

NGO Insurance for PSA Claims: Phase 2 Final Report

NSW Department of Communities and Justice



February 2023

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While due care has been taken in preparation of the report Finity accepts no responsibility for any action which may be taken based on its contents.

Finity Consulting acknowledges the Gadigal of the Eora Nation as the First Peoples and Traditional Owners and Custodians of the land on which this report was prepared. We also acknowledge the past and present Aboriginal and Torres Strait Islander children and young people disproportionately represented in out of home care in Australia.

2 February 2023

Gavin Peek
A/Director Policy and Practice Partnerships
NSW Department of Communities and Justice
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Dear Gavin

NGO Insurance for PSA Claims: Phase 2 Final Report

We are pleased to provide this final report on Phase 2 of Finity's work to advise on a national solution to physical and sexual abuse insurance issues for government-contracted or funded NGOs providing out-of-home care, youth homelessness and some disability services.

We would like to acknowledge the assistance received from the NSW Department of Communities and Justice, the interjurisdictional working group, non-government advisory group and all other stakeholders consulted through this engagement.

Do not hesitate to contact us if you would like to discuss our report further.

Yours sincerely



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NGO Insurance for PSA Claims: Phase 2 Final Report

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1 Executive summary

1.1 Background

Government agencies across all Australian jurisdictions rely on Non-Government Organisations (NGOs) to provide out-of-home care (OOHC) and youth homelessness services to vulnerable children and young people. In 2021/22 there were more than 400¹ NGO service providers contracted across all Australian jurisdictions to deliver these critical services.

Most Australian jurisdictions, as part of their contractual arrangements, require NGOs to have current and adequate insurance for the services they are contracted to provide. In these jurisdictions, where NGOs are unable to obtain appropriate insurance, including cover for physical and sexual abuse (PSA) where relevant, this may constitute a breach of contract leading to the withdrawal of funding and subsequently the withdrawal of the service provider from the market. Over the last two years, many NGO service providers have had difficulty renewing or obtaining insurance policies with cover for physical and sexual abuse claims under common law (PSA claims) following many commercial insurers withdrawing PSA cover from the market.

Finity Consulting Pty Ltd (Finity) has been engaged by Chair of the Interjurisdictional Working Group (IJWG), the New South Wales Department of Communities and Justice (NSW DCJ) on behalf of the IJWG regarding the difficulties for NGO providers of OOHC, youth homelessness and some disability services in obtaining liability insurance in respect of PSA claims.

The specific requirements of our engagement are to provide advice over two key phases:

- Phase 1:
 - > Review and analyse the extent of the PSA issue at both a jurisdictional and a national-level, risks to the service delivery, and the impact of not taking any action
 - > Identify and develop potential long-term solutions and recommend a preferred option for the PSA insurance issue for the IJWG's consideration.
- Phase 2:
 - > Design and cost the option selected by the IJWG
 - > Develop a concept implementation plan for the selected option, including an outline of the resources required to administer the selected option on an ongoing basis.

This report represents our final report under Phase 2 of this engagement. This report should be read in conjunction with our Phase 1 Final Report for a full discussion of the background and circumstances that have led to the current NGO PSA insurance issue, an exploration of the extent of the issue and an assessment of a range of potential long-term solutions.

The findings presented follow extensive consultation with key stakeholders from government and non-government sectors.

1.2 Summary of recommendations

The key recommendation of the Phase 1 Final Report was that state and territory governments should provide insurance or indemnities to NGOs, ideally established under a set of nationally agreed principles. We refer the reader to our Phase 1 Final Report for the full context and background to this recommendation.

¹ Estimated figure only.

In this report, we detail our recommendations regarding national design principles for consideration by the IJWG. These recommendations are intended to guide each state and territory through the establishment of long-term indemnity or insurance arrangements. These recommendations have been developed following consultation with government in each jurisdiction, the IJWG and the Non-Government Advisory Group (NGAG) as well as based on our knowledge of the key insurance issues and risks that need to be considered. Where reasonably possible we have sought to balance the (sometimes conflicting) requirements of various stakeholders.

It is worth noting that while our recommendations have been formed based on extensive consultation with key stakeholders, we expect that further consultation will be required between state and territory governments, the Commonwealth and non-government service providers throughout the design and implementation process.

We have outlined each of our recommendations below. We refer the reader to Section 4 of this report for the full background and context for each recommendation.

Recommendation 1 – National Consistency

Rec 1.1: Where reasonably possible, state and territory governments and the Commonwealth should agree in advance to a set of national principles.

Rec 1.2: The recommendations presented in this report should provide the basis for negotiation regarding which principles require national consistency as a matter of importance and which principles require a measure of flexibility.

Rec 1.3: The IJWG is the appropriate forum for reaching an ‘in-principle’ agreement on nationally consistent principles, with proposed approach to principles to be endorsed by the Community Services Ministers (CSM) meetings, before final recommendations and decisions are made within state, territory and Commonwealth governments via the appropriate channels.

Recommendation 2 – Participation mechanism

Rec 2.1: State and territory governments should provide cover to participating NGOs via either a signed deed of indemnity or insurance contract provided in writing to the NGO. The mechanism will vary by jurisdiction, dependent on the circumstances and existing structures available to each government.

Rec 2.2: Government agencies should not compel NGOs to participate in the insurance or indemnity schemes. Rather, participation should be optional upon application, so as to enable NGOs to source alternative insurance cover from the commercial insurance market if they are able to do so (under terms deemed reasonable by the NGO), both now and into the future.

Recommendation 3 – Eligibility requirements

Rec 3.1: All OOHC and youth homelessness providers contracted or funded by state and territory governments who can produce evidence of reasonable endeavours to obtain commercial insurance should be eligible to apply for insurance or indemnity. “Reasonable endeavours” should not require the payment of unaffordable premiums or the acceptance of unreasonable terms of cover (including unaffordable retentions and unworkable exclusions), as determined by the NGO. Evidence of reasonable endeavours should include a board approved declaration, accompanied by written confirmation from an NGO’s insurer or broker.

Rec 3.2: Recognising that service delivery models vary by jurisdiction, each state and territory will need to determine which current service categories are classified as OOHC and youth homelessness services. On a case

by case basis, some jurisdictions may determine to extend coverage to OOHC and youth homelessness providers for other contracted wrap-around or related services. All service categories should be clearly defined in the eligibility requirements.

Rec 3.3: Participating NGOs should be required to keep a current, board approved child protection policy and commit to keeping compliance with minimum safety and/or risk management requirements. These minimum requirements should be determined at a jurisdictional level, with regard to that jurisdiction's existing or planned child safety mechanisms or requirements.

Rec 3.4: Participating NGOs should be required to provide mandatory disclosures relating to any current or (where relevant) prior PSA claims or incidents that they are reasonably aware of. Reasonable awareness includes notifications or complaints made to an NGO director, company officer or senior manager in relation to PSA incidents.

Rec 3.5: If an NGO provides services that are not contracted or funded by state and territory government agencies that fund OOHC and youth homelessness services, claims occurring in relation to those services should not be covered.

Rec 3.6: Cover should be provided to NGOs irrespective of for-profit or not-for-profit status.

Rec 3.7: NGOs providing relevant services in Norfolk Island should be eligible to apply under any Queensland Government operated scheme.

Recommendation 4 – Basis of Cover

Rec 4.1: Insurance or indemnity should be provided for PSA risks on an annually renewable basis with claims occurrence cover.

Rec 4.2: In addition, limited claims made-retroactive cover should be offered to some NGOs (to provide cover for 'tail' risks). At a minimum, cover should be provided under the following circumstances:

- Where an NGO has previously held claims-made cover for PSA risks and this cover has ceased.
- Where an NGO can demonstrate that it has, in prior periods, made reasonable endeavours to obtain commercial insurance, but has been unable to. This includes periods where an NGO has accessed cover via a short-term indemnity provided by government.

Rec 4.3: This limited claims-made retroactive cover should be offered for as far back as an NGO can demonstrate reasonable endeavours to obtain insurance or has held continuous claims made cover, up to a maximum number of years. The maximum number of years should be determined by each state and territory government with reference to the historical circumstances and arrangements of service provision within each jurisdiction (noting that these circumstances and arrangements vary).

Rec 4.4: Based on consideration of the individual circumstances of each jurisdiction, and whether there may be a significant risk of service withdrawal, each jurisdiction should determine whether limited claims made retroactive cover should be extended to other NGOs with inadequate insurance cover for historical PSA risk.

Recommendation 5 – Scope of cover

Rec 5.1: The definition of 'physical and sexual abuse' should be clearly defined in writing and consistent at a national level.

Rec 5.2: The definition of ‘insured’ should include the organisation, its staff, directors, officers and volunteers (including foster and kinship carers).

Rec 5.3: Where an NGO subcontracts services to third parties, those third parties should not be indemnified for PSA claims, unless the subcontractor has arranged for insurance or indemnity directly with the relevant state or territory government. The NGO is responsible for ensuring that any contractors have adequate coverage.

Rec 5.4: The insurance or indemnity should cover all PSA incidents where a child or young person is under the care of the NGO, including if a child or young person is placed in another jurisdiction and/or if the incident occurred in another jurisdiction. For NGOs operating across multiple jurisdictions, separate indemnities or insurance cover will be required for services provided in each jurisdiction.

Rec 5.5: Any and all exclusions should be specified in writing in the deed or indemnity.

Rec 5.6: Where a state or territory provides limited claims-made retroactive cover with a retroactive date earlier than 1 July 2018, this cover should not extend to payments made under the National Redress Scheme, unless the state or territory determines that such an exclusion would lead to an unacceptable risk of service withdrawal for impacted NGOs.

Recommendation 6 – Limits of cover

Rec 6.1: The contract or deed should provide a limit of liability (inclusive of legal defence costs) of \$10m per policy year per PSA claim and \$10m in the aggregate.

