ACWA Insurance Forum Issues Paper

Introduction

Member agencies work to maintain appropriate insurance coverage to address the risks associated with their operations. For example DCJ states that agencies:

"..must have current and adequate insurance appropriate to the activities funded under [the relevant] Deed or associated Program Level Agreements." [1]

In addition to Workers Compensation insurance, agencies typically maintain a suite of insurance including, but not limited to, Public or General Liability, Professional Indemnity, and Directors and Officers Liability.

Changes in the Sector's operating environment present ongoing challenges in securing appropriate and affordable insurance coverage. Not having the right insurance potentially exposes the Sector to significant financial and reputational risks.

These broad and significant challenges extend across the human services sector, including disability services and child care services.

At the ACWA Insurance Forum, speakers will outline their experiences and concerns associated with agencies working to maintain their insurance coverage. This will include providing information on increases to costs, particularly over the last five years.

We will also hear about what may have worked well as agencies address the challenges that they have encountered. These contributions will assist with understanding the full extent of the insurance challenges the Sector is facing.

[1] DCJ Funding Deed 24 Sep 2019

[2] This section incorporates the insights of Neil Bull. Neil, who will be joining the Forum, is the CEO of

Challenges

The insurance challenges confronting agencies include:

- Understanding the mix of insurance most appropriate to an agency's activities where those activities, including where their activities might involve a mix of two or more of home care, child protection, early intervention, residential care or ITC
- How agencies can use their collective bargaining power to obtain insurance coverage that presents "best value for money"
- Difficulty in obtaining insurance. One specific example of the challenges the Sector is facing is the significant problems in obtaining insurance coverage for those agencies who provide OOHC services, particularly insurance cover in relation to historical allegations of child sexual assault. Where agencies have 'Claims made and notified' type policies and insurers decide not to offer renewals, all cover for historical child sexual assault incidents is lost.
- Responding to the overall increasing cost of insurance premiums generally in human services, especially in the provision of OOHC, including workers compensation premiums where the cost is driven up by psychological injury and vicarious trauma.

The forum is also interested in any other areas of service provision that are providing a significant challenge for the Sector, either in obtaining insurance cover or due to substantial increases in cost.

Are there strategies that can be adopted across the sector to address these challenges? Could a group purchasing initiative provide the Sector with an appropriate suite of insurance on a more affordable basis?

Insurance coverage for historical child sexual abuse

The Sector is finding it increasingly difficult to source insurance coverage for historical child sexual abuse or child sexual abuse in general. This puts at risk agencies' ability to deliver foster care, and residential / ITC care services and to a lesser extent, early intervention services.

Understanding Sexual Abuse Cover[2]

Sexual abuse cover comes in two forms, 'occurrence' cover and 'claims made and notified' cover, and it is important for agencies to understand which one they have.

'Occurrence' cover is insurance cover for any incident/abuse that occurs in a given policy period, irrespective of when the claim is made in the future. Given claims are still submitted on average more than 10 years after the incident, this is the most sensible insurance, but it is usually a little more expensive (as much as 30%).

Alternately 'Claims Made and Notified' policies cover organisations only where both an abuse incident occurs in a policy period and a claim is made within that same policy period. However there is often a gap between the time when you become aware that an incident has occurred, and when a claim is actually made. In these circumstances you also need to have additional 'retroactive abuse cover' in place.

'Retroactive' policies provide cover for incidents which have occurred in the past, but the claim is made in the current period of insurance. However there are very strict rules that apply to retroactive cover, including that you must have notified the incident to an insurer immediately that anyone in the organization becomes aware of an incident. In practice, most claims are declined for failure to promptly notify an incident at the time.

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[2] This section incorporates the insights of Neil Bull. Neil, who will be joining the Forum, is the CEO of Anglican Insurance and Risk Services (AIRS), a NFP insurance program for Anglican affiliated organisations.

The notification requirement is especially problematic where there is a large gap between incident and claim. (Unfortunately these delays in prompt notification are very common.)

So even with retroactive cover, 'Claims Made and Notified' policies offer much more limited cover. While insurers are able to offer this cover as a lower premium option, the trade off in terms of the cover provided is significant.

Perhaps the biggest problem with 'Claims Made and Notified' type policies is when insurers decide not to offer renewals, all cover for past historical incidents lost (even where an agency has notified the insurer of an incident). This is what is currently happening in the OOHC sector.

Current Insurance Market

It appears that the insurance market is not prepared to take on new OOHC risks. Ansvar Insurance is an example of the current challenges. Citing increasing costs associated with "the continuing preference for civil litigation over redress to resolve historical incidents", ANSVAR announced in January 2021 it would no longer offer sexual abuse cover for OOHC. They also stated that they would be reviewing their existing OOHC clients. It is a fact that already, a number (such as Berkley, Community Underwriting, Guild) have pulled out completely, even for existing clients. But if your insurer does offer you renewal, it will be critical to do everything you can now to retain cover (see section on The Future).

Overall it is safe to say the OOHC sector is facing very significant challenges when it comes to sexual abuse insurance cover.

Why is this happening?

Simply put, the increasing exposure of agencies to sexual abuse claims. Unfortunately for the OOHC sector, there has been a number of significant developments in insurance claims, particularly in NSW:

1. The government (and courts) are enjoining agencies as being vicariously liable in abuse cases that occur in a home where an agency manages placement. This

is only a recent development (the past few years) as governments historically have picked up the entire cost of such actions.

