

RIBA
PRACTICE
NOTES

Professional Indemnity Insurance

PN-1: Revision B 2021

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STATUS OF RIBA PRACTICE NOTES

RIBA and its members uphold high standards of professional competence. RIBA Practice Notes set out best practice guidance for members and for RIBA Chartered Practices, in particular fields of application. Adherence to the Practice Notes is not compulsory but members and Chartered Practices should use their judgment to determine when to follow such guidance and to what extent. RIBA cannot accept liability for when and how members and Chartered Practices apply best practice guidance published by RIBA.

Having an audit trail showing that the member took account of the practices contained in RIBA Practice Notes may provide a partial defence to an allegation of negligence. When seeking an independent expert report to defend such a case, the expert is likely to reference relevant Practice Notes as a measure of reasonable skill and care.

RIBA regularly reviews its Practice Notes and Guidance material, to take into account changes in the legal and regulatory compliance environment. However, it is each member's responsibility to ensure they keep up to date with legal and regulatory compliance regimes, supported by RIBA CPD compliance requirements and RIBA standards material as this is published and reviewed from time to time.

Members should be reminded that ARB Standards of Conduct (for all Registered Architects) and the RIBA Code of Conduct (for Chartered members) and RIBA Code of Practice (for Chartered Practices) impose requirements for holding suitable insurance to cover potential liabilities arising from negligence or breach of contract associated with professional activities.

INTRODUCTION

The RIBA Code of Conduct (for Chartered Members), RIBA Code of Practice (for Chartered Practices) and ARB Standards of Conduct (for all Registered Architects) impose requirements for holding suitable insurance to cover potential liabilities arising from negligence or breach of contract associated with professional activities (such as a breach of a contractual obligation to exercise reasonable skill, care and diligence when carrying out design).

Following the Grenfell Tower fire disaster, Professional Indemnity (PI) insurance premiums increased for the first time in over a decade. A number of insurance carriers and syndicates began to withdraw from the architects' and wider construction PI insurance market. Following subsequent fires in residential buildings (and guidance to building owners issued by MHCLG), there has been a further retraction from the construction industry PI insurance market, with limitations of cover being replaced in some instances by increasingly broad exclusions in relation to cladding and fire safety claims.

The RIBA is aware that the vast majority of RIBA Chartered Practices and other construction industry professionals face some form of restriction or complete exclusion of cover in relation to fire safety, and whilst we are working with the commercial market, as well as looking at alternative insurance arrangements for Chartered Practices, a sustainable and longer-term solution to address this issue is not yet in sight.

More recently, the findings of a pan-industry survey¹ (mid-February to mid-March 2021, with over one thousand responses from a mixture of consultants, contractors and specialists) led by the Construction Leadership Council *'pointed to widespread incidence of companies having to change the type of work they do because of restrictions on cover, with a quarter losing jobs because of tough conditions and limitations being placed on them by insurance firms. Even though two thirds of respondents said that less than 5% of what they do is high rise residential, almost one in three were unable to buy the cover they wanted or needed'*.

Of the 147 architects/architectural technologists practices that responded to the survey (about 15%), 78% have a cladding/fire safety restriction on their cover and about a third of those with a restriction have the most severe total exclusion of fire safety related claims.

Where practices have accepted exclusions relating to fire safety in order to obtain cover, this will have a knock-on effect in terms of limiting the type of work that they can undertake in the future. Given the 'claims made' nature of professional indemnity policies (i.e. in that it provides coverage when a claim is made, regardless of when the claim event occurred), such practices could also find themselves exposed to historic claims relating to fire safety that involved work undertaken before the relevant exclusions were introduced.

¹ Construction Leadership Council Professional Indemnity Insurance Survey <https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2021/03/Press-Release-30-March-2021-CLC-PII-survey.pdf> (Accessed 24.06.21)

INTRODUCTION

Although the impact of the Grenfell Tower fire tragedy has been significant, there are a number of other issues also affecting the construction PI insurance market. There has been an increasing number of claims, together with a significant contraction in available capacity. There is increasing uncertainty in the insurance industry about how to price risk in the context of a building regulatory regime and construction industry that have been heavily criticised in the Independent Review of Building Regulations and Fire Safety², and an environment where there are serious concerns about the competency of those involved in ensuring the fire safety of buildings and the quality of outcomes in building procurement processes.