Rec 6.2: Limits of cover should be indexed annually from the year of occurrence to the year of settlement, based on published wage inflation indices.

Rec 6.3: The limit of cover should be reviewed by states and territories every 3 to 5 years.

Recommendation 7 – Deductibles

Rec 7.1: NGOs should be required to contribute a deductible for each and every claim.

Rec 7.2: The deductible amount should be \$10,000 per claim for organisations with annual turnover less than \$20m per annum (from all revenue sources) and \$50,000 per claim for all other organisations.

Rec 7.3: NGOs that can demonstrate financial hardship or incapacity to contribute the deductibles required under Rec 7.2 should be able to apply for a reduced deductible. Any such reductions should be considered and assessed by states and territories on a case by case basis.

Rec 7.4: For simplicity, deductibles should be unindexed, but be reviewed by states and territories every 3 to 5 years.

Recommendation 8 – Funding

Rec 8.1: Participating NGOs should be required to pay an insurance premium or indemnity fee in respect of access to the PSA cover. Victoria is an exception to this recommendation given that the Victorian CSO insurance program provides public liability and professional indemnity insurance to eligible CSOs, including PSA cover, free of charge. Charging for cover is therefore a wider decision for the Victorian government beyond the PSA issue.

Rec 8.2: Subject to affordability constraints government agencies should target full funding, with total amounts charged to NGOs targeted at levels broadly aligned to the expected annual cost of providing cover to NGOs,

including the cost of claims as well as other costs of providing cover including administrative, legal and other costs. Where affordability constraints limit the ability of government to target full funding, government agencies should accept partial funding. Open and ongoing dialogue will be required between state and territory governments and NGOs to identify affordability constraints relating to premiums or fees.

Rec 8.3: Pricing and funding should be reviewed on a regular basis.

Recommendation 9 – Pricing structure

Rec 9.1: The insurance premium or indemnity fee charged to NGOs should be proportionate to the volume of outsourced services and associated risks.

Rec 9.2: The rate charged should be expressed as a percentage of government funding received by the NGO for the provision of OOHC or youth homelessness services. This rate should vary by the type of services provided. The number of categories of services provided, and associated rates charged should be determined by each respective state or territory government, recognising that service delivery models, and NGO risk profiles vary significantly by jurisdiction. Where reasonable, fewer numbers of risk categories is preferable to greater numbers.

Rec 9.3: Each state and territory should be responsible for the determination of rates. Rates should be determined with actuarial input and reviewed regularly (every three to four years). Data collection and sharing between jurisdictions may assist with this process (see Recommendation 11)

Recommendation 10 – Short term schemes

Rec 10.1: State and territory governments with established short-term indemnity schemes should continue to extend the applicable dates of these schemes until the long-term government-led indemnity or insurance arrangements are in place (subject to government review and approval processes).

Rec 10.2: State and territory governments that do not have short-term indemnity schemes in place should continue to closely monitor the environment to determine if an intermediate solution is required for potentially impacted NGOs until the long-term government-led indemnity or insurance arrangements are in place.

Recommendation 11 – Data collection, sharing and review

Rec 11.1: State and territory governments should collect and retain detailed risk exposure and claims information for NGOs covered by insurance or indemnity schemes. Where permitted by privacy law, state and territory governments should consider data sharing arrangements between jurisdictions to support best practice risk management at a national level and support pricing reviews, among other areas.

Rec 11.2: Collection and sharing of data and other scheme information should support regular, co-ordinated and independent reviews of state and territory schemes, conducted nationally every three to five years. These reviews should consider scheme elements including policy and indemnity wordings, limits and deductibles, affordability of pricing, and other scheme design elements, with suggestions and/or recommendations to be provided for the consideration of states and territories.

1.3 Concept implementation plan

A nationally consistent approach to the delivery of insurance or indemnity cover by state and territory governments is broadly supported by stakeholders. A key part of this is the co-ordination between jurisdictions on the implementation of their respective arrangements, while acknowledging that some flexibility between jurisdictions will be necessary.

An important element of the implementation plan is a detailed risk assessment. These risks should be considered through the various stages of implementation.

Noting that some elements of scheme design, timeframes and approval processes are expected to vary significantly between states and territories, the concept implementation plan presented in this report is necessarily brief. Individual states and territories will need to consider this concept implementation plan and adapt to their specific circumstances. Further details are contained in Section 5 of this report.

1.4 Indicative costing

This section is included in the report prepared for the IJWG only.

1.5 Reliances and limitations

The reliances and limitations are an important part of our advice and are contained in Section 7 of the report. These should be read in order to place our advice in its appropriate context.

2 Purpose and Scope

2.1 Background

Government agencies across all Australian jurisdictions rely on Non-Government Organisations (NGOs) to provide out-of-home care (OOHC) and youth homelessness services to vulnerable children and young people. In 2021/22 there were more than 400² NGO service providers contracted across all Australian jurisdictions to deliver these critical services.

Most Australian jurisdictions, as part of their contractual arrangements, require NGOs to have current and adequate insurance for the services they are contracted to provide. In these jurisdictions, where NGOs are unable to obtain appropriate insurance, including cover for physical and sexual abuse (PSA) where relevant, this may constitute a breach of contract leading to the withdrawal of funding and subsequently the withdrawal of the service provider from the market. Some jurisdictions do not have specific contractual requirements for NGOs to hold insurance cover for PSA claims and may instead be required to address the risk of PSA claims through internal risk management processes.

Over the last two years, many NGO service providers have had difficulty renewing or obtaining insurance policies with cover for PSA claims following many commercial insurers withdrawing PSA cover from the market. The drivers of this withdrawal were discussed in our report “NGO Insurance for PSA Claims: Phase 1 Final Report, September 2022” (Phase 1 Final Report). NGO service providers who are not able to obtain adequate insurance cover may have substantial exposure to uninsured abuse claims which may lead to a breach of their service provision contracts with government or leave them subject to financial risk beyond their risk appetite. As such, many providers could be compelled to withdraw from service provision if a solution is not forthcoming.

The viability of the OOHC and youth homelessness sectors are threatened by the withdrawal of commercial insurance cover for PSA. The substantial number of vulnerable children and young people dependent on the services provided by these NGOs means that the impact of any large-scale exit of OOHC or youth homelessness providers would be catastrophic for all stakeholders involved including governments responsible for administering these service systems under legislative frameworks and the clients in receipt of these vital services.

Consultations across the insurance and government sectors indicate that this is a national issue, impacting OOHC and youth homelessness service providers in every Australian jurisdiction. The Community Service Ministers’ meeting agreed to establish an interjurisdictional working group (IJWG) to explore possible responses to this issue. The IJWG is represented by community services agencies from every state/territory jurisdiction and the Commonwealth. The purpose of the IJWG is to identify feasible long-term options to respond to the issue at a national level, facilitate state, territory and Commonwealth-based approaches, and to share information to help support the development of a national response. The IJWG has also established a Non-Government Advisory Group (NGAG).

2.2 Scope

Finity Consulting Pty Ltd (Finity) has been engaged by Chair of the IJWG, the New South Wales Department of Communities and Justice (NSW DCJ) on behalf of the IJWG regarding the difficulties for NGO providers of OOHC, youth homelessness and some disability services in obtaining liability insurance in respect of PSA claims.

The purpose of our engagement is to support the development of a co-ordinated national course of action for the government agencies represented in the IJWG with the main aims of the overall project being to:

² Estimated figure only.

- 1 Provide a sustainable long-term response to the withdrawal of insurance cover for PSA claims from the market for NGO service providers
- 2 Address the risk to essential service delivery arising from the potential exit of NGO service providers from the market.

The specific requirements of our engagement are to provide advice over two key phases:

- Phase 1:
 - > Review and analyse the extent of the PSA issue at both a jurisdictional and a national-level, risks to the service delivery, and the impact of not taking any action
 - > Identify and develop potential long-term solutions and recommend a preferred option for the PSA insurance issue for the IJWG's consideration.
- Phase 2:
 - > Design and cost the option selected by the IJWG
 - > Develop a concept implementation plan for the selected option, including an outline of the resources required to administer the selected option on an ongoing basis.

2.3 Phase 1 Final Report

This report should be read in conjunction with our Phase 1 Final Report for a full discussion of the background and circumstances that have led to the current NGO PSA insurance issue, an exploration of the extent of the issue and an assessment of a range of potential long-term solutions. The key recommendation of the Phase 1 Final Report was that state and territory governments should provide insurance or indemnities to NGOs, ideally established under a set of nationally agreed principles. The reasons for this recommendation, relative to other options are that:

- It is the simplest and most timely solution to implement and can be built in to contracting arrangements
- It is the option that is most likely to succeed
- It ensures ongoing provision of essential services
- It provides certainty, assurance and consistency for NGO service providers
- While there will be additional costs involved for government, these costs are associated with essential services contracted or funded by government, and in the event of any market failure, governments would likely be responsible for these costs
- While there are a number of challenges and risks relating to this option, many of these can be potentially addressed or mitigated with careful scheme design, planning and implementation.

We refer the reader to our Phase 1 Final Report for the full context and background to this recommendation.

2.4 This report

This is our final report under Phase 2 of this engagement. A preliminary progress report was provided in November 2022. This report refines and expands upon the recommendations and findings in our Phase 2 preliminary progress report, considering the feedback and further consultation conducted across the various stakeholder groups. The detailed requirements and tasks undertaken during Phase 2 of our engagement can be summarised as follows:

- Design and cost the solution

- > Develop a draft implementation plan
- > Assess how jurisdictional and national-level implementation of the option can be co-ordinated, factoring in relevant approval processes at a national and jurisdictional level
- > Undertake detailed costings
- > Undertake consultations with IJWG members and key stakeholders to inform implementation plans and costings
- > Deliver a preliminary progress report.
- Develop a detailed concept implementation plan
 - > Co-ordinate with agencies represented in the IJWG
 - > Adjust draft plan to meet the needs of each jurisdiction
 - > Consider jurisdictional resources
 - > Develop a final report to present the concept implementation plan to IJWG.

