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## **Submission to the NSW Government on its Consultation Paper in Relation to the Civil Litigation Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse Prepared September 2017**

### **Introduction**

Community Underwriting Agency has prepared this paper in response to the NSW Government's request for input from interested parties on:

- a) Removing legal barriers from the civil litigation system in NSW to make it easier for survivors of institutional child abuse in the future to sue responsible institutions;
- b) How achievable and effective the proposed reforms would be, and;
- c) The potential impact of any changes on survivors of institutional child abuse, government, non-government organisations (NGOs) and the public interest.

We acknowledge the devastating impact of child abuse on survivors and their families.

This paper has been prepared in the context of an underwriting agency that is able to offer insurance coverage for organisations which will enable them to defend actions against them, alleging sexual abuse against clients or other stakeholders.

### **Background to Community Underwriting**

Community Underwriting Agency is a specialist Australian underwriting agency that provides insurance coverage specifically to Not for Profits and community groups. We are majority owned by the larger Not for Profits that we insure, and have a business model that requires us to return 75% of our annual surplus back to our clients by way of donations and small grants. We commenced operations as a dedicated underwriting agency in 2014, and prior to that operated as an insurance scheme for over 20 years.

In Australia, underwriting agencies are responsible for more than \$3.5 billion of premiums spent by Australian businesses and consumers annually. They act as a distribution channel for local and overseas insurers who allow them to act as an agent on their behalf, authorised to price premiums, arrange insurance cover, issue policies and often pay claims on their behalf.

This response has been prepared on behalf of Community Underwriting Agency and not on behalf of any of our current or previous supporting insurers. It is based on our current interaction in providing insurance to the Not for Profit sector and draws on more than 25 years of organisational experience both as a specialist underwriting agency and insurance facility.

We provide an extensive range of Not for Profits insurance solutions to insurance brokers and their clients which encompass charities, not for profit and community sector organisations from across Australia including:

Adult and Youth Accommodation Services	Health and Welfare Bodies
Advocacy Groups	Home Help
Animal Welfare Organisations	Home Modification and Maintenance Services
Arts and Crafts Groups	Landcare & Nature Protection
Bible Worship and Church Groups	Meal Services
Centre Based Services	Migrant Services
Chambers of Commerce	Multi Service Outlets
Community Aid and Information Referral Services	Neighbourhood Centres
Community Education Programs	Neighbourhood and Community Aid
Community Health Centres	Parents & Citizens Associations
Community Houses	Past Student Associations
Defence Force Organisations	Not for Profit Peak Bodies
Disability Services	Resident Action Groups
Disability Support Groups	Respite Care
Employment Placement Services	School Auxiliaries and canteens
Family Support and Counselling Services	Senior Citizens Groups
Festivals	Tourist Information Centres
Foundations	Transport Services

Our general liability coverage offered to clients specifically excludes Personal Injury (as defined) caused by or arising out of, or in connection with the Molestation of any person. Molestation is defined under the policy to be any abuse of a sexual nature, indecent exposure or sexual misconduct, whether or not such act is the subject of a criminal investigation.

We provide an option to submit risk information and pay an additional premium which allows this exclusion to be modified so that:

- It does not apply to any liability arising out of or in connection with the Molestation of any person, provided that the insured organisation had in place the necessary protocols required by legislation to limit or prevent such Molestation;
- Any extension is subject to a specific policy sub limit (typically \$1m or \$2m for all claims during the period of insurance and in the aggregate);
- The extension of cover only applies to the insured organisation's vicarious liability and does not apply to any individual involved in or causing or assisting in the Molestation of any person.

Compensation is not payable where:

- The Molestation is committed with the consent of an insured organisation or through deliberate neglect by that organisation;
- The Molestation is committed by the insured organisation against any director, executive officer, employee or volunteer;
- The insured organisation knew or ought reasonably to have known that the perpetrator of the Molestation had previously:
  - committed Molestation; and/or
  - been convicted of Molestation; and/or

- whilst being a director, executive officer, employee or volunteer of the insured organisation, been the subject of a prior complaint in respect of Molestation which had not been appropriately investigated by that organisation.

Our product provides coverage for legal liability which arises from Personal Injury that occurs during the period of insurance. We will not provide this extension to an organisation that cannot adequately demonstrate policies, procedures and controls that will mitigate the potential risk from an employee or volunteer. We do not provide retroactive coverage for acts that occurred in prior periods of insurance.

