Significant changes to the *Professional Indemnity Insurance Regulations* will come into force on 1 December 2009. John Elliot sets out this practical guide, flagging the changes that will directly affect solicitors' firms

On 11 September 2009, the President of the Law Society issued a letter by email to members about professional indemnity insurance (PII). The president stated that full details of changes to the PII regulations would be posted on the Law Society's website and a detailed explanatory article would appear in this issue of the *Law Society Gazette*.

Significant changes to the PII regulations will come into force at the start of the next indemnity period on 1 December 2009. This article is intended as a practical guide to the profession regarding these changes. The article does not set out a definitive statement or interpretation of the law. The article is a guide to the changes that directly affect solicitors' firms and does not address issues affecting only insurers. The article is based on the assumption that coverage terms offered to your firm do not exceed the mandatory minimum terms and conditions.

There are some important points to be aware of before looking at the detail of the changes, which are:

1) The PII regulations prescribe only the minimum level of cover required. Your firm should consider whether the value and nature of the work carried out by your firm requires additional cover and whether your firm should seek to limit by contract its liability to clients to the minimum amount permitted by law, which from 1 December 2009 will be €1.5 million.
2) PII is provided on a 'claims made' basis, which means that a transaction that your firm believes requires additional cover will need that additional cover renewed in subsequent indemnity periods, as a claim in respect of the transaction may arise after the end of the indemnity period in which the transaction is carried out.
3) Claims will be covered only if they are notified to the insurer in the correct indemnity period, which will be the indemnity period in which the claim is first made against your firm. Your firm will be exposed to liability for the full amount of a claim if your firm does not notify the claim in the correct indemnity period. A new indemnity period starts each year on 1 December and ends on 30 November in the following year.
4) Changes include significant reductions in coverage for liability in connection with undertakings in commercial property transactions, which for this purpose include all 'buy-to-let' residential property transactions. Your firm should seek additional cover if it proposes to give commercial property undertakings.

The attached table aims to summarise the changes in an 'easy-to-follow' format. The footnotes to the table explain certain points in more detail.

Commercial undertakings

The types of undertakings affected are relevant undertakings in the course of a commercial property transaction, where the undertaking was given by the firm (acting either for a client borrower alone, or for a client borrower and a financial institution jointly), in connection with the provision by the relevant financial institution of financial accommodation to the firm's client to permit that client to effect the relevant commercial property transaction.

Relevant undertakings are undertakings that relate to:

a) Discharge of security on, or a loan advanced on the security of
b) Furnishing the relevant financial institution with a certificate relating to title to
c) Furnishing the relevant financial institution with title deeds to, or
d) Payment of any stamp duty accruing due in connection with, or registration of title to

any land or buildings the subject of the relevant commercial property transaction, or undertakings to procure any of these actions.

Commercial property transactions are any transactions other than residential property transactions but, for this purpose, commercial property transactions include the acquisition of a building or part of a building as a dwelling exclusively with a view to earning rental income, sometimes called 'buy-to-let'. Purchases of principal private residences and second homes, such as holiday homes, are not affected.

It is only liability in respect of claims arising directly or indirectly as a result of the provision of the relevant undertaking that will be excluded. Therefore, if a borrower client suffers loss as a result of negligence committed by the firm in the course of a transaction, which does not arise directly or indirectly as a result of the provision of the undertaking (for example, failure to examine title to property), the borrower client will still be able to make a claim that will be insured.

Detailed proposal forms

Firms should expect to be required to provide significantly more comprehensive information than previously to be able to secure cover for the next indemnity period. The Law Society expects this will be the case with all insurers, including the Solicitors' Mutual Defence Fund. As a consequence, firms need to act quickly to prepare their submissions to prospective insurers. Firms should obtain detailed claims information from their insurer, not only to support renewal negotiations with their existing insurer, but also to approach other potential insurers. Firms also need to provide commentary regarding claims, particularly those that are outstanding, and cite what action has been taken to eliminate these mistakes in the future.

Firms considering ceasing practice: cost of run-off cover

Run-off cover is coverage that includes the minimum terms and conditions for a firm that has ceased to carry on practice where there is no succeeding practice. If your firm ceases practice without there being a succeeding practice, your firm will require run-off cover for six years, for which your firm will have to pay your current insurer. The concept of 'succeeding practice' is explained in the practice note starting on page 47 of the July 2009 issue of the *Gazette*. In brief, generally, run-off cover should only be an issue for sole principals. If you are a sole principal ceasing practice, and if you have the opportunity to do so, you should be able to avoid the need for run-off cover if you take on a partner, merge your practice, or arrange for your practice to be taken over prior to ceasing practice. Sole principals considering ceasing practice (including sole principals who have recently commenced practice) need to plan for cessation of practice, either for securing a succeeding practice or for financing the cost of run-off cover.

The contractual terms governing the cost of run-off cover are those that apply under the policy in force on the date your firm ceases practice. Premium levels are expected to rise substantially from 1 December 2009.

If your firm ceases practice on or before 30 November 2009, the cost of run-off cover will be fixed by your firm's current policy. If your firm ceases practice on or after 1 December 2009, the cost of run-off cover will be fixed by your firm's new policy in force from 1 December 2009, and the cost is expected to be substantially higher than under your firm's current policy.

If your firm is considering ceasing practice in the near future without there being a succeeding practice, the cost of run-off cover will probably be less – possibly significantly less – if your firm ceases practice on or before 30 November 2009, rather than on or after 1 December 2009.

The cost of run-off cover is a competitive issue. The cost may vary considerably from insurer to insurer. Seeking competitive quotes may reap significant benefits in terms of lower run-off costs.

Assigned risks pool contribution

An 'ARP contribution' payable by all firms will be introduced with effect from the next but one indemnity period, which is the 2010/11 indemnity period starting on 1 December 2010. The ARP contribution will be 2% of the premium payable for the minimum level of cover (excluding government levy).

Defaulting firms

Any firm for which confirmation of cover is not received by the Law Society within *ten working days* of the renewal date of 1 December 2009 (that is by 15 December 2009), and that has not applied, and been admitted to, the assigned risks pool (ARP), will be classified as a 'defaulting firm'. The ARP will automatically provide such firms with PII cover as a defaulting firm. The premium is expected to be very significantly higher than that available in the market. If claims arise while the ARP is providing a defaulting firm with cover, such claims will be dealt with by the ARP, but the ARP will have recourse against the firm for recovery of the full amount of the claim.

It is expected that the Law Society will seek a High Court order compelling any defaulting firm, which does not regularise its position swiftly, to cease practice. Obviously, it is in the interests of all firms to avoid becoming a defaulting firm.

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