An important element of our engagement has been to consult broadly with a range of relevant stakeholders representing various government agencies and the NGO service providers included in the scope of this work. We discuss our approach to stakeholder engagement in greater detail in Section 3.

2.5 Structure of this report

The remainder of this report is structured as follows:

Section	Topic	Contents
3	Stakeholder engagement approach	Summary of our stakeholder consultation process and approach
4	National design principles	Recommendations for nationally consistent design principles
5	Implementation plan	Concept implementation plan for jurisdictional application
6	Scheme costing	Indicative costings of solution implementation at a national level as well as attribution to individual jurisdictions and pricing considerations.
7	Reliances and limitations	Important reliances and limitations of our work

3 Stakeholder engagement approach

3.1 Stakeholders and consultation approach

Stakeholder engagement is a critical element of this engagement. Due to the nature of the NGO PSA issue, there is a broad range of impacted stakeholders from various sectors, each with a unique perspective on the issue and differing requirements for the long-term solution.

The preferred solution recommended in the Phase 1 Final Report is a government-led solution. Consultation during Phase 2 has therefore primarily focussed on government agencies. However other stakeholders from the non-government sector have also been consulted.

Our approach to stakeholder engagement includes a variety of approaches, namely:

- 1 Informal interviews: for most stakeholder groups we have sought to conduct informal interviews to discuss the key issues and considerations relevant to this engagement.
- 2 Interactive workshops: for the IJWG and NGAG interactive workshops have been facilitated and planned following key deliverables to provide an opportunity for review and feedback.
- 3 Data requests: for some stakeholders (particularly government sector), we have provided tailored requests for data to support our investigation and particularly the costing elements of this engagement.
- 4 Written responses: Following delivery of our Phase 2 Preliminary Progress Report and related interactive workshops, written responses have been provided by most state and territory governments and the NGAG. These written responses have been closely considered in the recommendations presented in this Phase 2 Final Report.

4 National design principles

In this section we cover:

Section	Title	Coverage
4.1	Background and approach	An overview of the approach to recommending national principles
4.2	National consistency	Considerations regarding adoption of consistent national principles
4.3	Participation mechanism	The form of the insurance or indemnity agreement
4.4	Eligibility requirements	Consideration of which NGOs should be eligible for cover
4.5	Basis of cover	Consideration of claims-occurrence or claims-made cover
4.6	Scope of cover	Consideration of who and what is covered by the arrangements
4.7	Limits of cover	Consideration of limits per claim and in the aggregate
4.8	Deductibles	Consideration of co-contributions by NGOs to the cost of claims
4.9	Funding	Whether and how much funding should be collected from NGOs
4.10	Pricing structure	Consideration of how fees or premiums should be determined
4.11	Interaction with current schemes	Arrangements required while a long-term solution is established
4.12	Data collection, sharing and review	Consideration of interjurisdictional data collection, sharing and review

4.1 Background and approach

The key recommendation of the Phase 1 Final Report was that state and territory governments should provide insurance or indemnities to NGOs, ideally established under a set of agreed national principles.

An indemnity is an agreement where one party takes financial responsibility for the losses of another; in this case the government and the NGOs, respectively. The indemnity would be offered via a deed or letter issued by the government agency responsible for community services. This would be backed either directly by Treasury or through a government self-insurance agency. The structure of this arrangement is similar to the existing short-term indemnity schemes.

Unlike indemnities, issuing insurance would require the establishment of an insurance entity. Insurance differs from indemnity in that under this arrangement insurance policies would be issued with a contractual requirement to cover losses. For some states and territories, this would require legislative changes to establish an appropriate insurance entity.

To facilitate a nationally consistent approach (which has been highlighted as particularly important by stakeholders consulted), each state and territory government could be responsible for their own indemnity or insurance scheme, established under a set of guiding principles agreed in advance.

In this section, we outline our recommendations regarding this set of guiding principles for the consideration of the IJWG. These recommendations have been established following consultation with various government agencies from each jurisdiction, consultation with the NGAG and based on our knowledge of the key insurance issues and risks that must needs be considered. We have additionally considered the detailed written feedback received from key stakeholders regarding the initial recommendations presented in our Phase 2 preliminary progress report. Where reasonably possible we have sought to balance the (sometimes conflicting) requirements of various stakeholders.

4.2 National consistency

4.2.1 General discussion

In the absence of a single national solution, and as noted above, stakeholder consultation has highlighted the importance of a nationally consistent approach to the provision of insurance and indemnities to NGOs. This is particularly important for NGOs that operate across multiple jurisdictions or nationally. Notwithstanding this, the aspiration for national consistency needs to be balanced against an acknowledgement that the service delivery models, nature of risk exposures and existing mechanisms and government structures under which insurance and indemnities might be established vary significantly by jurisdiction.

In view of this, it is important to distinguish between scheme design elements where consistency is most important and design elements where some level of flexibility may be appropriate and warranted.

4.2.2 Stakeholder feedback

There is general agreement from all stakeholders that national consistency is desirable and that scheme design principles should be agreed as a matter of priority. Notwithstanding this, some jurisdictions highlighted the importance of flexibility in some areas where jurisdiction specific circumstances warrant a level of variation.

There is general agreement that the IJWG is the appropriate forum for reaching 'in-principle' agreement on nationally consistent principles, noting that formal approvals will still be required via the appropriate channels. Some jurisdictions also suggested that it may be appropriate for any proposed principles to be endorsed by the Community and Family Services (CAFS) and Community Services Ministers (CSM) meetings.

4.2.3 Recommendation

Recommendation 1 – National consistency

Rec 1.1: Where reasonably possible, state and territory governments and the Commonwealth should agree in advance to a set of national principles.

Rec 1.2: The recommendations presented in this report should provide the basis for negotiation regarding which principles require national consistency as a matter of importance and which principles require a measure of flexibility.

Rec 1.3: The IJWG is the appropriate forum for reaching an 'in-principle' agreement on nationally consistent principles, with proposed approach to principles to be endorsed by the Community Services Ministers (CSM) meetings, before final recommendations and decisions are made within state, territory and Commonwealth governments via the appropriate channels.

4.3 Participation mechanism

4.3.1 General discussion

An important scheme design consideration is the detail of the mechanism by which NGOs participate in the insurance or indemnity scheme, as well as the requirements of government with respect to which NGOs can and/or should participate. Eligibility requirements for participation are discussed further in Section 4.4, however a key question is whether a government should compel NGOs providing contracted or funded services to participate in the insurance or indemnity scheme.

State and territory governments across Australia each have varying pre-existing legislative and structural frameworks which mean that the most appropriate participation mechanism may be different for each state

and territory. As such, at a high level, we consider that some flexibility is required in this regard and full national consistency may not be appropriate or desirable. For example, the existing Victorian Community Service Organisation (CSO) insurance program issued by the Victorian Government Managed Insurance Authority (VMIA) already provides public liability and professional indemnity insurance to eligible CSOs (including many providers of OOHC and youth homelessness services), and includes PSA cover. As such, the continued operation of the CSO insurance program in Victoria is likely the most appropriate mechanism by which to provide cover to the majority of NGOs operating in Victoria. In other jurisdictions, a lack of pre-existing legislation and authority structures means that an insurance solution is not readily achievable and the most appropriate participation mechanism may be a deed or letter of indemnity issued by the government agency contracting or funding the relevant NGOs.

Proper management of financial risks, including potential exposures to PSA claims, is of vital importance to the continued operation of NGOs providing OOHC and youth homelessness services. As a consequence, most Australian jurisdictions, as part of their contractual arrangements, require NGOs to have current and adequate insurance for the services they are contracted to provide. While our investigations in Phase 1 concluded that the insurance sector, in large part, considers PSA risk as uninsurable, we understand that there are a limited number of NGOs which have been able to maintain an adequate level of cover from the commercial market. This is typically limited to NGOs insured by one insurer that provides cover with restricted eligibility criteria, or where the NGO has sufficient scale or breadth of other revenue sources which means that it is able to negotiate cover, potentially from limited off-shore markets (even so oft-times on unfavourable terms). As such, the long-term solution proposed should, as much as possible, avoid the transfer of risks to government which are able to be insured by the commercial market. Similarly, the solution should minimise any incentivisation for remaining insurers to withdraw from providing this cover, and where possible, provide a suitable long-term ability for government to 'exit' from providing cover if the commercial insurance market determines in future that it is willing and able to re-commence provision of PSA coverage for the relevant sectors.

4.3.2 Stakeholder feedback

Stakeholders generally agree that each jurisdiction requires flexibility in determining the appropriate participation mechanism. Stakeholders also agree that NGO participation should be optional, with an application and assessment or approval process, and that government should not 'compete' with the commercial insurance market but rather act as the provider of last resort.

4.3.3 Recommendation

Recommendation 2 – Participation mechanism

Rec 2.1: State and territory governments should provide cover to participating NGOs via either a signed deed of indemnity or insurance contract provided in writing to the NGO. The mechanism will vary by jurisdiction, dependent on the circumstances and existing structures available to each government.

Rec 2.2: Government agencies should not compel NGOs to participate in the insurance or indemnity schemes. Rather, participation should be optional upon application, so as to enable NGOs to source alternative insurance cover from the commercial insurance market if they are able to do so (under terms deemed reasonable by the NGO), both now and into the future.

4.4 Eligibility requirements

4.4.1 General discussion

A key challenge associated with the establishment of a long-term insurance or indemnity solution provided by government is the determination of which NGOs should be eligible to participate in the scheme. Some of the

key elements relating to eligibility requirements for participation in the scheme, which will need to be reviewed, as well as the relevant considerations with respect to each of these are shown in Table 4.1 below.