In December 2019, the RICS introduced the EWS1 process (External Wall Fire Review)³ which sets out a way for building owners to confirm to valuers and lenders that an external wall system or attachments, such as a balcony, on buildings containing flats has been assessed for safety by a suitable expert, in line with government guidance⁴. The process itself involves a “qualified professional” conducting a fire-risk assessment on the external wall system, before signing an EWS1 form, which is then valid for the entire building for a period of five years. The form was originally designed following Government advice regarding external wall systems on buildings above 18m and was created to ensure residential buildings over 18m tall could be assessed for safety to allow lenders to offer mortgages. Changes in Government advice in January 2020, brought all residential buildings potentially within scope.

The latest version of the EWS1 form published by the RICS, at the time of publishing this Practice Note, is 8 March 2021.

² Independent Review of Building Regulations and Fire Safety <https://www.gov.uk/government/publications/independent-review-of-building-regulations-and-fire-safety-final-report> [Accessed 24.06.21]

³ RICS External Wall System Process <https://www.rics.org/uk/news-insight/latest-news/fire-safety/cladding-qa/> [Accessed 24.06.21]

⁴ MHCLG Building safety advice for building owners <https://www.gov.uk/government/publications/building-safety-advice-for-building-owners-including-fire-doors> [Accessed 24.06.21]

BEST PRACTICE GUIDANCE

The RIBA offer the following best practice guidance:

- In the current market conditions, it is essential to make early contact with your insurance broker prior to renewal and to submit your renewal proposal in good time; it is currently taking on average up to three times longer to secure renewal terms. You should maintain regular contact with your broker during this period if matters are not progressing;
- Complete your proposal/renewal form properly and comprehensively. All facts material to the proposed insurance must be disclosed, fully and truthfully to the best of your knowledge and belief. Failure to do so may make the contract of insurance voidable or severely prejudice your rights in the event of a claim. In this regard, a material fact is one likely to influence the insurer's assessment or acceptance of the proposal; if you are uncertain what may be a material fact, you should consult your broker;
- Produce a covering letter/email giving the background to your practice; explain the nature of your work and your client base, and point out any good risk management procedures you have in place. Practices with accurate record-keeping, good knowledge of the materials they specify, robust quality management systems and a proper risk management process will be more attractive to PI insurers;
- If your practice has been involved in work on buildings with external cladding systems during the last 15 years, you will need to document this in as much detail as possible;
- Produce a claims history document that details at a minimum any PI claims/notifications you have had as far back as required by your insurer (typically 10 years), and the current status of these (name of claimant, date of loss, insurer, details of any payments/reserves, open or closed status). Check with your insurer if there is any additional specific information you need to provide. If you have claims closed with payments, or any still open, ensure a summary of the claim/notification is included with confirmation of the present position; it is important this document is updated at each renewal;
- For your own information and protection on projects involving contractor design, you should check that the contractor's PI insurance policy does not have significant limitations and exclusion clauses resulting in narrower cover than your own, and that the contractual requirements for your PI insurance are not more onerous than that offered by the contractor's policy;

BEST PRACTICE GUIDANCE

- You should continue to anticipate increases in your insurance premium and factor the additional costs into your annual business overheads and fee calculations. When you are offered different policy options, it is recommended that you accept the least limiting terms regardless of the premium differential.
- The CIC Liability Panel issued a risk management briefing on changing insurers⁵ in June 2019 which urges caution when changing insurer, as cheaper policies may not provide the same level of cover. There is also a risk that claims will not be covered in the future, or will be disputed and may not be paid. Your broker should be able to advise on any differences in the scope of cover afforded when changing insurer, as well as ensuring that all appropriate notifications have been made to your previous insurer;
- Where you have been engaged on a number of projects, specific attention should be paid to the scope of the aggregation wording in the policy to determine whether sufficient cover is in place (i.e. whether each individual project will be treated as a separate claim with its own limit of indemnity, or whether the individual projects will aggregate together under a shared limit of indemnity);
- In the event that you are unable to obtain PI insurance (including run off cover), or you have any limitations or exclusions attached to your policy (including cladding or fire safety):
 - You should seek legal advice regarding your contractual obligations (project work). Free 15 minute consultations from the RIBA's specialist practice consultants are available to RIBA Chartered Members, through the members information line open Monday to Friday, 10am to 1pm and 2pm to 5pm, 020 7307 3600.
 - You should keep a record of your efforts to secure wider insurance and ask your insurance broker to provide a statement attesting to the market-wide restrictions that insurers are imposing.
 - You should check whether any agreements with past and current clients include a contractual obligation to inform them of these changes to your PI insurance cover. For example, under an RIBA Professional Services Contract, still within the contract limitation period, you have a contractual obligation (Clause 8.2 – 2018 or 2020, or Clause 7.6 of the RIBA Standard Conditions of Appointment for an Architect 2010 (2012 revision)) to inform your client if, subsequent to the date of the contract, your insurance is no longer available, or if any restrictions are attached to the policy or an aggregate limit now applies to any matters other than those specified

