



Further update on insurance following meeting with DCJ 30 April 2021

The insurance challenges currently facing agencies

Agencies providing OOHC and SHS are expressing increasing concern as they struggle to maintain the sexual abuse insurance cover they require in order to continue to provide services.

ACWA and YFoundations share the concerns of our member agencies. These concerns include the following:

- One provider of OOHC and SHS services experienced a 392% increase (as a % of revenue) in premiums in 20/21 after being required to go to the London market to secure sexual abuse cover.
- One church affiliated provider of a very broad range of services, including OOHC, saw a 164% increase in premiums whilst sexual abuse cover was reduced from \$10m to \$2m. Furthermore, they had initially been declined cover and were only able to secure it by going through their church group purchasing body.
- A provider of a broad range of services including SHS, OOHC, PSP and other prevention and intervention services, has been advised they will no longer be covered for sexual abuse claims or for redress claims. Their insurance premiums have increased by 47%. The service will be required to spend operational funds to cover any redress claims. This along with the rising cost of insurance premiums leaves the service financially vulnerable.
- A provider of a broad range of services including OOHC and SHS is currently seeking sexual abuse cover. They are finding it difficult to find insurers who are prepared to consider providing cover. Identifying adequate insurance offerings, that are not limited by complex special limitations, whilst satisfying increasingly onerous threshold requirements for extensive documentation, is proving a challenge.

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- Another provider of a broad range of services, including foster care, saw a 111.70% increase in premiums in 2019.
- We are also aware of a provider that had been insured with Berkley. Berkley declined to offer them renewal. They have been unable to secure replacement cover. Their insurance cover expired in December 2020 and they currently remain without insurance.
- We have also been contacted by an OOHC provider that had also been insured by Berkley. Berkley advised them they would not be offering renewal. They then were in negotiations with another insurer. This insurer also declined cover. Their insurance expired on 30 March and they are anxiously trying to access the London insurance market.
- Another SHS and OOHC provider currently has no sexual abuse cover. The service is currently dealing with a redress claim which is pending settlement for a substantial amount. This will leave the agency financially vulnerable.
- We are also aware of a large provider whose insurance expires on 30 June. Their current insurer is not prepared to offer renewal for their sexual abuse cover for Residential OOHC and Foster Care Services. They are asking their current insurer for an extension whilst they seek alternative cover.
- We know of another provider whose insurance expires on 30 October. They have been unable to source cover from the domestic insurance market and are currently seeking cover from the London Market.
- Since our meeting on Friday 30th April we have been contacted by another church affiliated provider of a very broad range of services, including OOHC and SHS. Their cover is currently provided through Ansvar and they have been advised that it is very unlikely that their cover will be renewed when it expires on 30 October.

Market failure

Insurers are rapidly leaving the marketplace. We understand that a number of insurers including Berkley, Community Underwriting and Guild, have withdrawn from the insurance market for sexual abuse cover, even for existing clients.

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When we issued our Position Paper, we noted that Ansvar had announced that they would not be offering sexual abuse cover to new clients who are providers of OOH. Additionally, in relation to existing clients they signalled an intention:

- to shift from offering an 'occurrence' policy wording to a 'claims made and notified' wording in certain circumstances; and
- to revise annual aggregate limits and increase premiums and excesses.

In explaining their position, Ansvar cited the increased judgments and settlements associated with "*the continuing preference for civil litigation over redress to resolve historical incidents.*"

Consistent with the case example included above, we have since been advised by an industry source that Ansvar have decided they will no longer be offering sexual abuse cover even to existing clients.

Agencies are also largely self-funding redress claims, as insurers decline to cover these claims. This adds to their cost burden.

The drift from occurrence cover to claims made and notified

Even where agencies are able to secure cover it is very likely to be at significant cost and it is unlikely to be the preferred 'occurrence' type cover.

As noted above, part of Ansvar's revised position was that it would consider offering clients 'claims made' rather than 'occurrence' cover in certain circumstances.

'Occurrence' cover is insurance for any abuse incident that occurs within a given policy period, irrespective of when the claim is made. As noted in our Position Paper, claims are submitted on average more than 10 years after the fact (the Royal Commission cited an average figure of approximately 23.9 years after the abuse before most people even disclose their abuse). This means that 'occurrence' cover is the most appropriate insurance for agencies to hold.