Table 4.1 – Eligibility requirements – key considerations

Element	Considerations
Determination of eligible NGOs	<ul style="list-style-type: none"> ◦ A key implementation risk (discussed further in Section 5.5) is the risk of ‘scope creep’, a situation where the scheme unintentionally provides coverage to a broader range of NGOs and risks than originally intended. ◦ The scheme design should ensure that access is limited to the intended NGOs for the specific services that are intended to be covered. This may require strict definitions around what contracted or funded services are ‘in scope’.
Availability of commercial insurance	<ul style="list-style-type: none"> ◦ The purpose of the proposed long-term solution is to provide an alternative means of cover for PSA risk to impacted NGOs. As noted in recommendation 2, government should not compel NGOs to participate in the insurance or indemnity schemes where an NGO is still able to source commercial insurance coverage on reasonable terms. Eligibility requirements should consider this.
Incentivisation of risk management	<ul style="list-style-type: none"> ◦ The scheme design should ensure that there is an alignment of eligibility criteria and incentives for best practice risk management. ◦ This might necessitate mandatory adoption of minimum risk management requirements as a precursor to accessing cover. This may include adoption of national child safe standards. However, we understand that there is inconsistent progress at a jurisdictional level in terms of implementation and establishment of oversight mechanisms.
Cover for peripheral or related services.	<ul style="list-style-type: none"> ◦ State and territory governments will need to determine if eligibility should be limited to services which are contracted or funded by the relevant government agency, or whether peripheral or other related services should also be covered. ◦ State and territory governments often contract NGOs to provide wrap-around or other distinct services related to the delivery of OOHC and youth homelessness services. Examples of this are Targeted Earlier Intervention programs aiming to identify and support children that are at risk of vulnerability or family preservation programs. ◦ Another example of peripheral or related services is voluntary OOHC (VOOHC) which is indirectly funded by the Commonwealth and state and territory governments via the NDIS; in some cases state and territory governments provide funding for “bricks and mortar”. Many (likely most) NGOs providing these services are also contracted or funded by state and territory governments to provide statutory OOHC and youth homelessness services.
Other elements	<ul style="list-style-type: none"> ◦ Consideration will need to be given to whether there are any other eligibility requirements. Examples include not-for-profit vs for-profit status, and whether cover should be limited to current service providers only.

4.4.2 Stakeholder feedback

We make the following comments regarding stakeholder feedback on eligibility requirements:

- Where scheme eligibility requirements necessitate that NGOs have first undertaken reasonable endeavours to source cover from commercial insurance markets, stakeholders have suggested that reasonable endeavours should not require the payment of unaffordable premiums or the acceptance of unreasonable terms. The NGO sector has suggested that the determination of whether premiums are unaffordable or terms are unreasonable should be at the assessment of NGOs, while some Government

stakeholders have suggested that this assessment should be accompanied by a board approved declaration and written confirmation from the NGOs insurer or broker.

- Many stakeholders highlighted the importance of clarity regarding which service providers are eligible and which services are covered while noting that definitions and categorisations are likely to differ by jurisdiction.
- There is general agreement from state and territory government representatives that cover should only be provided for services that are contracted or funded by the government agency engaging the NGO to provide OOHC and youth homelessness services, and in some cases other state contracted or funded wrap-around services. Where an NGO provides other services that are contracted or funded by any other agency, state and territory government representatives have generally indicated a lack of appetite to cover these services. The primary peripheral services where there remains an outstanding question of cover relates to VOOHC services. VOOHC services are discussed further in section 4.4.4.

4.4.3 Recommendation

Recommendation 3 – Eligibility requirements

Rec 3.1: All OOHC and youth homelessness providers contracted or funded by state and territory governments who can produce evidence of reasonable endeavours to obtain commercial insurance should be eligible to apply for insurance or indemnity. “Reasonable endeavours” should not require the payment of unaffordable premiums or the acceptance of unreasonable terms of cover (including unaffordable retentions and unworkable exclusions), as determined by the NGO. Evidence of reasonable endeavours should include a board approved declaration, accompanied by written confirmation from an NGO’s insurer or broker.

Rec 3.2: Recognising that service delivery models vary by jurisdiction, each state and territory will need to determine which current service categories are classified as OOHC and youth homelessness services. On a case by case basis, some jurisdictions may determine to extend coverage to OOHC and youth homelessness providers for other contracted wrap-around or related services. All service categories should be clearly defined in the eligibility requirements.

Rec 3.3: Participating NGOs should be required to keep a current, board approved child protection policy and commit to keeping compliance with minimum safety and/or risk management requirements. These minimum requirements should be determined at a jurisdictional level, with regard to that jurisdiction’s existing or planned child safety mechanisms or requirements.

Rec 3.4: Participating NGOs should be required to provide mandatory disclosures relating to any current or (where relevant) prior PSA claims or incidents that they are reasonably aware of. Reasonable awareness includes notifications, allegations or complaints made to an NGO director, company officer or senior manager in relation to PSA incidents.

Rec 3.5: If an NGO provides services that are not contracted or funded by state and territory government agencies that fund OOHC and youth homelessness services, claims occurring in relation to those services should not be covered.

Rec 3.6: Cover should be provided to NGOs irrespective of for-profit or not-for-profit status.

Rec 3.7: NGOs providing relevant services in Norfolk Island should be eligible to apply under any Queensland Government operated scheme.

4.4.4 Voluntary OOHC (VOOHC)

Questions of responsibility with respect to VOOHC services are complex in nature. We have not made a formal recommendation in this report with respect to VOOHC services. Discussions between the Commonwealth and state and territory governments have highlighted the following:

- There is arguably no contractual relationship between any government and the NGO providers with respect to these specific services, though state and territory governments may have contractual relationships with these NGOs for other services provided.
- The Commonwealth and state and territory governments indirectly funds these services via the NDIS when scheme participants access these services under their participant plans.
- Memoranda of understanding are in place between state and territory governments and the Commonwealth which appear to assign some level of responsibility to states and territories for the

safety of children and young people. The NDIS Quality and Safeguards Commission also has an important role.

- The number of children and young people currently in voluntary OOHC under an NDIS plan is relatively small (around 220).
- The extent to which providers of VOOHC services are impacted by the PSA insurance issue is unclear.

Based on discussions with states and territories and due to the complexities noted above, it is unclear whether there is appetite and impetus to expand eligibility to provide cover for VOOHC services. Further discussion between the Commonwealth and state and territory governments will be required before a final position is reached. We do however note that:

- If coverage is extended to some disability services provided under the NDIS, there would likely need to be some form of agreement between state and territory governments and the Commonwealth with respect to funding. State and territory governments would also need to consider the appropriate mechanism for cover which may prove challenging where there is a lack of a direct contractual relationship with the NGOs in question.
- If coverage is not extended, state and territory governments and the Commonwealth would likely need to conduct a risk assessment in relation to taking no action, including consideration of the risk that some of the children and young people utilising these services may end up in statutory OOHC if provision of these services was withdrawn as a result of the PSA insurance issue.

We suggest that states and territories and the Commonwealth maintain an open dialogue in relation to VOOHC.

4.4.5 Victorian CSO insurance program

We note that our recommendations in section 4.4.3 relating to eligibility requirements are not consistent with the current eligibility requirements of the Victorian CSO insurance program. The particular eligibility requirements of the Victorian CSO program that are inconsistent with our recommendation include:

- 1 The CSO insurance program requires the NGO to have a head office in the state of Victoria
- 2 NGOs with a for-profit status are not eligible for the CSO insurance program.

Recognising these differences, we anticipate that there could be potential inconsistencies and gaps in coverage in Victoria for NGOs that do not meet these criteria. We understand that there are approximately 12 NGOs in Victoria currently providing OOHC or youth homelessness services that are ineligible for the CSO insurance and have not been able to source an adequate level of insurance coverage. It is possible that this number could increase. While we understand that there may be a potential option available to some NGOs to circumvent the for-profit status eligibility restriction (requiring a change in company registration status), this option may not be available to all ineligible NGOs. Where the services provided by ineligible NGOs are assessed as being essential, we suggest two potential policy responses that the Victorian Government could adopt in order to resolve this potential gap. These are outlined in the table below, along with potential considerations.

Table 4.2 – Potential Victorian government policy responses to close gaps

Policy Option	Consideration
Option 1: Expand the eligibility criteria for the CSO insurance program to allow NGOs in these categories to access cover	<ul style="list-style-type: none"> Expanding eligibility criteria would require an amendment to Section 25A of the Victorian Managed Insurance Authority Act. The CSO insurance program provides public liability and professional indemnity insurance to eligible organisations and is a much broader coverage than PSA. Expanding eligibility criteria would necessitate providing this broad coverage to these NGOs, beyond just PSA cover. This may have implications for other NGOs not providing OOHHC and youth homelessness services.
Option 2: Provide a PSA indemnity to NGOs ineligible for CSO program	<ul style="list-style-type: none"> This option provides a more bespoke long-term solution for specific impacted NGOs in relation to PSA cover. The indemnity arrangement for impacted NGOs could be established consistent with the national principles recommended in this report. There would be no change in cover for other NGOs eligible for the CSO insurance program. While the CSO insurance program is in many respects more generous than the PSA indemnity and insurance solution recommended in this report, an indemnity arrangement for ineligible NGOs would limit liability exposures for the Victorian Government relative to Option 1.

Additional data was requested from the Victorian Government in relation to NGOs currently ineligible for the CSO insurance program, in order to better understand the extent of the potential ‘gap’ in coverage, however this data has not been provided in time for this report. We suggest that the Victorian Government further investigate potential policy responses and progress to a solution.

