



## Important Briefing Document – Please Read

### Duty of Disclosure and the Insurance Act 2015

#### Introduction

The Insurance Act, which comes into effect on the 12<sup>th</sup> August 2016, makes significant changes to the duties imposed upon policyholders when renewing or making changes to an existing policy, or when taking out a new policy.

The Act replaces much older legislation dating back to 1906 and is designed to modernise insurance law and put the insured party in a more favourable position by providing greater protection against insurers avoiding claims (more of which later).

However, as part of this change it does introduce a new “duty of fair presentation” which modifies the previous duty of disclosure. This new duty clarifies the steps that policyholders must take in this regard when renewing, changing or entering into an insurance contract.

This briefing paper is intended to prepare Congregations for this change by explaining what the duty of fair presentation means for a Congregation and the preparation that is needed.

#### Duty of Fair Presentation

The duty requires those acting on behalf of the Congregation, in practice the authorised officials of the Board or Session, to make a fair presentation to the insurer, without misrepresentation, of every material circumstance that it knows or ought to know that might influence the insurer in assessing the risk and the terms and conditions that it would apply.

Although it is not possible to list all the circumstances which should be disclosed, you should think in terms of special or unusual events or information, for example;

- ❖ when your buildings are no longer being used or become unoccupied temporarily (for more than 45 consecutive days) or permanently.
- ❖ If you let your Manse to someone other than your Minister or for commercial purposes.

- ❖ If you change the use of your buildings e.g. foodbank, overnight sleeping or night shelter.
- ❖ When you intend to make major alterations or changes to your buildings other than for maintenance and repair.
- ❖ Changes to your activities undertaken in the church and unusual or hazardous outreach in the community.

In some ways this is very similar to the disclosure obligations under the old Act. However, there are a number of specific elements to this new duty.

In this briefing we will consider each of the relevant components for you as the policyholder, to ensure that you fully understand the changes and are able to review your own internal processes to make whatever changes are necessary.

**1) Senior Management** - the duty of fair presentation means that the insured, namely the Congregation, must disclose material information known by its senior management i.e. those individuals who play significant roles in the making of decisions about how the activities are to be managed or organised. In practice this is the Board or the Session, including all the usual members Treasurer, Session Clerk, Minister, Property Convener and so on.

It is, therefore, important that some mechanism is put in place within the Board or Session that ensures material information relating to the insurance known perhaps by some, but not all members, is conveyed to the individual(s) handling the insurance, then disclosed to us at the Church of Scotland Insurance Services Ltd (COSIS).

This could be achieved for example by having a specific regular insurance agenda item on the Board or Session meetings and, when appropriate, consulting widely within the Board prior to renewal of your policy or when making changes during its term. There are some useful forms on our web site which will help you with this, please have a look at the Insurance Checklist at <http://www.cosic.co.uk/church-insurance-downloads>

**2) Reasonable Search** – the Act describes the material information that a policyholder *ought to*



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*know* as that which should *reasonably be revealed by a reasonable search*.

For Congregations, when renewing or changing their insurance, it is important, in complying with this element of the duty of fair presentation, that material information that is held within the church itself and others such as its suppliers or contractors is disclosed.

It would also be important to consult widely within the Board/Session to similarly ensure material information is disclosed. Asking some simple questions at Board/Session meetings may help. What has changed in the church? Are we undertaking any unusual or abnormal activities? Who should we be speaking with to ensure that a full grasp of any changed circumstances is obtained?

**3) Clear and Accessible Information** – this requirement places a duty on the policyholder to *avoid vague or cryptic information* being supplied but avoiding overly large amounts of information being provided, known as “data dumping”. Congregations should consider how information, which is perhaps held in several places or within the minds of a number of members of the Session/Board, is brought together and disclosed clearly to the insurer.

You should also be aware that disclosing information in part or whole to a department within 121 George Street is not sufficient. It must be sent to the Church of Scotland Insurance Services Ltd (COSIS) directly so that we can ensure it is delivered to the insurer.

**4) Sufficient information to put a prudent insurer on notice** – this element provides something of a fall-back position for policyholders if they fail to disclose all the material information that they know or ought to know.

Consequently, the policyholder can satisfy the duty of fair presentation by providing sufficient information to put a prudent insurer on notice that it needs to make further enquiries. Although this does provide some additional protection, in practice we would strongly recommend that Congregations do not rely upon it, but instead

provide all material information in a clear and accessible manner to us.

Three further points to make regarding the duty of fair presentation. Congregations are not required to disclose information:

- ❖ already held by the insurer and, therefore, accessible to the underwriter of the risk.
- ❖ Information that an insurer involved in the insurance of church business would reasonably be expected to know.
- ❖ Common knowledge.

