

## **Association of British Insurers (ABI)**

ABI response to Scottish Parliament Education and Skills Committee call for evidence on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill

### **About the ABI**

The Association of British Insurers is the voice of the UK's world-leading insurance and long-term savings industry. A productive, inclusive and thriving sector, our industry is helping Britain thrive with a balanced and innovative economy, employing over 300,000 individuals in high-skilled lifelong careers, two-thirds of which are outside of London. In Scotland the industry supports more than 22,000 jobs generating more than £3bn to the Scottish economy.

The UK insurance industry manages investments of over £1.7 trillion, pays nearly £12bn in taxes to the Government and powers growth across the UK by enabling trade, risk-taking, investment and innovation. We are also a global success story, the largest in Europe and the fourth largest in the world.

Founded in 1985, the ABI represents over 200 member companies providing peace of mind to households and businesses across the UK, including most household names and specialist providers.

The ABI's role is to:

- Get the right people together to help inform public policy debates, engaging with politicians, policymakers and regulators at home and abroad;
- Be the public voice of the sector, promoting the value of its products and highlighting its importance to the wider economy and society;
- Help encourage consumer understanding of the sector's products and practices; and
- Support a competitive insurance industry, in the UK and overseas.

The ABI appreciates the opportunity to comment on the above Bill and to help inform MSPs on the position of liability insurance in relation to redress schemes such as the one proposed in the Bill.

The role of the insurer in historical abuse claims is not to defend abuse. Insurers usually become involved in these claims once they have been notified by a policyholder, most often under public liability insurance policies. The nature of liability insurance is to indemnify an organisation – which can include businesses, charities, religious orders and local authorities – for certain legal liabilities under the terms of their policy or policies. In the context of abuse claims it is important to note that insurers do not indemnify the abuser, who will always retain primary and personal responsibility. Insurers indemnify their policyholders in circumstances where there is vicarious liability for the direct acts of an organisation's employees, liability as a result of institutional failures, or liability as a result of negligence of the organisation's employees (not necessarily systemic negligence).

Historical child abuse is the most sensitive type of claim insurers will deal with and so they handle it differently to any other kind of personal injury. They have designed practices and protocols specifically for abuse claims.

Historically, liability policies were not written in contemplation that they would cover potential liabilities from alleged abuse. The law has changed, and through these changes liability has arisen for employers or organisations who then seek an indemnity through their insurers. In the majority of such cases where insurers have become liable this has been through policies which were written decades previously. These policies were not written with liabilities for child abuse in mind, but it is part of the function of insurance to absorb unforeseen risks and so the policies will often respond.

A significant proportion of claims for compensation for historical abuse is not covered by insurance. Employers' liability insurance is mandatory and must be purchased by employers. Public liability insurance is not mandatory and many organisations will have not purchased it in the past. Those organisations that did purchase public liability insurance cover may have bought it with a large uninsured excess in the event of any claims, or purchased a low limit of indemnity cover up to a fixed sum of money. Only a small percentage of the ABI's membership has a risk in this area. A number of abuse claims against care providers and local authorities for instance are therefore managed and paid with no insurance involvement.

Where there is a valid policy and a legal liability then an insurer would indemnify the insured organisation including the payment of any compensation settlement and legal fees.

It is important to recognise that redress, including the redress proposed under the scheme in the Bill, is not compensation. Paragraph 235 of the policy memorandum supporting the Bill states: *"the redress scheme does not establish legal liability, and it is not intended to work as a civil court would."* Paragraph 12 states: *"The scheme is not about establishing legal liability for the consequences of the abuse; redress serves a different purpose."* Paragraph 127 states: *"the scheme is not intended to replicate either the process or payment available through the civil courts and will not attempt to establish legal liability for the consequences of the abuse, nor determine any issue of fault or negligence arising from any matter to which an application for a payment under the scheme relates. It follows from this that the purpose of redress is not to provide compensation akin to an award of damages which would seek to calculate loss insofar as possible to put the survivor back in the position they would have been in had they not been abused. Redress serves a different purpose which will be reflected not necessarily in comparable awards but in a more accessible application and determination process with access to non-financial redress, such as support."*

Insurance policies covering personal injury including historical child abuse claims will be triggered only when a legal liability is established. There is a lack of detail in the Bill on the level of evidence proposed by the Scottish Government to meet the requirement for a redress payment and so it is not clear whether that level of evidence meets the standard required under civil law to trigger an insurance policy.

Where a legal liability is established, the level of cover under a liability insurance policy will depend on the wording used in the policy and whether it excludes any particular operations or activities of an organisation. A policy may also set a deductible or excess sum payable by the insured organisation, meaning a claim below that value would not be covered by the insurer. Policies will also include a maximum limit on the financial value of the indemnity provided in the event of a claim. An indemnity limit may apply on an aggregate basis covering all claims made in the period covered, or an 'each and every claim' basis where each claim has an individual indemnity limit.

The Bill does not refer to insurance or insurers and the supporting documents only make limited reference to the role of insurers in the proposed redress scheme. Paragraph 232 of the policy memorandum states that: *"It is not appropriate for the Scottish Government to interfere in contractual relationships between insurers and those insured."* We agree with this. The financial memorandum at paragraph 114 notes that *"The Scottish Government has engaged with insurers on the subject of the redress scheme. Some insurance companies may determine that they will contribute to the scheme on behalf of those they insure with historical responsibility for the care of children."* It will be an individual commercial decision for an insurer whether or not they provide a contribution to an organisation they have insured if that organisation decides to make a financial contribution to the proposed redress scheme.

Paragraph 49 of the policy memorandum states: *"fair and meaningful financial contributions to the redress scheme are sought from those organisations who were responsible for the care of children at the time of the abuse, whether providing care directly or otherwise involved in the decision making processes and arrangements by which the child came to be in care."* Insurers would not have been involved in that decision-making process or responsible for the care of children at the time of the abuse they suffered.

Some care providers may find that their insurer for the period when the abuse took place is no longer in business or has been taken over by another insurer or insurers over time. This may present challenges in tracing policies and establishing the presence and levels of liability cover.

Over the past decade there has been a considerable amount of change in the liability insurance market. A number of insurers have sold their historic liability businesses to third parties which are now responsible for handling and meeting any claims against those policies. Some other insurers have entered into agreements with reinsurers who, depending on the wording of these agreements, may now ultimately be responsible for paying claims against these liability policies.

The lack of clarity in the Bill as introduced means it is not possible for an insurer to confirm its position on the Bill at this point in time as there are too many unknown factors involved. We note that in his statement to Parliament on August 19 the Deputy First Minister said: *"The terms of the Bill are there for amendment—every single word of them"*. Insurers recognise the potential for MSPs to amend the Bill during its passage but this means insurers would not be able to take a definitive view on the legislation until it has been passed by the Scottish Parliament.