4.5 Basis of cover

4.5.1 General discussion

The design of government insurance or indemnity schemes needs to consider the PSA claims risks that NGOs are exposed to, including contemporary and potentially historical risk. Options include the provision of cover on either a claims occurrence or claims-made basis:

- Claims occurrence cover:** a claims occurrence arrangement provides cover for incidents that occur within the specific time period of the policy or deed, irrespective of when the claim is reported. These arrangements provide indefinite cover for incidents occurring over the specified time period, even after the policy or deed ceases. Claims occurrence cover does not cover incidents that occurred prior to the commencement of the arrangement.
- Claims-made cover:** a claims-made arrangement provides cover for incidents that are reported within the specific time period of the policy or deed. This means that if the arrangement ceases, there no longer remains any cover for future claims, even if the incident occurred when the policy or deed was active. Claims made cover is often offered with a retroactive date, and only provides cover for incidents occurring after this date.

The following table highlights the advantages and disadvantages of each in the context of the PSA NGO insurance problem.

Table 4.3 – Basis of cover – advantages and disadvantages

Cover	Advantages	Disadvantages
Claims occurrence cover	<ul style="list-style-type: none"> ◦ Claims occurrence cover provides the greatest certainty for NGOs that any incident occurring over the relevant period will be covered. ◦ Claims occurrence cover may provide the most complete cover for NGOs and minimises the likelihood of essential service withdrawal or disruption due to questions of inadequate cover. ◦ Provision of claims occurrence cover may better facilitate commercial insurer market re-entry at some point in future if this becomes feasible (i.e. it would enable insurers to offer ‘clean’ claims-made cover, which is claims-made cover with no retro). 	<ul style="list-style-type: none"> ◦ Due to typical PSA reporting delays, the cost of providing claims occurrence cover cannot be known with any certainty for many years (i.e. until all claims are reported and resolved). ◦ Even if an NGO ceases to provide services, the responsible state or territory government remains responsible for any claims arising for the period of prior service. ◦ This type of cover is in most cases more comprehensive than that currently available in commercial insurance markets (in the limited circumstances where PSA cover is still available).
Claims-made cover (with limited retro)	<ul style="list-style-type: none"> ◦ This cover is consistent with (most) recent commercial insurance arrangements for PSA cover³. ◦ As claims covered are limited to those reported in the time period of the arrangement, the cost of providing this cover will be known much sooner. 	<ul style="list-style-type: none"> ◦ Claims-made cover provides no guarantee of cover if an NGO ceases to be a service provider. ◦ This risk may not be acceptable to some NGO boards, noting the long-term nature of PSA risk. The exception to this would be if there is a guarantee of run-off claims made cover available to exiting providers. However, under such an arrangement, this cover effectively becomes the same as claims occurrence cover.

Noting the advantages and disadvantages of the two options, on balance we consider that claims occurrence cover may provide superior outcomes in terms of minimising disruption to the provision of essential services to children and young people. This claims occurrence cover would need to be supplemented with limited retroactive claims-made cover for NGOs with uninsured risk exposures relating to service periods prior to the commencement of the insurance or indemnity scheme.

4.5.2 Stakeholder feedback

Stakeholders generally agree that claims occurrence cover is the most appropriate form of PSA cover and provides the greatest certainty for NGO providers of OOHC and youth homelessness services.

Stakeholders have expressed a range of conflicting views regarding whether additional retroactive claims-made cover should be provided to some or all NGOs with historical uninsured risk. These views are summarised in the table below.

³ We are aware of at least one insurer offering contemporary claims occurrence cover, though this cover is only available to a restricted number of institutions.

Table 4.4 – Stakeholder feedback: Retroactive claims-made cover

Stakeholder group	Feedback
Non-Government Advisory Group	<ul style="list-style-type: none"> ◦ The NGAG has advised a view that additional retroactive claims-made cover should be granted to all providers irrespective of whether or not they had previously held or unsuccessfully attempted to obtain cover from commercial markets. ◦ This view is based on a ‘no-gap’ approach and suggests that allowing gaps in cover will present an unacceptable level of risk to affected providers
Majority of states and territories	<ul style="list-style-type: none"> ◦ The majority of state and territory government representatives have indicated an ‘in principle’ support of the provision of limited additional retroactive claims-made cover on a case-by-case basis for NGOs who had previously held claims-made cover and this cover has ceased or where reasonable endeavours had been undertaken in prior periods to obtain commercial cover. There was also general agreement that there should be a maximum period of retroactive cover and that jurisdictional differences in service provision and claims profiles may necessitate that each state and territory determine the appropriate maximum period. ◦ Notwithstanding this support, most states and territories indicated the importance of understanding the potential costs associated with the provision of limited retroactive cover, before making a decision. ◦ The rationale for not providing retroactive cover to all NGOs is that NGOs who by choice did not obtain PSA cover implies a decision that this risk was within the financial capacity of the organisation. If commercial insurers had not withdrawn from the market, this gap in cover would still exist and the scope of our work and recommendations relates to the impact of the withdrawal of commercial insurance for PSA. ◦ Conversely, it has been highlighted that some jurisdictions have not historically required NGOs to specifically hold PSA cover and as such, some NGOs were not aware that they were not covered for PSA risk under historical insurance arrangements (PSA coverage is sometimes offered as an optional extension to an insurance policy). It is arguable that these NGOs did not make an informed decision.
Minority of states and territories	<ul style="list-style-type: none"> ◦ One jurisdiction has indicated that it does not support the provision of any form of retroactive cover to NGOs.

4.5.3 Recommendation

Recommendation 4 – Basis of Cover

Rec 4.1: Insurance or indemnity should be provided for PSA risks on an annually renewable basis with claims occurrence cover.

Rec 4.2: In addition, limited claims made-retroactive cover should be offered to some NGOs (to provide cover for 'tail' risks). At a minimum, cover should be provided under the following circumstances:

- Where an NGO has previously held claims-made cover for PSA risks and this cover has ceased.
- Where an NGO can demonstrate that it has, in prior periods, made reasonable endeavours to obtain commercial insurance, but has been unable to. This includes periods where an NGO has accessed cover via a short-term indemnity provided by government.

Rec 4.3: This limited claims-made retroactive cover should be offered for as far back as an NGO can demonstrate reasonable endeavours to obtain insurance or has held continuous claims made cover, up to a maximum number of years. The maximum number of years should be determined by each state and territory government with reference to the historical circumstances and arrangements of service provision within each jurisdiction (noting that these circumstances and arrangements vary).

Rec 4.4: Based on consideration of the individual circumstances of each jurisdiction, and whether there may be a significant risk of service withdrawal, each jurisdiction should determine whether limited claims made retroactive cover should be extended to other NGOs with inadequate insurance cover for historical PSA risk.

It is possible that under the recommended arrangements, some NGOs may retain exposure to uninsured PSA risks relating to prior service delivery (for example where an NGO did not purchase insurance in previous years and retroactive cover is not extended under Rec 4.4). As is currently the case, NGOs and government agencies responsible for funding or contracting services may need to form a view in relation to these risks and respond to emerging circumstances accordingly on a case-by-case basis.

4.6 Scope of cover

4.6.1 General discussion

There are a number of additional details of coverage that will need to be agreed and included in the insurance or indemnity wording to provide clarity to NGOs regarding who and what is covered under the arrangements. We include a number of recommendations in this section based on our consultations with various stakeholders and our understanding of the relevant insurance issues.

4.6.2 Stakeholder feedback

One area where stakeholders have requested additional clarity is with regards to whether the indemnity or insurance arrangements should provide cover for applications under the National Redress Scheme for people who have experienced institutional child sexual abuse (the National Redress Scheme). It is important to first note that the National Redress Scheme is only accessible to people who experienced child sexual abuse before 1 July 2018 and are aged over 18 or will turn 18 before 30 June 2028. Where an insurance or indemnity cover is offered to NGOs on an occurrence basis (as per Rec 4.1), redress applications would therefore not be covered (as they relate to periods prior to the occurrence cover). Where a state or territory also offers limited claims made retroactive cover (as per Rec 4.2), and this cover extends to periods prior to 1 July 2018, there is a question as to whether this cover should extend to payments under the National Redress Scheme. We note the following relevant considerations:

- The proposed insurance or indemnity arrangements are intended to provide a long-term solution to the challenge of commercial insurance withdrawal of PSA coverage. We note that the typical contract wordings of commercial insurance arrangements cover PSA claims under common law, but generally do not provide coverage for redress payments. Therefore, the withdrawal of commercial insurance for abuse has not had an impact on most NGOs financial exposure to National Redress Scheme costs.
- Notwithstanding the above point, we understand that there are some exceptions to this whereby an insurer may determine to cover some payments under the National Redress Scheme. We understand, however, these determinations have been on a case by case basis, dependent on the interpretation of relevant contract wordings and/or at the discretion of insurers.
- We understand that some states and territories either contractually require or strongly encourage contracted or funded NGOs to participate in the National Redress Scheme.
- The average payments under the National Redress Scheme are, on average, less than the amounts that are typically awarded under common law⁴. We would expect many NGOs would be able to directly fund National Redress Scheme costs. However, it is possible that some NGOs may experience financial hardship due to the uninsured cost of funding payments under the National Redress Scheme. It is possible that this hardship could, in some cases, lead to a decision by an NGO to withdraw services.
- Of the short-term indemnity schemes already established, the only scheme that provides claims made cover for incidents occurring prior to 1 July 2018 is the NSW scheme. We understand that this scheme provides cover for redress payments.

⁴ The maximum redress monetary payment under the National Redress Scheme is \$150,000.

4.6.3 Recommendation

Recommendation 5 – Scope of cover

Rec 5.1: The definition of ‘physical and sexual abuse’ should be clearly defined in writing and consistent at a national level.

Rec 5.2: The definition of ‘insured’ should include the organisation, its staff, directors, officers and volunteers (including foster and kinship carers).

