

Dear Chair

As the endorsed insurance providers to the Australian Psychological Society and the pre-eminent insurance provider to psychologists in Australia, we provide our comments relating to the proposed revisions to the Professional Indemnity Insurance Arrangement Regulation Standard (Consultation paper 8)

Amount of Cover

The new proposed standard is that a psychologist who is earning greater than \$40,000 income per annum is required to purchase professional indemnity insurance of a minimum amount of \$10 million for any one claim and those earning less than \$40,000 per annum are required to purchase a minimum amount of \$5 million for any one claim. Whether these limits are appropriate is questionable considering the current claims climate for psychologists. According to the statistics that Aon has collated, for the past 10 years there has not been a claim settlement of greater than \$300,000. The propensity for a catastrophic loss against a psychologist compared to some other allied health professionals, such as physiotherapists and chiropractors, is significantly less because of the non-physical nature of treatment provided by psychologists.¹ In all the circumstances, we submit the proposed minimum amounts may be excessive.

Additionally, the financial impact to the individual psychologist of increasing the minimum limits of indemnity may lend itself to opportunistic insurance providers offering a cheaper product to the detriment of adequate policy coverage.

Under the proposed revisions, practitioners will also need to undertake a self-assessment to determine whether, based upon their circumstances, they may need to purchase a limit of indemnity greater than the minimum requirement. Some of the major criteria of the self-assessment (at page 6) are too subjective and not attainable by the vast majority of the practitioners. In particular, we refer to the proposal that the practitioner is required to seek advice from a range of sources including professional

¹ i.e. there is a potential risk of catastrophic physical injury in terms of stroke or spinal injury in treatments provided by physiotherapists and chiropractors.

indemnity insurers and professional associations. Unless working under a Financial Services licence, industry associations are not permitted to provide insurance advice.

Automatic reinstatement

Reference by the consultation paper is made to most insurance policies underwritten being subject to an aggregate and having a legal costs inclusive limit of indemnity. Please be advised that this is not entirely correct as the Aon policy has a costs in addition limit of indemnity component, which means legal costs do not erode the limit.

Cover for disciplinary matters

Of greatest concern with the proposed changes to the professional indemnity insurance standards is the recommendation that cover for disciplinary matters be removed. According to our claims statistics, which are very extensive, more than 95% of all complaints made against psychologists have first been made to the relevant State-Registration Boards.² Indeed, the insurer has spent significant sums every year protecting the interests of psychologists who have been required to appear before their respective Boards in relation to disciplinary matters. It is Aon's opinion that a policy without this protection will be to the detriment of both the profession and the public for a range of reasons, including:

- Legal representation before a disciplinary tribunal is invariably a costly process and is likely to be prohibitive for a practitioner who is not indemnified for the costs of legal representation. If a practitioner is unrepresented at a disciplinary hearing, the Tribunal Members will inevitably be confronted with a range of legal and evidentiary difficulties, in attempting to afford an unrepresented practitioner natural justice and procedural fairness.^{3,4}

For example, without the necessary legal expertise, an unrepresented practitioner might: (i) put questions to a patient/complainant or other witness that might be inappropriate, unfair or

² The trends throughout Australian jurisdictions since the introduction of tort reform legislation in or about 2003, has been for a reduction in litigated civil claims.

³ As one example, the concept of standard of proof in disciplinary proceedings is a complex issue (e.g. see *Briginshaw v Briginshaw* (1938) 60 CLR 336). It is a rigorous legal standard that must be understood by all parties at a professional disciplinary hearing.

⁴ Even in the event that a psychologist did seek legal advice in circumstances where they were not indemnified, the temptation might be to engage lawyers on the basis of price rather than on the necessary expertise.

unduly upsetting for the witness; and (ii) seek to lead evidence or introduce documents that might be in breach of privacy and health records legislation. Such occurrences would clearly not be in the interest of the patients or complainants involved.

- Further, a hearing involving an unrepresented respondent would inevitably be “drawn-out” and would take more time for all involved, including the patient/s involved and other witnesses, as well as for the tribunal itself. This additional time would add to the overall costs of the tribunal process would not be in the public interest.

Overall, there is little doubt that in order to be accorded natural justice and procedural fairness and to understand their rights, practitioners should be legally represented in disciplinary matters.⁵ If a practitioner is not adequately represented, there is a risk of the defence being compromised and, ultimately, their professional services being lost to the public (i.e. by a practitioner’s registration being suspended or cancelled in circumstances where they have not had the opportunity to present their “best defence”). It is not in the public interest for such professional services to be unnecessarily “lost” to the community given shortages of trained health professionals and the costs to the public of educating and training psychologists.⁶

Requirements for individual and employer Professional indemnity insurance arrangements

The proposed arrangements now appear to be split up into two categories: one for individuals and the other for employers. There is no clarification as to who may be considered an employer. For example, if a psychologist in private practice employs one other psychologist and a receptionist, do they fall within the definition of an employer? Additionally for individuals, it states that automatic reinstatements are required where appropriate to cover the level of cover. How many reinstatements is the “appropriate” amount according to the proposed changes. Also, what stipulations do you have regarding run-off cover (i.e. years of mandatory cover after practice, free cover versus paid cover, minimum limit of indemnity etc.).

⁵ Noting the potential significant ramifications of loss of livelihood and reputation from an adverse finding.

⁶ It is also important for public confidence in the psychology profession to be maintained. As Board findings may be published, it is important that practitioners have legal representation, again so that their defence can be fairly presented and reflected in any published decision by the Board.

Scope of cover

The proposed scope of cover requires that the professional indemnity insurance arrangements must provide cover for civil liability incurred by, or loss arising from, a claim that is made as a result of “a negligent act, error or omission” in the conduct of the practitioner (at page 10). A civil liability policy does not require the practitioner to prove or indeed disprove that negligence was a factor in the claim. By stipulating the word “negligent”, it adds an additional onus on the insured. Removal of the word negligent or insertion of the term “alleged” prior to the term negligent is suggested in order to clarify the scope of cover.

General comments

It is important to recognise that Aon has provided professional indemnity insurance to psychologists for in excess of 20 years. Our views above stem from many years of managing complaints against psychologists, understanding the mechanisms of claim activity and the commercial reality involved in the settlement of claims. The Psychologists Registration Board has an important role to play in not only protecting the public but also in ensuring that the legal process involved in the handling of complaints is conducted fairly in accordance with the principles of natural justice and as efficiently as possible, for the benefit of patients who lodge complaints, as well as the community in maintaining public confidence in the profession and the regulatory process.

In conclusion, in representing the interests of nearly 10,000 psychologist policy holders, we believe we have a responsibility to ensure that both the interests of our policy holders and those of the general public are represented and protected, in any proposed revisions.

We thank you for the opportunity to present our comments regarding the proposed revisions and hope they are of assistance.

If you have any queries, please feel free to contact Chris Ristevski on 03 9211 3149.

Yours faithfully,

Aon Risk Solutions