

# TOP UP INSURANCE PURCHASING CONSIDERATIONS



## Considerations on Purchasing Top-up

This short paper is aimed at assisting barristers in deciding on whether to take out insurance in excess of that provided by Bar Mutual and if so, to what amount.

Aside from the requirement to be insured by BMIF, there is no detailed rule regarding the specific level of cover a barrister must purchase. Rule rC76.1 of the BSB Handbook requires barristers to “ensure that you have adequate insurance (taking into account the nature of your practice) which covers all the legal services you supply to the public”. The handbook has no definition of ‘adequate’.



It is therefore down to the individual barrister to determine, and perhaps justify in future, an adequate level of cover. The following factors may be helpful when arriving at this decision:

## Composition and Nature of your Practice

Clearly, the nature of an individual’s practice will be the principal driving factor behind determining the adequacy of a particular level of cover. Aside from any values attached to a case or sums in dispute and the possible extent or degree of any negligence; it is necessary to also consider the parties in the case, whether any claim may also be brought against instructing solicitors or other specialist advisors, whether any liability cap has been agreed in contractual terms (and indeed the likely enforceability of such a cap) and whether there are various counsel involved. On the latter point – it is important to note that each individual barrister would be treated independently in the event of a claim, so it would not be appropriate for example for a junior Barrister to rely on the cover of their leader – as any potential negligence would be attributed to the individual primarily responsible for the error or omission.

It may also be prudent to take advice from your Senior Clerk or clerking team about their knowledge of your practice, your peers and/or the expectations of instructing firms.

## “Claims Made” nature of Professional Indemnity Insurance

The cover provided by Bar Mutual and top-up insurers is on a claims-made basis. This means that the relevant insurance cover is that in place when the claim is first made, not when the alleged negligence occurred. Often in the case of substantial claims, barristers are not involved in the initial claim but are later involved in recourse actions. This can have the effect of the claim arising against the barrister for the first time long after the relevant advice was given. As such, it is important to factor in the history of your practice, any relevant limitation periods, and also claims inflation (which is dealt with in more detail later in this paper) when considering the adequacy of your cover.

Taking out Top-up cover for a high-value case must also be considered carefully in this regard. To remain protected at an increased level of cover – a barrister is effectively obliged to continue to purchase cover at that higher level for at least the duration of the likely limitation period.

This is equally important when approaching retirement and ensuring that your level of cover continues to reflect your exposure – including any past contractual commitments you may have made, and any limitation period which may still be relevant after you cease practice – and for which Run Off cover can cater.

The Chair of the Bar Mutual in a recent communication commenting on claims-made cover said: “It follows that the level of their cover will need to be sufficient to meet not only claims arising from their current practice, but also claims arising from their practice in the past. And their past practices may be capable of giving rise to claims with substantially higher quantum than their current practice, especially in the case of barristers who are winding-down their practices in preparation for or who are in retirement.”

## Attitude to Risk

There will be several factors which are relevant to particular barristers which influence the decision on selecting a level of cover. The most fundamental of these will be an individual’s attitude to risk. The most prudent approach would be to purchase the maximum available level of cover – which remains at £150m, but clearly a balanced assessment is necessary – bearing in mind again the comments of the Chair of the Bar Mutual: “dealing with a claim for which there is inadequate insurance is a miserable experience for the individual concerned and can be career-ending”. The increasing frequency and severity of higher value claims does pose a correspondingly higher likelihood of a limit of cover being breached or exceeded by a claim – potentially leading to a significant personal liability.

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## Claims Inflation

An important consideration is not to simply rely on the level of cover 'I bought last year' - as the adequacy of your insurance cover should be fully re-assessed at least annually.

Claims inflation is an important factor in this regard. As accountability grows, regulatory frameworks expand and costs are squeezed, many professions are feeling the impact of excess claims inflation on the value and the volume of claims presented. Commercial disputes face inflation around the costs of goods, materials, energy and supply chain delays. Loss of profit/opportunity claims will also by their very nature, be higher than they once were.

In the Personal Injury arena, increases in legal costs continue to be a key driver of claims inflation. Guideline hourly rates have recently been updated, with some grades of lawyer and geographical location seeing upward revision by up to 28%. Increasing care costs are also a significant reason for claims inflation in England and Wales. This has impacted both claims for non-commercial care voluntarily provided by family and friends as well as commercial care required in more complex cases. Practitioners in this area will also be conscious of how changes to the discount rate affect settlements and consequently the maximum likely exposure of a serious personal injury case.

## Conservative Level of Cover

Previous readers of our guidance notes may recall that a figure of 50 times the previous year's fee income has been considered to constitute a conservative level of cover. It should be noted that this figure has been utilised since 2001 and may in itself be subject to further scrutiny and revision. It is important that this metric should not be solely relied upon - and the individual context of a Barristers practice be fully considered before deciding on an adequate level of insurance.

## Cost-effectiveness and breadth of cover

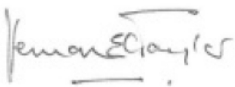
Lastly, it is worth considering the relative cost of the cover, the position regarding tax, and also the valuable elements of primary cover that Top-up provides which Bar Mutual does not.

Although claims across the profession have unavoidably forced pricing higher in recent years - cover remains competitively priced, particularly so when benchmarked against solicitors and law firms. Whilst the Top-up premiums include a non-recoverable element of Insurance Premium Tax (IPT), the cost of Top up is an income tax deductible business expense - and therefore the ultimate cost of the cover is net of the prevailing income tax rate.

The Bar Mutual's cover specifically excludes certain activities - known as "Additional Legal Services". Activities such as lecturing in law and editing law books, acting as a trustee, as well as providing advice via social media or other internet-based forums or websites is not covered by Bar Mutual - but is covered under a Top up policy. Similarly, contingent cover for work undertaken on secondment is included, as well as Contractual Liabilities arising under the COMBAR terms (£900,000 in excess of Bar Mutual's £100,000 limit).

In conclusion, there are many important factors to consider when providing appropriate protection for a Barrister's personal wealth, reputation, and regulatory obligations. Key to those is an assessment of your practice, potential limitation periods, claims inflation, the value of cover, and ultimately an individual's attitude to risk.

If you would like to discuss the considerations raised in this note in more detail, please do not hesitate to contact us.



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