Rec 5.3: Where an NGO subcontracts services to third parties, those third parties should not be indemnified for PSA claims, unless the subcontractor has arranged for insurance or indemnity directly with the relevant state or territory government. The NGO is responsible for ensuring that any contractors have adequate coverage.

Rec 5.4: The insurance or indemnity should cover all PSA incidents where a child or young person is under the care of the NGO, including if a child or young person is placed in another jurisdiction and/or if the incident occurred in another jurisdiction. For NGOs operating across multiple jurisdictions, separate indemnities or insurance cover will be required for services provided in each jurisdiction.

Rec 5.5: Any and all exclusions should be specified in writing in the deed or indemnity.

Rec 5.6: Where a state or territory provides limited claims-made retroactive cover with a retroactive date earlier than 1 July 2018, this cover should not extend to payments made under the National Redress Scheme, unless the state or territory determines that such an exclusion would lead to an unacceptable risk of service withdrawal for impacted NGOs.

4.7 Limits of cover

4.7.1 General discussion

The limits of cover should consider the likely distribution of future settlement amounts for PSA claims. The limits of cover must also balance the competing requirements of:

- Government: to limit potential financial liability; and
- NGOs: to provide adequate cover for any foreseeable PSA claims risk, including large claims.

It is important to recognise that while any insurance or indemnity scheme should be regularly reviewed (see section 5.4), it may not be preferable to revise indemnity or insurance limits frequently. As such a level of ‘future-proofing’ of any recommended limits may be considered appropriate.

There has been a substantial uplift in the quantum of civil awards received by survivors of abuse following the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). Claims data collected as part of this engagement indicates an average cost of claims in the vicinity of \$300,000 per claim in recent years, which is materially higher than average settlements observed prior to the Royal Commission (in the vicinity of \$100,000 per claim⁵). Monitoring of court judgments illustrate PSA awards of up to \$5.3m⁶. It is

⁵ National Redress Scheme Participant and Cost Estimates July 2015 (Appendix D – Claims Project Additional Information), Pearson, Portelli

⁶ ZAB v ZWM [2021] TASSC 64

important to note that recent increases have occurred in the context of a rapidly changing legislative environment. It is unclear if or for how long average awards will increase at such a rapid rate.

Another important consideration is our understanding that in the vast majority of PSA claims in the OOHC sector, claims costs are typically shared between multiple parties (typically between an NGO and the relevant government agency funding or contracting the related services). As such, the recommended limit need only cover the NGO's share of costs. We note that the cost sharing arrangements between NGOs and government agencies are less clear in the youth homelessness sector.

In determining a recommended limit of cover, we have considered the limits historically offered by commercial insurers. These have varied substantially, typically in the range of \$1m to \$5m, though sometimes as high as \$10m or \$20m. An important consideration, however, is that these commercial market benchmarks are only directly comparable to the recommendation in this report where they apply to claims occurrence cover. While there may be some evidence that delays from incident to report for PSA claims are reducing following the Royal Commission, average delays are still typically in the range of 10 to 20 years, though can be much longer in some circumstances. As such, any limit of cover for claims occurrence cover should consider the potential future increases in settlement amounts between the time of providing cover and the likely period of settlement of any future claims.

By way of illustrative example, we might make the following assumptions:

- A current 'landmark' award for PSA claims might be in the vicinity of \$5.0m.
- In the context of OOHC, a NGO's share of this amount can vary widely, however for this illustration the share might be 50% of this amount (\$2.5m)
- Any claims occurring over the next 12 months may take many years to be reported and ultimately settled. We can reasonably expect that future settlement amounts will be greater than recent amounts, after allowing for a level of claims inflation. If we assume a long-term inflation assumption of 5.5% p.a. (3.5% p.a. benchmark inflation in awards plus 2.0% p.a. superimposed inflation) this might imply that a landmark claim may cost an NGO around \$5.6m in 15 years' time.

While there is significant uncertainty in these estimates, they provide a helpful starting point for consideration. Some other important considerations include:

- Adopting a higher limit of liability may, in some cases, encourage claiming behaviours that target awards at this upper limit
- While average delays from incident to report may be in the range of 10 to 20 years, in some cases these delays may be much longer. There may also be significant delays between claim notification to settlement. These delays may erode the 'real' value of liability limits, after allowing for inflation
- One approach to mitigate this risk of liability limit erosion is to allow for an indexation clause. Such a clause would increase the likelihood that liability limits are adequate for any significantly delayed claims, though this increases the complexity of cover.

4.7.2 Stakeholder feedback

In our Phase 2 preliminary progress report, our initial recommendation was a limit of liability (inclusive of legal defence costs) of \$3m per claim and \$6m in the aggregate, with the limit of cover to be indexed annually from the date of policy inception to the date of claim settlement. Stakeholder feedback regarding the limit of cover has been mixed. We have summarised the feedback as follows:

- Some jurisdictions have indicated support of a limit of \$3m per claim

- Some jurisdictions have expressed concern if landmark awards in future exceed recent estimates (after allowing for indexation), a breach of this limit could create risk for the NGO sector. It was also noted that a higher limit would not be expected to materially impact financial risk for state and territory governments as virtually all (if not all) claims would be expected to be below these limits.
- One jurisdiction has highlighted potential complexities associated with annual indexation and has suggested that indexation on a less frequent basis would be more appropriate.
- The NGAG has advised a view that provision of any limit of cover, other than a figure of about \$20m (unindexed), would provide an unacceptable degree of risk to the sector.

4.7.3 Recommendation

Recommendation 6 – Limits of cover

Rec 6.1: The contract or deed should provide a limit of liability (inclusive of legal defence costs) of \$10m per policy year per PSA claim and \$10m in the aggregate.

Rec 6.2: Limits of cover should be indexed annually from the year of occurrence to the year of settlement, based on published wage inflation indices.

Rec 6.3: The limit of cover should be reviewed by states and territories every 3 to 5 years.

We make the following comments regarding Recommendation 6:

- The limits outlined in Rec 6.1 provide greater certainty for the NGO sector. A limit of \$10m per claim would be broadly equivalent to a limit of around \$20m per claim without indexation⁷
- The recommended limit is at the higher end of limits that we understand most NGOs have been able to obtain from commercial markets in recent years. We are aware that some NGOs have been able to access limits up to \$20m (without indexation), though lower limits (typically in the range of \$1m to \$5m) have been common.
- While a higher limit of liability may, in some cases, encourage claiming behaviours that target awards at this upper limit, it is unlikely for a higher limit to have a material impact on the total cost of claims for state and territory governments.
- We have maintained a recommendation (Rec 6.2) that the limit of cover for a given policy year should be indexed annually, noting that reference to published indices in the insurance or indemnity wording reduces ambiguity for NGOs and complexity for government agencies. The indexation of limits need only be considered when a claim is settled in excess of the base limits. A separate recommendation (Rec 6.3) has been made regarding a review of the base limits of \$10m per claim and \$10m in the aggregate to ensure that these remain fit for purpose over time.

4.8 Deductibles

4.8.1 General discussion

Consultation conducted during Phase 1 of our engagement highlighted a broad consensus that it is important for any insurance or indemnity arrangement to incentivise good risk management processes. This co-commitment might necessitate NGOs contributing towards the cost of any PSA claims. We recognise that there is a wide diversity of NGOs which operate in the OOHHC and youth homelessness sectors, ranging from large

⁷ Assuming inflation of 5.5% p.a. for 15 years

national organisations to small organisations with limited financial means. Any recommendation with respect to deductibles should take this diversity into account. We note that the pricing structure (discussed in Section 4.10) should reflect the level of deductible imposed.

In recommending the level of deductibles imposed on providers we have considered the deductibles offered by commercial insurers for PSA claims which ranges from \$0 (albeit, rare) up to \$500,000 per claim.

4.8.2 Stakeholder feedback

In our preliminary progress report, we suggested a minimum deductible of \$10,000 per claim should be required for small NGOs with annual revenue (from all sources) of less than \$10m and a deductible of \$50,000 for all other NGOs. We also recommended that these deductibles be indexed annually.

We summarise below the feedback received from various stakeholders:

- Most jurisdictions are generally supportive of a minimum deductible of \$10,000, though some noted the importance of any deductible being reasonably affordable for very small NGOs, including those operating in remote locations
- Some jurisdictions highlighted the importance of setting deductibles based on an NGOs capacity to pay (i.e. that NGOs with strong balance sheets should bear a higher deductible). We note that NGOs with a higher deductible would reasonably expect to pay a lower premium or fee for cover
- The NGAG has expressed concern that a minimum deductible of \$10,000 would result in an unacceptable burden on many providers. The NGAG has also indicated a view that requiring higher deductibles for some NGOs would be unfair. The NGAG has proposed that a single, equal deductible level is the preferred approach for the following reasons:
 - > Due to greater numbers of children in care, large providers will be expected to experience a greater number of claims and therefore will already contribute a higher total deductible amount proportionate to their scale
 - > The purpose of a deductible is to incentivise less claims being made for smaller amounts, whilst also informing the calculation of the premium (i.e. the higher the deductible, the lower the premium)
 - > The NGAG does not expect the deductible level to have any impact on the way that NGOs manage PSA risk.
- Some jurisdictions have highlighted that the indexation of deductibles would create unnecessary complexity.

4.8.3 Recommendation

Recommendation 7 – Deductibles

Rec 7.1: NGOs should be required to contribute a deductible for each and every claim.

Rec 7.2: The deductible amount should be \$10,000 per claim for organisations with annual turnover less than \$20m per annum (from all revenue sources⁸) and \$50,000 per claim for all other organisations.

Rec 7.3: NGOs that can demonstrate financial hardship or incapacity to contribute the deductibles required under Rec 7.2 should be able to apply for a reduced deductible. Any such reductions should be considered and assessed by states and territories on a case by case basis.

Rec 7.4: For simplicity, deductibles should be unindexed, but be reviewed by states and territories every 3 to 5 years.