⁵ CIC Risk Management Briefing: Professional Indemnity Insurance – Changing Insurer <http://cic.org.uk/admin/resources/rmb-professional-indemnity-insurance-changing-insurers-june2019.pdf> [Accessed 24.06.21]

BEST PRACTICE GUIDANCE

in the Contract Details. You will also need to check the wording of your policy and consult with your broker as to whether you can pass such information. In this regard, only those material restrictions or exclusions which are relevant to the specific project should be notified to the client (rather than any unrelated changes to your PI Insurance cover). Where there is no contractual obligation to inform a client of changes to your PI insurance cover, the question of whether or not to inform the client in any event is ultimately a matter for your discretion, with advice from your broker. It should, however, be remembered that, by informing the client, you afford both you and the client with the best means of protecting their respective positions.

- When agreeing terms of appointment on any projects, you should ensure that your obligation to maintain professional indemnity insurance cover reflects the limitations or exclusions placed on your policy, within the professional services contract and any third-party warranty documentation.
 - If you have an exclusion on all fire safety advice appended to your PII policy, you should ensure that you limit your services to explicitly exclude fire safety advice so that it is clear that you are not assuming responsibility for matters for which you are not insured. You should advise any current and future clients that they will need to appoint a fire safety specialist with appropriate PI insurance to carry out services in relation to fire safety, and carry liability for fire safety advice. You should seek legal advice for any current project work where a consultant with appropriate PI insurance cannot be appointed.
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- If appointed to undertake an External Wall System Assessment, and the subsequent completion of an EWS1 form, you should ensure that you have the appropriate skills, knowledge, experience and insurance cover to undertake this work. You should ensure that you follow the RICS guidance on undertaking this work and document the methods and information used to assess the external wall. You should not provide any guarantee of workmanship as this will generally be subject to an exclusion under your PI cover.
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Notes on revisions

Introduction

Revision A:

- Updates to reflect the evolving situation in the insurance market since the Practice Note was first published in March, noting increasingly broad exclusions in relation to cladding and fire safety claims.
- Confirmation of typical premium increases that should be anticipated and specific examples provided where aggregate limits and exclusions may apply.

Revision B:

- Updates to reflect the evolving situation in the insurance market since Revision A of the Practice Note, noting increasingly broad restrictions or exclusions in relation to cladding and fire safety claims.
- Introductory summary of the RICS EWS1 process (External Wall Fire Review).

Best practice guidance

Revision A:

- Confirmation of typical timeframes to secure renewal terms.
- Omission of the minimum 18m height threshold limit previously applied to projects with external cladding which should be documented in detail.
- Clarification that advice to check contractor's professional indemnity insurance is for the architect's own protection rather than to advise their client.
- Additional guidance on giving careful consideration before changing insurer with reference to the CIC Liability Panel guidance.
- Additional guidance on anticipating premium increases, and choosing the least limiting terms. Reminder to members who have used RIBA forms of agreement or Professional Services Contract of their contractual obligation to inform past and current clients of any significant changes to their PI insurance, and to otherwise check all agreements for contractual obligations regarding PI insurance.

Revision B:

- Reminder to maintain regular contact with your broker to secure renewal terms.
- Additional guidance on completing your proposal/renewal form, to disclose all facts material to the proposed insurance.
- Clarification on producing a claims history document as far back as required by your insurer.
- Additional guidance when changing insurer and ensuing all appropriate notifications have been made to your previous insurer.
- Reminder to check the scope of the aggregation wording of your policy to determine whether sufficient cover is in place.
- Record your efforts to secure wider insurance and request a statement attesting to the market-wide restrictions, if imposed.
- Additional guidance to check whether any agreements with past and current clients include a contractual obligation to inform them of changes to your PI insurance cover.
- Reminder to ensure that when agreeing terms of appointment on any projects, your obligation to maintain PI insurance cover reflects any limitations or exclusions placed on your policy.
- Reminder to limit your services if you have an exclusion of all fire safety advice (to explicitly exclude fire safety advice), and advise any current and future clients that they will need to appoint a fire safety specialist with appropriate PI insurance.
- Additional guidance on completing an EWS1 form, and to ensure that you have the appropriate skills, knowledge, experience, and insurance cover to undertake this work.

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