## **Specific Response to Appendix 1 – Discussion Questions – Insurance Questions 29 - 41**

### **29. *Should the Royal Commission’s insurance recommendation be adopted?***

In principle, we agree with the concepts of:

- Making it easier for survivors of institutional abuse to sue “responsible” institutions, particularly where they have been able to evade scrutiny through elaborate corporate structures;
- Requiring institutions to have insurance cover for child abuse (we believe that this applies equally for services provided where there is the potential for abuse of the elderly, adults with disabilities and other vulnerable clients);
- Considering any changes in the context of the broader approach to child safety in NSW and other states, including existing systems for child protection.

The approach taken however needs to balance this with the overall public interest, and in particular:

- An organisations ability or willingness to continue to provide services in a regime of strict liability that applies irrespective of how much effort and resource is expended to mitigate the potential risk;
- The willingness of volunteers to continue to be involved with organisations providing these services if the default option is to remove the presumption of their good character and innocence.

### **30. *Would the Royal Commission’s civil litigation recommendations have a substantial impact on insurance premiums or the availability of insurance?***

It is our view that the recommendations as proposed would have an impact both on the cost and the availability of insurance.

Insurance at its most essential is based on covering organisations against loss that:

- Is unexpected and unforeseen; and
- Could result in adverse outcomes that are greater than an individual organisation can easily fund from their own resources.

We currently extend cover for the potential of an action taken against an organisation on the premise that many of the high-profile cases of extended abuse over extended periods relate to a period of poor controls, checks and procedures and transparency of actions.

The improved risk mitigation controls implemented in each state and territory over the last decade with regards:

- Working with children and other vulnerable stakeholders;
- The acknowledgement of organisational responsibility for the actions of employees and volunteers; and
- The implementation of policies and procedures that can mitigate exposures

provide us with a level of confidence that we can provide coverage for organisations to defend an action for their legal liability arising from a loss that was unexpected and unforeseen. We currently require organisations to demonstrate that they have procedures in place as part of their risk mitigation strategy before we are prepared to extend coverage for this exposure.

In this environment, there is an ability for insurers to build a premium pool over time that allows affordable premiums to be offered covering potential claims and legal expenses.

We believe that some of the concepts proposed including:

- Strict liability and the concept that organisations could be legally responsible for abuse regardless of whether the institution itself is at fault;
- Reversing the onus of proof so that liability is established unless the institution can prove (as yet undefined) that it took reasonable steps to prevent the abuse from occurring;

will substantially alter the concept of a loss being unexpected and unforeseen. From our perspective, this would substantially change the environment in which we are able to extend coverage for organisations. We are able to provide insurance protection to Not for Profit organisations for a wide range of operational exposures including third party personal injury, errors and omissions in the provision of services, employment practices liability and wrongful acts of office bearers. This coverage is provided (and premiums calculated) on the premise that the organisation must be found legally liable, there is an opportunity to demonstrate reasonable controls and procedures to mitigate potential loss and that there will not be an automatic determination of fault.

The increased legal and other costs likely to be required to defend any accusation under a strict liability environment, will have an immediate impact on the loss ratio of the portfolio of all insurers that provide this coverage. Globally insurers look at their current and predicted loss ratio's as a tool to determine the price that they require and if they are prepared to extend coverage for these exposures.

Likely outcomes include:

- Significant increase in the premium required to extend the coverage to include exposures which may move from being sudden and unforeseen;
- An increase in the self-insured amount (excess or deductible) that each organisation is required to bear for the insurance; and/or
- Withdrawal from offering the coverage in part or completely.

There are many examples of insurance products / areas where spiralling loss ratios have made the cost of coverage prohibitive and/or resulted in extremely limited capacity being available including workers compensation, builders warranty, compulsory third party and property insurance in cyclone / disaster prone locations. In a number of these areas governments have been forced to step in and create self-insured funds as the only solution for coverage to continue to be offered.

**31. How would an increase in insurance premiums impact on the viability of organisations offering services to children? Which types of institutions would have a problem? How could this be managed?**

Many of our smaller clients pay annual premiums for general liability insurance that are less than a few thousand dollars, with relatively low excesses.