We make the following comments regarding Recommendation 7:

- We have continued to recommend a minimum deductible of \$10,000, noting that we expect this level to be affordable for most NGOs and that we understand deductibles below this level have historically been uncommon in the commercial insurance market.
- We have, however, recognised feedback that a deductible at this level may pose financial challenges for NGOs of limited scale and financial means. Accordingly, we have included Rec 7.3 whereby impacted NGOs in specific circumstances may be able to negotiate a lower deductible with states and territories on a case by case basis.
- We have continued to recommend a higher deductible level for larger NGOs for the following reasons:
 - > Where an NGO can reasonably afford to contribute a higher deductible, this reduces the cost of the scheme for governments and in turn the fee or premium that NGOs would be required to pay.
 - > At the recommended turnover threshold of \$20m, an NGO would be expected to contribute the first \$50,000 of any claim which represents around 0.25% of annual revenue.
 - > In the context of PSA insurance, the purpose of a deductible is not simply to disincentivise smaller claims being made (in fact we would suggest that all incidents should be reported, irrespective of size – see Rec 3.4). The primary purposes of a deductible are to share the cost of claims with NGOs (where it is reasonable to do so) and to minimise moral hazard (i.e. to align the financial interests of the ‘insurer’ and the ‘insured’).
- We have omitted the recommendation to index deductibles for simplicity of administration.

4.9 Funding

4.9.1 General discussion

An important design consideration is the extent to which the insurance or indemnity schemes are funded by premiums or fees charged to participating NGOs. Funding options include:

⁸ ‘All revenue sources’ refers to all revenue earned by the provider, including government funding for services covered by the indemnity or insurance arrangement as well as government funding for other services or revenue generated by other means.

- Full funding: Premiums or fees are charged to NGOs commensurate with the cost of providing PSA cover. That is, aggregate premiums or fees collected are intended to be sufficient to cover the cost of claims as they arise, as well as any costs associated with the management of claims and administration of the insurance or indemnity schemes⁹
- Partial funding: A level of premiums or fees are charged to NGOs, however the full cost of providing the insurance or indemnity arrangement is subsidised by the state or territory governments from other revenue sources
- No funding: Government does not charge a premium or fee to participating NGOs. Funding for PSA claims and other costs must come from other government revenue sources.

The table below highlights some of the advantages and disadvantages of the various funding options.

Table 4.5 – Funding arrangements – advantages and disadvantages

Funding	Advantages	Disadvantages
Full or partial funding	<ul style="list-style-type: none"> ◦ Similar to the discussion above regarding deductibles, stakeholder engagement has indicated that most stakeholders reasonably expect participating NGOs to share in the costs associated with PSA cover. ◦ While state and territory governments providing insurance or indemnity will bear the risk of costs being higher than anticipated, targeting full or partial funding reduces the net cost to government and reduces the need to rely on other government revenue sources. ◦ A requirement for NGOs to pay an amount increases transparency for NGOs in relation to the cost of PSA risk, ensures that the appropriate ‘paperwork’ is completed and data is collected and can also incentivise better governance and discipline from NGO boards. 	<ul style="list-style-type: none"> ◦ Commercial insurers have generally assessed that PSA risk is uninsurable and that insurance premiums are unlikely to be affordable to NGOs. As such, it may be challenging for government agencies to target full funding, without requiring unaffordable premiums or fees. ◦ Even if government targets full funding, there are significant challenges and uncertainties with estimating the cost of PSA cover and it may take many years before full costs are known with relative certainty. As such, this may result in either over-funding or partial funding of costs.
No funding	<ul style="list-style-type: none"> ◦ The costs associated with insurance cover are typically already built into NGO funding arrangements. Given this funding comes from government, there is an argument that providing funding for cover and then requesting payment for the same may create a ‘circular’ funding arrangement which creates unnecessary complexity. 	<ul style="list-style-type: none"> ◦ A premium or fee provides an important risk signal to NGOs. Of all options, the provision of free cover may afford the least incentivisation for risk management. ◦ If cover is provided free of charge, this may further reduce the likelihood of any long-term commercial insurer market re-entry.

On balance we consider that there should be a level of contribution of NGOs to the cost of providing PSA cover.

⁹ ‘Full funding’ means that annual premiums or fees charged would cover the estimated increase in government liabilities (i.e. the cost of claims in the year plus expenses incurred in administering the scheme). With respect to retroactive coverage, ‘full funding’ means that premiums or fees would cover the expected claims arising from this coverage.

4.9.2 Stakeholder feedback

There is general agreement from stakeholders that a level of contribution from NGOs ensures that there is an appropriate price signal, while recognising that ultimately the cost will be borne by government via NGO funding arrangements.

4.9.3 Recommendation

Recommendation 8 – Funding

Rec 8.1: Participating NGOs should be required to pay an insurance premium or indemnity fee in respect of access to the PSA cover. Victoria is an exception to this recommendation given that the Victorian CSO insurance program provides public liability and professional indemnity insurance to eligible CSOs, including PSA cover, free of charge. Charging for cover is therefore a wider decision for the Victorian government beyond the PSA issue.

Rec 8.2: Subject to affordability constraints government agencies should target full funding, with total amounts charged to NGOs targeted at levels broadly aligned to the expected annual cost of providing cover to NGOs, including the cost of claims as well as other costs of providing cover including administrative, legal and other costs. Where affordability constraints limit the ability of government to target full funding, government agencies should accept partial funding. Open and ongoing dialogue will be required between state and territory governments and NGOs to identify affordability constraints relating to premiums or fees.

Rec 8.3: Pricing and funding should be reviewed on a regular basis.

4.10 Pricing structure

4.10.1 General discussion

Where a premium or fee is to be charged to participating NGOs (referred to hereafter as premium for brevity), consideration will need to be given as to how these amounts are determined. Consistent with insurance principles, in the first instance the relevant government agency will need to determine the total premium pool required each year to cover the expected cost of future claims across all NGOs expected to participate in the scheme, as well as any other costs associated with the scheme including administration, claims handling, legal and other costs. This total premium pool should then be allocated to individual NGOs based on an assessment of risk and level of potential exposure. This allocation might be expressed as a relative rate per unit of exposure for each type of risk. If this allocation implies an unaffordable level of premium for some or all NGOs, it may be necessary to either alter the allocation or reduce the total premium pool (with government subsidising the short-fall with funds from other revenue sources).

Key considerations for assessment of an appropriate pricing structure include:

- Risk category: Differential premium rates may be appropriate for different types of risks covered. For example, the PSA risks associated with foster care placements may differ from residential care placements. Any price differentiation needs to consider the additional complexity associated with quantifying relative levels of risk by category and whether these can be accurately assessed
- Exposure metric: The level of premium charged should be commensurate with the scale of risk undertaken. Possible exposure metrics could be the volume of government funding received or the number of children placed or under the care of the NGO. The number of children placed or under the care of the NGO may be the more risk sensitive metric, however the volume of government funding may be simpler to measure consistently across NGOs

- Deductible level: The level of premium charged should be commensurate with the expected cost of claims, net of any deductibles. A higher deductible should imply a lower rate of premium and vice versa.

4.10.2 Stakeholder feedback

Stakeholders generally agree that the premium charged to participating NGOs should be commensurate with the level of exposure and risk faced by NGOs. Some jurisdictions expressed concern that it will be challenging to determine appropriate premiums where there is limited data available.

4.10.3 Recommendation

Recommendation 9 – Pricing structure

Rec 9.1: The insurance premium or indemnity fee charged to NGOs should be proportionate to the volume of outsourced services and associated risks.

Rec 9.2: The rate charged should be expressed as a percentage of government funding received by the NGO for the provision of OOHC or youth homelessness services. This rate should vary by the type of services provided. The number of categories of services provided, and associated rates charged should be determined by each respective state or territory government, recognising that service delivery models, and NGO risk profiles vary significantly by jurisdiction. Where reasonable, fewer numbers of risk categories is preferable to greater numbers. The total amounts to be charged across all insured or indemnified NGOs should be commensurate with the principles defined in Rec 8.2.

Rec 9.3: Each state and territory should be responsible for the determination of rates. Rates should be determined with actuarial input and reviewed regularly (every three to four years). Data collection and sharing between jurisdictions may assist with this process (see Recommendation 11)

4.11 Interaction with current schemes

4.11.1 General discussion

A number of jurisdictions have established short term indemnity arrangements while a long-term solution is being developed. The implementation plan timeframes proposed in this report (see section 5.2) indicate that there may still be some time (up to a year or longer) before the long-term solution is in place across all jurisdictions. Accordingly, it is likely that these short-term indemnity arrangements will need to continue until such time as the long-term indemnity or insurance arrangements are in place.

4.11.2 Stakeholder feedback

Stakeholders generally agree that short-term indemnity arrangements will need to continue until a long-term solution is implemented, though some highlighted that the ultimate decision to establish or extend short-term indemnity schemes rests with each respective state and territory government. Once the parameters for the long-term insurance or indemnity arrangements are agreed, one jurisdiction suggested that it may be appropriate for the short-term indemnity arrangements to be aligned to the long term parameters, in order to enable a smoother transition.

4.11.3 Recommendation

Recommendation 10 – Short term schemes

Rec 10.1: State and territory governments with established short-term indemnity schemes should continue to extend the applicable dates of these schemes until the long-term government-led indemnity or insurance arrangements are in place (subject to government review and approval processes).

Rec 10.2: State and territory governments that do not have short-term indemnity schemes in place should continue to closely monitor the environment to determine if an intermediate solution is required for potentially impacted NGOs until the long-term government-led indemnity or insurance arrangements are in place.