'Claims made and notified' policies cover agencies only where both an abuse incident occurs within a policy period and a claim is made within that same policy period. It needs to be supplemented by additional '*retroactive abuse cover*' if it is to protect an agency against exposure to historical claims. Strict notification rules apply to retro cover and we have been advised that, in practice, most claims are

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declined for a failure to promptly notify the insurer. So, even with retroactive cover, 'claims made and notified' policies offer more limited cover.

Perhaps the greatest risk with 'claims made and notified' policies is that if insurers decide not to offer renewal, an agency will lose all cover for past historical incidents, even where they have notified the insurer of an incident.

Going to the London market?

Seeking insurance on the London market is unlikely to be a long-term solution. Aside from the increased cost, and the more limited cover that is likely to be offered, our advice is that typically this results in opportunistic players coming into the market who are likely to quickly retreat once they start to receive claims.

We also understand that the London syndicates have limits on the amount of cover they can write and sometimes an agency will need to wait until there is capacity available. One agency had to endure a period of month to month insurance before they could secure longer term cover.

The drivers of the current crisis and why they are likely to intensify

These developments are being driven by a complex mix of related changes which together are increasing agency exposure to sexual abuse claims. The cost pressures associated with these changes are very likely to intensify, rather than to abate.

In the Position Paper we identified a number of drivers for the changes in the insurance market including:

- Increasing numbers of claims, including historical claims (the NSW Court of Appeal has noted in excess of 200 such claims in the Supreme Court Sydney Registry alone¹);
- Increases in the quantum awarded to victims of child sexual abuse (recent Supreme Court of NSW awards include figures up to \$3.5m in damages²);
- The continued development of the law of vicarious liability³, meaning that what was sought to be resolved by the Civil Liability Act 2002 (i.e. in response to the insurance crisis which came in the wake of HIH & FAI Insurance

¹ See: *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102 (9 May 2019) at [13] per Bell P

² See: *MC v Morris* [2019] NSWSC 1326

³ See: *Prince Alfred College Incorporated v ADC* [2016] HCA 37; and more recently *Plaintiff A and B v Bird*; *Plaintiff C v Bird*; *Plaintiff D v Bird* [2020] NSWSC 1379.

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becoming insolvent), has been obviated, as that Act does not apply to claims for vicarious liability;

- The practice by government of enjoining agencies to claims resulting in the apportionment of liability to these agencies – noting different practices across States as to the divide of parental responsibility and movement of children between Government and NGO care. This practice results in the agencies needing to brief external law firms and barristers to defend the cross-claims brought by Government and ultimately to negotiate a cost share with Government in a formal court environment, resulting in unnecessary additional substantial expense.

Additionally, and very significantly, the coming impact of the *Civil Liability Amendment (Child Abuse) Bill 2021* (NSW) will increase the ability of victims of sexual abuse to revisit past settlements, especially with the previous removal of limitation periods in which to commence claims. This is likely to result in the reopening and substantial topping up of awards, of many hundreds (if not thousands) of previously settled claims.

Which services are vulnerable?

OOHC and SHS providers are facing the same challenges. Many of these agencies are likely to be informed in the near future that their insurer is not offering renewal of their existing cover, leaving them in a struggle to source alternative cover, in circumstances where the marketplace is shrinking and costs are rising. The developing crisis threatens the ability of agencies to provide the services that government has contracted (and needs) them to provide.

If they are unable to source adequate insurance, agencies will be in breach of their funding agreements with DCJ, and could potentially even result in the agencies being unable to ensure their own solvency. Board members will likely resign due to their personal exposure to insolvent trading and related breaches of directors' duties. This would threaten the ability of agencies to continue to operate and would confront government with profound challenges in securing appropriate arrangements for the children in their care.

It appears that all providers of human services are likely to be vulnerable. Ansvar has flagged that they were looking closely at their exposure to all vulnerable third parties, including aged care, child care and disability care.

Action by government in other States

The South Australian government has recently intervened in the insurance market by guaranteeing cover to OOHC providers for 6 months pending an assessment of the situation.

Through the Victorian Managed Insurance Authority (VMIA), the Victorian government provides a Community Service Organisations' (CSO) insurance program. Under the program, funded agencies are provided with access to a suite of relevant insurances including \$20m in sexual abuse cover on an occurrence basis.

The position of the ACWA insurance steering committee meeting

Our Steering Committee, which includes OOHC and SHS providers, met on 29 April 2021 and adopted the following position:

Government needs to respond to insurance market failure in the community services sector by agreeing to provide insurance cover for all government funded agencies providing OOHC and SHS.

This cover needs to include funding for redress claims.

The Steering Committee also called for an early meeting with the Minister in order to set out its concerns.