If there is a requirement for organisations to have the insurance, but reforms significantly increase the cost or eliminate / restrict the availability of coverage, the obvious outcomes are:

- The need for insured organisations to increase (where possible) any charges made to clients to cover the increased premium or self-insured costs;
- To seek additional revenue from funding providers, donors and other sources to increase the funds needed to meet operating costs;
- To restrict or cease providing services for the areas that are effected by the reforms.

Whilst the focus of the consultation paper is on organisations working with children, the changes in cost and availability of coverage is likely to extend to other areas where services are provided to vulnerable clients such as disability and aged care.

**32. Should the recommendation also extend to organisations which are not recipients of government funding, such as religious organisations? How could the requirement be enforced in these cases?**

We believe that any recommendations should flow equally across all organisations in the sector that have involvement with vulnerable clients and stakeholders.

**33. Should the Royal Commission's recommendation that unincorporated bodies have insurance extend to recipients of 'indirect' government funding? How far should this extend?**

We believe that funding sources should not be the criteria, rather the activities that an organisation may be involved in and the policies and procedures in place.

**34. Does the insurance industry currently offer policies which insure against liability arising from the commission of an intentional act?**

This coverage is not offered (or considered) by Community Underwriting and we are not aware of any other insurers in either the Australian or overseas insurance markets that would provide it.

**35. What would the likely repercussions be of the proposed changes to the duties of institutions?**

As stated above, we are concerned at the potential for the reversal of the onus of proof so that liability is established unless the institution can prove that it took reasonable steps to prevent the abuse from occurring. Legal firms responding to this paper are likely to provide more detailed observation on the specific changes to the duties of institutions.

**36. What are the elements which impact on insurance premiums?**

Many of the following factors impact on the insurance premiums that are charged for this exposure.

They include:

- The type of activities being undertaken by the organisation;
- The size (annual revenues / balance sheet metrics) of the organisation;
- The limit and scope of coverage required;
- The level of self-insurance (excess or deductible) that the organisation is able / willing to accept;
- The organisations approach to managing risk;
- The individual organisations claim history;
- The claims history of the insurers own portfolio of risks insured and/or the insurance industry experience in these types of risk.

**37. When considering the risk of child abuse, what are the factors that underwriters will examine?**

- The type of activities being undertaken;
- Compliance with relevant legislation, conditions, checks or regulations regarding working with vulnerable clients and other stakeholders;
- The Insured's policies and procedures to:
  - Check the suitability of employees and volunteers working with vulnerable clients and other stakeholders;
  - Establish a code of conduct with clear expectations for appropriate behaviour;
  - Train, supervise and enforce practices that reduce the risk of child abuse;
  - Report and address child abuse concerns and complaints;
- Any history of potential claims or circumstances that might give rise to a claim.

**38. How has the insurance industry in Australia responded to the recent increase in child abuse claims? Has this been similar to the response overseas?**

The majority of child abuse claims in Australia (particularly those reported widely in the media), relate to claims for abuse that have occurred over extended periods of time and in the main to large institutions. Community Underwriting are not involved in any of these matters. There are a number of insurers in Australia and internationally that will not consider providing cover for sexual abuse, and the revelations from the various enquiries have reinforced the decision not to do so. For those insurers that are prepared to provide the cover, many (including Community Underwriting) will not consider providing any retroactive coverage.

**39. What mechanisms and responses would institutions need to have in order to support the affordability and availability of liability insurance cover for child abuse?**

The factors outlined in response to question 36 and 37 provide the broad framework for continued coverage, but this will be limited by reforms that might move the exposures into a strict liability environment and which reverse the onus of proof.

**40. *What insurance cover could be offered to nominated 'proper defendants' to child abuse claims?***

The organisational structure of the Insured has less bearing on our decision to provide coverage than those factors outlined in questions 36 and 37. We believe coverage could be obtained by these "proper defendants", subject to what other reforms are introduced.

**41. *What would be the likely cost of specific insurance coverage for child abuse? Would such coverage be available for small organisations, and at what cost?***

In the current environment coverage is available for organisations that can demonstrate that they have in place adequate controls to mitigate the exposures. The costs involved can vary dramatically depending upon the responses to the factors outlined in questions 36 and 37. For a small organisation this can mean a premium of a few thousand dollars.

From our perspective, the coverage provided would be as detailed above in the background to Community Underwriting.