### Remedies for Breach of the Duty of Fair Presentation

The new Act introduces greater balance and, potentially, protection for policyholders by extending the remedies available to insurers in the event of a breach. A new proportionate system is being introduced, which replaces the contract/claim avoidance-only regime of the old Act. What this means in practice is as follows:

- ❖ If the breach is deliberate or reckless the insurer can still *avoid the policy* from inception, not pay a claim and keep the premium. The insurer must prove that the breach was deliberate or reckless.
- ❖ If the breach was not deliberate or reckless, there are a number of options available to the insurer by way of remedy. More than one remedy can be applied and the insurer must show that they would have acted in that way if the breach of duty had not occurred.
  - If the insurer would not have insured the risk, had it known the information which has come to light, it can *avoid the contract* but has to repay the premium.
  - If the insurer would have charged a higher premium, then it can *proportionately reduce* any claims payments.
  - If the insurer would have included new terms, or imposed different terms other than in respect of premium such as conditions/warranties, exclusions, sub-limits etc., the contract is to be treated as if it had been *entered into on those terms*.



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### Summary of the Duty of Fair Presentation:

The diagram opposite shows how this all fits together.

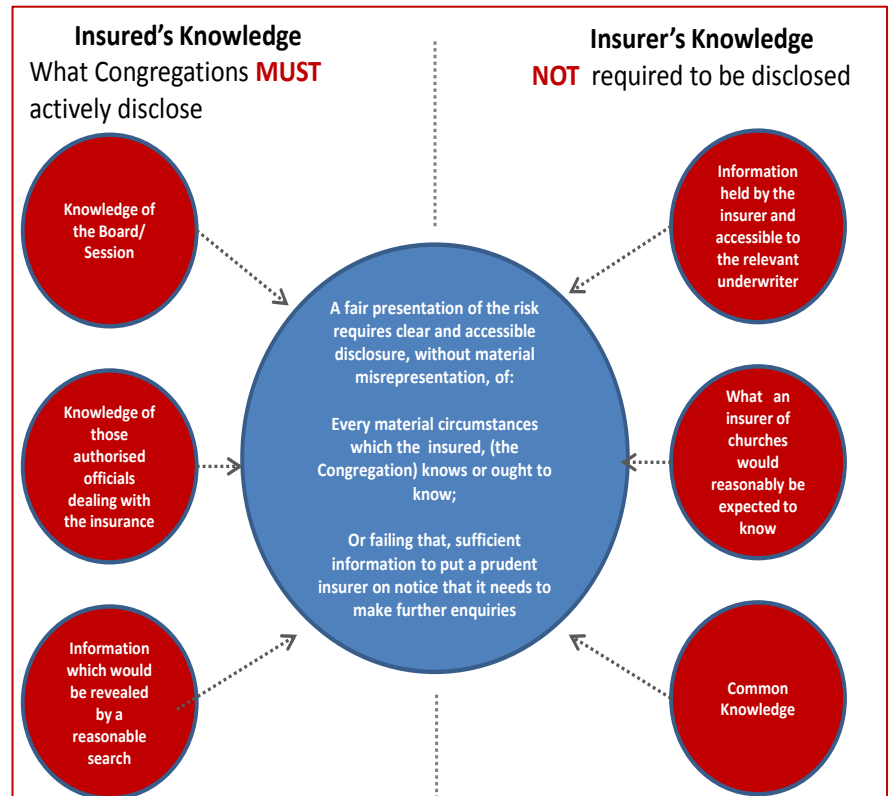
### Other Points to Note

The new Act makes three adjustments to how policy terms operate, largely in favour of the insured:

- 1) Basis of contract clauses are abolished. These provisions turn information disclosed into warranties, so that any change (even if trivial) would lead to termination of the contract.
- 2) Breach of warranty will no longer automatically terminate the policy. Instead liability is suspended and, if the breach is remedied then the contract is resumed.
- 3) The new regime does not allow insurers to use breach of warranties, conditions precedent or other terms to exclude or limit claims if the insured can prove that non-compliance with the term could not have increased the risk of loss which actually occurred.

Having said all of this, Congregations should take great care not to breach any applicable conditions and warranties. Please refer to your Policy Schedule for those that apply to your Congregation.

**And finally...** the new Act tidies up what happens in the event of a fraudulent claim. In such circumstances the insurer will be liable for claims up to the date of the fraudulent act but can treat the policy as having terminated at the point when the fraudulent act was committed. It also states that the insurer does not have to pay the fraudulent claim, including any legitimate element. It can also recoup any amounts paid after the fraudulent act.



### CHURCH OF SCOTLAND INSURANCE SERVICES LTD

FOR FURTHER INFORMATION REGARDING THIS DOCUMENT OR ANY OTHER MATTERS RELATING TO YOUR CHURCH INSURANCE SCHEME POLICY PLEASE CONTACT US.

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