2. The cost of claims has sky-rocketed. Recent NSW court decisions have seen some very significant increases in quantum decisions. This flows right through the system as plaintiff lawyers seek more significant, multi-million dollar payouts across the full range of cases. The developments in 'nervous shock' claims where natural parents claim for developing psychiatric illness following someone else abusing their children are also contributing to this trend.
3. The frequency of claims and difficulty managing risk in the home. Sexual abuse in the general community is at a staggering proportion with estimates as much as 1/3 of all females being abused before the age of 18. While the Royal Commission report could not identify abuse statistics in the OOHC segment, clearly the risk is high, even where agencies have the best screening practices.

Implications for Agency CEO's and the Board

If you have had 'Claims Made and Notified' abuse insurance and it has not been offered at renewal, you will have no cover for historical incidents and in addition you will face significant challenges in obtaining cover for the future. Apart from agencies potentially being in breach of their funding agreements, agency directors (board and committee members) and officers (i.e CEO, CFO, COO) are at high risk of personal liability in the event of a claim against an agency with no cover in place. Almost all directors & officers insurance excludes abuse claims, and also exclude claims for failure to obtain insurance. It is critical for you to get advice on this matter as to how it applies to your situation.

Other States

Agencies obtain their own insurance in all states except Victoria, where the state government provides funded agencies with access to the VMIA fund. VMIA provides $20m cover on an occurrence basis. At this stage, it is primarily the NSW and Qld governments who are pursuing contribution from agencies in the event of a claim.

Other states have not commenced this practice, however they are directly impacted as insurers withdraw nationally from a market, not just in particular states.

The Future

It is a significant risk that, unless an agency belongs to a large 'insurance group'[3], abuse cover might not be available to your agency within the next 12-18 months. Furthermore those that are able to secure cover, will need to continue to demonstrate robust processes in the following:

- End to end incident reporting and management – from notification through to governance reporting
- Comprehensive training and monitoring
- Data collection and management, especially long-term historical data
- Independent reviews (beyond compliance through to quality and culture)
- Thorough risk assessment

This should not be viewed as establishing a compliance regime, but risk management in its truest sense. Agencies in the sector must consider risk management as a core part of its culture moving forward, not just boxes to tick and policies to write.

Neil Bull from AIRS, proposes a number of options to address the challenges:

Consider Group / Alternative Insurance Initiatives

There are different insurance market options such as creating mutual, or group self-funded aggregates. The difficulty is that the group would need significant up-front capital to start up. As most of the larger agencies are protected by large group insurance schemes, this may be a difficult task to realistically get going. An investigation into alternatives should be undertaken, as, at a minimum, it will strengthen the position that government support may be required.

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[3] Insurance groups include the insurance programs conducted by, for example, the Anglican, Uniting and Catholic churches,where sexual abuse risk can be spread across a very large volume of other insurances.

Risk Management

If you have not embedded risk management into your culture, it should be considered a priority. Undertake an external and independent risk culture review (not a compliance one). In reviewing your culture, carefully consider any OOHC specific activities that are higher risk that might compromise your ability to retain insurance cover.

Consider Mergers or Partnerships

If your agency or its directors/officers feel too exposed, now may be the time to consider your options by having discussions with others in a more favorable position. You may have to give something up, but it may make the difference to your ability to continue to operate.

Ask Insurers for Help

It would not be unreasonable to ask insurers who are abandoning this segment to contribute to finding a solution. They may not be willing or able to underwrite the cover any more, but it is reasonable that they not walk away without providing some alternative assistance.

Workers compensation insurance[4]

Workers Compensation premiums for the Sector are increasing.

iCare calculates premiums based on a number of factors, particularly:

- Industry classification rate
- Total annual wages

The Industry classification rate for Residential Care Services, for example is 4.070%

iCare states that where an employer has "multiple separate and distinct business activities" this is reflected in the premium calculation.

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[4] iCare now refers to workers compensation insurance as 'Workers Insurance'.

iCare also provides a Loss Prevention & Recovery product which uses an alternative method of calculating premiums. Where employers implement specific loss prevention and recovery at work strategies, premiums are then calculated on a 'burning cost' basis. This means premiums are calculated based on an employer's claims costs each year.

iCare indicates that this approach is mainly targeted at larger employers but it may be available to the Sector on a group basis.

A role for Government?

In circumstances where the kinds of strategies discussed above do not fully address the challenges, there may be a role for government.

Governments operate a variety of insurance schemes. The structure of many of these schemes illustrates that, even where Government involvement is necessary, the solutions often involve working closely with both government and insurers.

Through the Victorian Managed Insurance Authority (VMIA) the Victorian government provides a Community Service Organisations' (CSO) insurance program for eligible community service organisations that are funded by Victorian State Government Departments.

iCare operates a number of other NSW government insurance schemes, including Lifetime Care (Motor Accident insurance) and the Home Building Compensation Fund (iCare HBCF).

A number of 'insurer of last resort' schemes are operated by governments in circumstances of 'market failure'. For example the Commonwealth worked with medical indemnity insurers to create the Premium Support Scheme to ensure medical practitioners in private practice have indemnity insurance. The insurer of last resort is determined by the historic market share of insurers in each State and Territory.