

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Consultation on amendments to the BSB's Minimum Terms of Cover (MTCs)

February 2022

About this consultation

1. We are seeking views on proposed amendments to our Minimum Terms of Cover (MTCs) for professional indemnity insurance (PII). PII is required of all self-employed barristers and firms regulated by the BSB.
2. The BSB publishes two sets of minimum terms – one for self-employed barristers and one for firms (also known as '[BSB entities](#)'). We propose to make identical changes to the definitions section in both MTC documents. This will clarify the expected level of cover by professional indemnity insurers in the event of a cyber incident¹. This is not a substantive change, but a clarification. Our twin aims, therefore, are to maintain current levels of protections for consumers and to bring about clarity for policyholders, insurers of barristers and BSB entities, and for consumers.
3. For the avoidance of doubt, our proposed amendments to the MTC documents are to make explicit what was previously implied in the current MTC documents should a cyber-related incident occur. Our current MTCs require insurance against civil liability, in connection with the insured practice². We believe that this covers consumer ('third party') losses, should the losses arise from a cyber incident in relation to the insured practice. Our rules do not mandate that barristers and BSB entities insure against their own ('first party') losses that may arise from remedying a cyber incident (for example, repairs to a computer system). We are, therefore, not seeking to alter cover or protections for consumers or policy holders.
4. The consultation is open for comment from 9 February 2022 until 22 March 2022. Following the closure of the consultation, we will confirm any changes to be made to the MTCs; once amended, we expect insurance providers to ensure their policies are aligned with the amended MTCs and we will work with them to do so.

Background to this consultation

Professional Indemnity Insurance

5. Professional Indemnity Insurance (PII) is compulsory for all practising barristers and entities regulated by the BSB. All self-employed barristers must be covered by the Bar Mutual Indemnity Fund (BMIF), as are the vast majority of entities, although BSB entities may choose to have PII provided by an alternative insurer. The [BSB Handbook](#) sets out the rules relating to PII at rC76-78, stating that barristers and entities must have adequate insurance, which takes into account the circumstances of their practice. Furthermore, the BSB sets Minimum Terms of Cover for both [Self-employed barristers](#) and for [BSB entities](#).
6. Further details about our requirements can be found [here](#).

¹ See Annex 1 for definition of cyber incident.

² 'Insured practice' includes the supply of legal services regulated by the BSB and certain other activities, such as acting as an arbitrator or mediator.

Cyber-related risks in PII policies

7. Over the last few years cyber-related incidents, whether taking the form of intrusive malware or some other form of data theft, interference or blackmail, are becoming increasingly commonplace. Cyber-related attacks can be directed at both individuals and businesses. It is thought that legal services professionals and businesses are prone to such attacks because many will handle sensitive corporate or personal data and/or money from clients (although barristers are not permitted to hold client money, cyber-attacks could cause significant harm to barristers' clients).
8. The Prudential Regulation Authority (PRA), the regulator of insurance providers, has asked insurers to identify, quantify and manage cyber insurance underwriting risk. The PRA is particularly concerned that some insurance policies, including those for "general" professional indemnity, are not specific enough about exactly what cyber-related losses are covered and are, therefore, not pricing these risks appropriately. Insurance policies which do not expressly state what is or is not covered in the event of a cyber-related incident have come to be known as "silent cyber".
9. The PRA has identified certain actions that insurers could take to manage this risk. These include, for example, explicitly confirming cover and adjusting premiums to reflect this or introducing robust wording which sets out what risks are excluded.
10. A review by Lloyd's of London (Lloyds,) which manages syndicates operated by insurers, has further mandated that all policies of its syndicate members must provide clarity regarding cyber cover by either expressly excluding or expressly providing affirmative cyber cover.
11. In the last couple of years, the International Underwriting Association (IUA) has undertaken to work with insurers to develop a model clause/endorsement that could be applied by insurers to address the issue of "silent cyber". The IUA has said that the purpose of the clause is to ensure that traditional PI exposures remain covered, while claims more appropriately covered under a stand-alone cyber policy are excluded.

Impact on the regulatory objectives

12. Our work in defining minimum terms of cover particularly impacts on the following regulatory objectives (as defined by the Legal Services Act 2007):

Protecting and promoting the public interest – Our aim is to maintain current levels of protection. We also believe it is in the public interest that barristers, BSB entities and consumers should be aware of the minimum terms of cover required by the regulator.

Protecting and promoting the interests of consumers – Consumer protection is the reason for professional indemnity insurance. Clarifying cover in the event of a cyber-related incident will maintain protection for consumers.

Promote competition in the provision of legal services – Competition in the market for legal services would be diminished without access to adequate and affordable insurance cover.

Encouraging an independent, strong, diverse and effective legal profession –

Greater clarity in cover will enable barristers and BSB entities to decide whether they need further cyber protection for themselves or their entity, via separate insurance. By providing clarity about the risks to which they are exposed, practitioners are better able to take appropriate action, thus promoting sustainability in the sector (which may also indirectly benefit consumer and competition objectives).

Our proposed amendments

Our approach

13. We believe that existing policies, complying with the MTCs, are broadly suitable to provide appropriate protection in circumstances where claims are made against insured practitioners. However, we now consider that we should make explicit what is currently implied in our MTCs.
14. The primary purpose in setting out minimum terms of cover is to ensure that barristers and BSB entities have adequate insurance to cover consumer losses, should a problem arise in relation to the insured practice. We have, therefore, sought to ensure that any amendments to the MTCs should:
 - continue to provide the same level of protection for all consumers (and other third parties); and
 - expressly clarify what is covered in the event of a cyber-related incident.

