risks of errors and omissions; and

insurers do not have an accurate view of the risks they write, so may not hold appropriate levels of capital.²⁵

These issues seem to be ones for codes of practice or market agreements rather than for contract law. However, given the level of interest in contract certainty, it might be useful for the project to explore the issues and appropriate methods of resolving them. As on all the topics I have mentioned, we invite your views.

Codification

In Part 3 of the Scoping Paper we ask whether we should try to produce a ‘codification’ of insurance contract law, either in the form of a new Act on general insurance contract law, to replace the general provisions of the Marine Insurance Act 1906, or specifically for consumer (and possibly small business) insurance contracts.

Either type of code would take considerable time and effort. Were it to be attempted at all, it would have to be as a second phase to the project, so as not to delay any reforms that we recommend in the light of the review as described so far. Taking it on would also be subject to the availability of resources within the Law Commission, and in particular the availability of Parliamentary Counsel.

Even though no final decision to work on either kind of codification can be taken for some time, it would help to have some idea of whether either kind of Code is thought worth pursuing, since it is likely to have some impact on the first stage of the project. If for instance there were wide agreement that there should be a code of insurance contract law for consumers, then we might present any reform proposals separately for consumers and for non-consumers. We kept Part 3 of the Scoping Paper short because we did not want to burden readers, but in front of this audience containing so many legal experts, I would like to explore some of the issues in more detail. I suspect some non-lawyers in the audience will also be interested in the form in which we should have our insurance law - and that the rest will forgive me.

²⁵ See Scoping Paper para 2.34.

A new Insurance Contracts Act?

There would be significant advantages in a new Insurance Contracts Act covering the basic rules applicable to all types of insurance. The law would be collected in one place. It would, I trust, be more coherent than piecemeal reforms to those parts of the 1906 Act which need to be changed but not others.

A new Insurance Contracts Act could also be a very useful model for any European directive or regulation on insurance contracts. Insurance contracts are mentioned specifically as a candidate for future harmonisation in the European Commission's *Action Plan on European Contract Law*.²⁶ An 'optional instrument', or non-national and supposedly neutral system of law that could be adopted by the parties to govern their insurance contract (rather as the parties to an international sale of goods contract can contract under the 1980 Vienna Convention) also seems a possibility. For those of you not familiar with developments on the European front (which at present are at a very early stage) I have appended to this paper a personal view of what's going on. At this stage I will say only that if there were to be an insurance contracts directive or optional instrument, I think we would have a very hard time persuading the Commission or our colleagues in other Member States that it should be based on English law in its present form.

Sir Andrew Longmore said that he had no principled objection to a new codification provided it did not hold up reform. I agree that it would have to be a second step. Thus a new general Insurance Contracts Act would require separate legislation, with all the difficulty of obtaining Departmental resources and Parliamentary time. That doesn't make it impossible; there have been times when the government of the day has not had a sufficient majority to present anything politically contentious and, for want of other business in Parliament, several Law Commission Bills have been passed in a single year. But the risk that time will never be found is certainly a factor against working on a general codification.

Robert Merkin and Colin Croly have argued that codification should be avoided.²⁷ They argue that the parts of the law that were codified into the Marine Insurance Act

²⁶ Action Plan on A More Coherent European Contract Law COM (2003) final, OJ C 63/1, para 63; European Contract Law and the revision of the acquis: the way forward Communication from the Commission to the European Parliament and the Council, COM(2004) 651 final, 11 October 2004, Annex I.

²⁷ [2001] JBL 587.

1906 produce just as much litigation as those that were not, that the courts have had to resort to pre-Act law in order to interpret it and that codification is likely to produce inflexibility.

I think these points are more arguable. The truth of the matter is that we have no way of knowing what litigation would have occurred had the 1906 Act not been passed. Moreover, the cases on the Act that Merkin and Croly considered were from 1991-2001. Given the enormous changes in insurance practice since 1906 it would be surprising if by 1991 the Act were not showing its age and giving rise to difficulties that the draftsman did not foresee.

That the Act left so many questions unanswered is a serious criticism. Again, however, it may be that the court was confronted with some new development that the Act could not have dealt with. I think we would get a more accurate picture if we were to look at cases in the 25 years or so after 1906, to see whether the Act helped or hindered their resolution. Acts dealing with changing markets need to be kept up-to-date – but so does the common law.

It is true, as the authors say, that an insurance Act cannot answer all the questions; insurance law has many sources and there will always need to be resort to the common law. But that is true of most Acts. The Sale of Goods Act, for instance, has served remarkably well although the general law of contract also applies to sales of goods.

Flexibility is a difficult issue. Merkin and Croly are not the only lawyers who are afraid of what my predecessor Andrew Burrows termed ‘statutory concrete’.²⁸ I have one point, however, and some questions about the supposed loss of flexibility.

The point is that we already have a code in the 1906 Act. We would therefore not lose any flexibility by a replacement Act. What we really have to ask is what would be involved: what would the difference be between a series of amendments to the 1906 Act and a recasting of the parts of the Act that apply to insurance contracts in general? We would not, I am sure, want to change the parts of the 1906 that are specific to marine insurance unless they too are causing difficulty. They would either be left in place or be re-enacted in their existing form, as was done with so many provisions of the Sale of Goods Act when it was updated in 1979.

²⁸ Burrows [1997] *Edinburgh Law Review* 155, 156.

What might be in a new Act? We can look at the question in two ways. One is to look at the chart in the Scoping paper.²⁹

<i>Definition of insurance</i> <i>Insurable interest</i> Capacity <i>Non-disclosure</i> <i>Misrepresentation</i> Questions on the proposal form Waiver and estoppel Agency Form <i>Contract certainty</i> Payment of premiums Interpretation Incomplete or ambiguous terms Unfair or unusually onerous terms <i>Worthless policies</i> Basis of the contract clauses Promissory warranties Illegality Mistake	<i>Joint insureds</i> Claims Notification conditions Burden and standard of proof Indemnity Loss reduction measures Proximate cause Under-insurance Methods of settlement Contribution <i>Unjustifiable delay in settling claims</i> <i>Subrogation</i> Assignment Cancellation Renewals <i>Post-contractual utmost good faith</i> <i>Fraud</i> Dispute resolution Group policies
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This is based on suggestions made to us of topics that would need to be covered.

The other is by going through the 1906 Act to see which sections have general application. Without having carried out detailed study, I would suggest the following sections might be replaced or replicated in a new Act:

- 4-9, 13-15 (insurable interest)
- 17-19 (disclosure)
- 20 (misrepresentation)
- 21 (conclusion of contract)
- 26-28 (subject-matter, valued and unvalued policies)
- 31 (premium)
- 33-35, 41 (warranties)
- 50-51 (assignment)
- 52-54 (premiums)
- 55- 57, 60-61 (losses)
- 67-69 measure of indemnity

²⁹ Para 3.4.

79-80 (subrogation, contribution)

81 (under-insurance)

82-84 (return of premiums)

85 (mutual insurance)

86-94 (supplementary)

The first question about flexibility is how much we really want it. One of the supposed virtues of English law, and a characteristic that is claimed to make it the law of choice for so many international contracts, is its certainty. In some respects I think English contract law is more certain than some of its continental counterparts – for example, I suspect (though I cannot prove) that the interpretation of contracts is more predictable in English law than in some other systems, and that our courts are much less ready to qualify or disapply, by one means or another, what the parties have expressly agreed. But the underlying common law quite often undergoes change, sometimes radical change – and to date always does so with retrospective effect.³⁰ That hardly seems to produce certainty. I could see an argument that an industry concerned with risk would prefer to have a statutory framework, even if that framework had to be revised (with prospective effect only) from time to time.

If I am wrong, and flexibility in the general law is wanted, I have a second question. Should we consider a statutory code that has a built-in mechanism for amendment without the need for an amending Act? This is what is currently being pursued by the DTI in its recent Company Law Reform Bill. If accepted by Parliament, this will give the Secretary of State power to issue “company law reform orders” to “amend the law relating to companies.”³¹ Would a new insurance contracts Act be more acceptable if it contained a similar power.

I would be interested in your reactions to these ideas. However, I quite see the argument that for “business” insurance contracts, the added accessibility and coherence of a new Act would not really justify the cost

³⁰ See *Re Spectrum Plus* [2005] UKHL 41, [2005] 2 AC 680.

³¹ Company Law Reform Bill cl 774.

A consumer insurance contract code?

My personal view is that the case for a consumer insurance code is much stronger. With consumer law accessibility is much more important. First, because the amounts at stake are so much lower, it is much less likely that those involved on the insurer's side, intermediaries and those advising consumers will have the degree of expertise to deal with law. Secondly, the law is even more complex: not only is it scattered over several statutes and cases but the same issues may be dealt with in different ways in both legislation or common law and in regulations, codes of practice, industry rules and statements of practice. Thirdly, much more of the law is mandatory. This means that the terms of the contract are less likely to give a full picture of the relevant issues, let alone the answers.

I also think that a consumer code could appropriately be contained in secondary legislation. A large proportion of consumer law in general is already in this form, to say nothing of the ICOB rules – while the requirements of the FOS do not even have this form. That could solve two problems. It would not be necessary to find the Parliamentary time to pass the code; a power to issue a code could be granted in the Act reforming insurance law generally. It would be easy to amend the consumer code in order to keep it up to date with emerging market practices – easier than to get an amending Act and even, I suspect, than to negotiate amendments to Statements of Practice.

A code by statutory instrument could supplement the Act, where necessary replacing any provisions that are not appropriate for consumer contracts with those that are; or it could replicate the provisions of the Act that apply to consumer contracts. That would bring all the relevant provisions into one place.

It would not, however, replace the ICOB rules. These cover many issues that are not issues of contract law. But there are areas where issues covered by the ICOB rules, quite apart from the effects of non-disclosure and misrepresentation,³² could be brought within a consumer contract code – distance selling,³³ for instance, or cancellation rights.³⁴ Moreover, the two sets of rules could be incorporated into a single document if that would help advisers who have to use it.

³² ICOB 7.3.6. R.

³³ ICOB 2.7.

³⁴ ICOB 6.

Future work

We have asked for responses to the Scoping Paper by 19 April. In the meantime we will start work on the topics that we have already decided to cover, the ones that were dealt with in the 1980 Report. When we have analysed the responses to the Scoping Paper, the Law Commissions will decide what other topics should be brought within the review.

We hope to issue a full consultation paper in a year or 18 months' time. The exact timing will depend on the number of topics to be covered. A final report on reforms (as opposed to any codification) will take about a further year.

While we are working we hope that we can keep in touch with at least some of the audience. We value enormously the help of those who, like so members of BILA, are expert in insurance, whether they be practising lawyers, academics or in the insurance industry. We very much hope that we can keep up a regular dialogue with them. The greater the input from them as we go along, the better our consultation document. Before we publish the consultation paper, we plan to issue a number of informal papers on particular topics to anyone who is interested to receive them. We hope to hold informal seminars on these papers, as we have found that round-table discussions usually lead to fuller and better-digested responses. The last purpose of the Scoping Paper is to invite you to sign up to receive these papers and invitations to the seminars. If when you return the questionnaire you care to include your email address we will put you on the 'emailing list' - unless of course you indicate that you would rather not receive the papers.