How we have amended our MTCs

15. In determining whether to amend the MTCs, we (and other legal services regulators) have been in contact with the International Underwriters Association (IUA), who have consulted insurers to develop an endorsement/clause for regulators to use which would ensure affirmative clauses are provided on cyber-related matters. We have used the IUA's endorsement as a starting point and have adopted several definitions from the IUA's endorsement for the changes we are proposing.
16. We propose to amend the definition of *civil liability* in the definitions section of each MTC document. For the purposes of these Minimum Terms of Cover, *civil liability* will include "any liability arising from a *Cyber Act* or *Cyber Incident*". *Cyber Act* and *Cyber Incident* are also defined, which provides context for any claim for civil liability. *Computer System* and *Data* are also now defined.
17. We think that making the amendments, as proposed above, offers clarity for barristers, BSB entities and insurers looking to ensure their terms are compliant with the BSB's requirements.

Is there a need to mandate first party cover?

18. We have not proposed that our rules should require barristers and BSB entities to insure against their own losses in relation to cyber incidents (these are known as 'first party losses' and may include costs such as notifying individuals affected by any data breach, taking preventative or remedial action in relation to a cyber incident, or

repairing computer systems). We believe our primary role is to protect consumers from loss and this is the purpose of professional indemnity insurance. Practitioners should assess their own levels of risk and decide whether they need additional insurance to cover their own losses. Our understanding is that stand alone insurance policies which cover first party losses are readily available. Alongside these changes, we propose to work with insurers and the Bar Council to raise awareness of the risk of first party losses. However, there may be some indirect benefits to consumers of requiring insurance against first party losses, such as reducing business continuity risks in the event of cyber-attacks and reducing the consequent disruption to clients or others. At this point in time, we do not think this justifies regulatory action and propose instead to encourage barristers and entities to review their own risk assessments.

19. If you think first party cover is necessary, please tell us why you believe it to be the case as part of your answer to Question 5, with reference to the [regulatory objectives](#)³. If you think there would be any unintended consequences or equality impacts of requiring first party cover, please tell us what these are.

Impacts of our proposed amendments

Regulatory objectives

20. We believe the proposed amendments to our requirements for PII have a positive impact on the regulatory objectives, for the reasons discussed at paragraph 12. They provide greater clarity in relation to consumer protection, should a barrister or BSB entity be the victim of a cyber incident. The proposed amendments, and associated communications, will clarify the scope of cover for practitioners and the additional risks to which they may be exposed, enabling them to consider obtaining separate cyber insurance.

Equality impacts

21. We have not identified any negative impacts to any group of barristers or vulnerable consumers arising from the proposed amendments. This is because the amendments maintain the current levels of protection and provide greater clarity for all stakeholders. If you believe there to any equality impacts resulting from these amendments, please let us know in your answer to Question 4.

Impacts on consumers

22. We have not identified any negative impacts to consumers. The proposed amendments will maintain current levels of protection for consumers, should their barrister (or BSB entity) be the victim of a cyber incident.

³ The regulatory objectives are: protecting and promoting the public interest; supporting the constitutional principle of the rule of law; improving access to justice; protecting and promoting the interests of consumers; promoting competition in the provision of services; encouraging an independent, strong, diverse and effective legal profession; increasing public understanding of citizens' legal rights and duties; and promoting and maintaining adherence to the professional principles.

Impacts on insurers of barristers and BSB entities

23. We have engaged with the Bar Mutual Indemnity Fund (BMIF) and other insurers of BSB entities to discuss our proposed amendments. As part of these discussions, we have not identified any negative impacts to insurers who provide cover to barristers or BSB entities. We will continue to engage with insurers throughout the consultation period.

Impacts on barristers and BSB entities

24. Barristers and BSB entities are not currently required to have insurance for their own losses (first party cover), should a cyber-related incident occur. However, we believe that the proposed amendments to the MTCs and associated communications will provide barristers and BSB entities with greater clarity about what protections are required when seeking insurance. Practitioners can use this information to assess their own levels of risk and decide whether they need additional insurance to cover their own losses.

How to respond to this consultation

25. The deadline for this consultation is 22 March 2022. You do not need to wait until the deadline to respond to this consultation. Please use the form provided to submit your response to: policy@BarStandardsBoard.org.uk.
26. If you have a disability and need to access this consultation in an alternative format, such as larger print or audio, please let us know. Please let us know if there is anything else we can do to facilitate feedback other than via written responses.
27. Whatever form your response takes, we will normally want to make it public and attribute it to you, or your organisation, and publish a list of respondents. If you do not want to be named as a respondent to this consultation, please let us know in your response.

Our consultation questions

Question 1: Do you agree with the proposed amendments to our MTCs? If not, please explain.

Question 2: Do you agree that the draft amendments simply clarify the current MTC requirements? If not, how do they substantively change the scope of cover?

Question 3: Are you aware of any potential unintended consequences if we implement these amendments? If yes, please describe the consequences and tell us how the MTCs can be amended to account for this.

Question 4: Are you aware of any equality impacts if we implement these amendments? If yes, please describe the impacts (and the groups affected) and outline any possible mitigation.

Question 5: Is there anything else we should consider as part of this review of the MTCs or PII more generally? For example, should we be considering extending our rules to require barristers and BSB entities to insure against their own losses in relation to cyber incidents ('first party losses')?

Next steps

28. Once the consultation closes, we will collate and analyse the responses. We will then confirm our final position before applying to the Legal Services Board for approval.
29. Should the Legal Services Board approval be given, we will work with insurers to agree any necessary changes to their terms of cover in the light of the new requirements.