4.12 Data collection, sharing and review

4.12.1 General discussion

A key challenge associated with insurance or indemnity arrangements for PSA risk is a lack of consistent, reliable claims and other information to support assessment of potential liabilities, risk management and pricing. A co-ordinated national approach to data collection and potential sharing of information between jurisdictions (subject to privacy law requirements) may afford a range of benefits to government agencies. These benefits may support identification of risk management impacts for PSA claims, improved management of the insurance or indemnity schemes (including financial and pricing assessments), as well as providing opportunities to demonstrate to the commercial insurance market any impacts of changes in risk management practices leading to reduced claims costs and the potential future insurability of PSA risks.

4.12.2 Stakeholder feedback

There is general agreement from stakeholders that the sharing of data between states and territories will enable a range of benefits.

4.12.3 Recommendation

Recommendation 11 – Data collection, sharing and review

Rec 11.1 State and territory governments should collect and retain detailed risk exposure and claims information for NGOs covered by insurance or indemnity schemes. Where permitted by privacy law, state and territory governments should consider data sharing arrangements between jurisdictions to support best practice risk management at a national level and support pricing reviews, among other areas.

Rec 11.2 Collection and sharing of data and other scheme information should support regular, co-ordinated and independent reviews of state and territory schemes, conducted nationally every three to five years. These reviews should consider scheme elements including policy and indemnity wordings, limits and deductibles, affordability of pricing, and other scheme design elements, with suggestions and/or recommendations to be provided for the consideration of states and territories.

5 Implementation plan

5.1 Project objectives

5.1.1 National implementation co-ordination - objectives

As noted above, a nationally consistent approach to the delivery of insurance or indemnity cover by state and territory governments is broadly supported by stakeholders. A key part of this is the co-ordination between jurisdictions on the implementation of their respective arrangements, while acknowledging that some flexibility between jurisdictions will be necessary.

Key objectives of national implementation co-ordination include:

- Supporting stability and certainty for all NGOs currently contracted or funded to provide OOHC and youth homelessness services.
- Ensuring continuity of essential service provision across Australia for all children and young people living in alternative care arrangements or supported accommodation.
- Developing a long-term solution design that appropriately balances the needs of NGOs as well as the financial and risk implications for government.
- Consistently identifying and incentivising national best practice risk management for NGOs.
- Providing consistent arrangements (where reasonable and achievable) for NGOs operating across jurisdictions, while also giving due recognition to the various differences in service delivery models and risks for each state and territory.
- Supporting an environment for the potential re-entry of national and international insurers into the market (in the long-term) for PSA risks covered by the jurisdictions' insurance or indemnity schemes.
- Consistent data collection (noting privacy law requirements) to enable periodical reviews by individual jurisdictions (and potentially nationally co-ordinated reviews) of the suitability and sustainability of the jurisdictions' schemes.

5.1.2 Timing for delivery – 1 January 2024

Finity has specifically asked jurisdictions to provide information on the nature and timing of delivery of insurance or indemnity arrangements. During the course of consultations, jurisdictions have provided information about current insurance and indemnity arrangements already in place.

The following positions have been broadly consistent across jurisdictions:

- Current arrangements for short-term indemnities can be extended for a further period by Ministerial approval/directive (legislation is not required).
- The state/territory insurers typically do not cover third party liabilities, and jurisdictions may not wish to provide PSA cover to NGOs via state/territory insurance arrangements.
- The preference is for the government agency funding or contracting services to provide indemnities to NGOs for PSA risks via a deed of indemnity.
- A long-term indemnity/insurance scheme in each jurisdiction should be able to be established within 12 months of the IJWG's response to the recommendations in this report.

We note the following state-specific considerations:

- While not representing a firm policy position, NSW Government representatives have advised that if NSW was to establish an insurance based solution to be administered by icare, legislation would be necessary.
- In Victoria, not-for-profit Community Service Organisations (CSOs) are currently covered via an insurance arrangement with the Victorian Managed Insurance Authority (VMIA). An extension of this arrangement to other CSOs currently ineligible for cover (due to for-profit status or not holding a Victorian-based head office), would require a legislative amendment. However, indemnity cover for PSA risks could alternatively be provided to these CSOs via Ministerial action (see section 4.4 for further discussion).

Some jurisdictions are currently not able to confirm a specific timeframe for implementation of their long-term solution. However, taking all of the above into account, as well as an election in NSW in March 2023, Finity proposes that **1 January 2024** is a feasible, common commencement date for the long-term solutions in each jurisdiction, if not established earlier.

Finity recommends that each jurisdiction should make best endeavours to achieve solution delivery by 1 January 2024 to support the key objectives of an expeditious solution and a nationally consistent approach.

5.2 Key milestones and timeframes for solution delivery

This section has been redacted.

5.3 Resources and functions

States and territories have provided some feedback on the following aspects of solution delivery:

- The potential need for budget appropriation for funding
- Expected timing for any legislative amendments required
- Administration of the solution (noting that the solution may in some cases be administered/supported by the jurisdiction's insurer)
- Pricing, underwriting, reserving and oversight of the financial sustainability of the solution
- Risk management and oversight of participating NGOs
- Claims management for cover provided by the solution
- Data collection from participating NGOs
- Periodic reviews of the solution – including ongoing engagement with NGOs.

As noted above in section 5.2, each jurisdiction's relevant department is not currently able to provide firm commitments or details for specific implementation actions and resourcing.

While each state and territory will be responsible for implementation of their respective schemes, it is important to note that there may be some opportunities for efficiency. For example, there may be potential benefit in the preparation of a 'common' insurance or indemnification clause, that captures the key requirements of any agreed national principles. This common clause could then be adapted and/or modified by each jurisdiction to meet specific requirements. Finity recommends that this issue, and other potential efficiencies are placed on the agenda as a specific item for discussion and decision at a meeting of the IJWG.

Consultation with representatives from the NT Government have indicated that there may be appetite for the NT Government to partner with another state or territory to deliver a long-term indemnity solution in the NT. We expect that the principles of this arrangement might include:

- Administrative support provided by the other state or territory. This might include registration and signing up of eligible NGOs and provision of indemnity documentation.
- Claims management services providing on behalf of the NT. The supporting state or territory would need to co-ordinate with the NT communities and treasury departments.
- The NT Government would remain liable for the cost of providing the indemnity, including for the cost of services provided by the supporting state or territory government. Funding arrangements would need to be established in advance between the NT Government and the supporting state or territory.

There are similar outsourcing arrangements in place in other jurisdictions (for example the NSW government provides outsourced administration of the ACT Lifetime Care and Support Scheme).

5.4 Governance and oversight

States and territories should establish their own executive governance and accountability arrangements as well as review mechanisms. The nature of these arrangements will depend on how the longer-term cover is funded and provided. However, specific elements that should be monitored and/or reviewed at a jurisdictional level will include:

- NGO uptake and access to the insurance or indemnity arrangement.
- Administrative efficacy (including registration processes and claims administration).
- Claims experience monitoring (i.e. number and cost of claims over time).
- Claims management.
- Scheme financial performance and sustainability (i.e. comparison of expected ultimate claims costs by policy period relative to premiums or fees collected).
- Risk management assessments (i.e. to identify if there are any learnings from claims experience that highlight potential improvements to risk management standards and requirements for NGOs).

A national review of the long-term solution could be referred to the Community Services Ministers meeting (CSM) as part of the national plan to implement 'Safe & Supported' – *the National Framework for Protection of Australia's Children 2021 – 2031*. A national review mechanism could examine and design arrangements for data-sharing and the establishment of a (de-identified) national claims database which would support:

- The identification of national claims trends
- More informed pricing decisions, noting that the number of claims per annum is expected to be relatively small, particularly for smaller jurisdictions
- Identification of improved risk management practices, and the development of national risk management standards for OOH and youth homelessness services
- The potential for commercial insurers to re-enter the market (for example, if claims data collected indicates that risk management practices and improving claims experience suggest the insurability of PSA risks).

5.5 Risk assessment

There are a number of key risks relating to the implementation of any long-term indemnity or insurance solution. These are outlined below under five broad categories, potential mitigating actions where relevant and a residual risk rating (after allowing for mitigating actions).

Table 5.1 – Risk assessment

Risk area	Mitigating actions	Residual risk rating
Political risk		
Failure to secure Ministerial/Treasury support for solution	Clear and early communication across government of risks/benefits/costs of solution and briefings on the background and purpose of the solution.	Low
Amending legislation (if required) not passed in time for planned commencement date	If relevant and required, approvals sought in NSW before commencement of caretaker period in February 2023	Low
Stakeholder risk		
Administrative burden for NGOs	Early and clear communication strategy with NGO community (including NGO boards) and stakeholders.	Low
Demand from other providers of social support services to be covered by long term solution	Clear, well-defined eligibility criteria for participation in long-term schemes. Clear guidelines for NGOs for engagement with relevant agency in jurisdiction – covering administration of cover and claims management.	Low
Scheme establishment could lead to an environment where compliance and risk management is not prioritised (i.e. moral hazard)	In accordance with national framework for supporting children and young people, and child safe standards, support NGOs with clear standards, guidelines and minimum requirements for cover eligibility to reduce PSA risk.	Moderate
VOOHC services for disability sector may be withdrawn if cover does not extend to those services	Some jurisdictions are open to discussion with the Commonwealth regarding the extension of cover to VOOHC services in the disability sector, though funding arrangements would need to be agreed.	Moderate

Financial risk		
Cost of providing cover for government may be too high and/or too uncertain	<p>Close engagement with central agencies (Treasury and departments of the Premier/Chief Minister & Cabinet) – with advice and support from a jurisdiction’s insurance adviser(s).</p> <p>Given state and territory governments fund NGOs for the provision of OOHC and youth homelessness, it is arguable that they are already funding this cost. While PSA risks may be concentrated and potentially volatile, these risks are arguably small relative to the financial volatility that governments are already exposed to with respect to PSA for OOHC. The cost of providing cover is also expected to be small relative to the overall cost of service provision.</p>	Low
Inadequate pricing for cover provided, increasing financial risk for government. It may take many years to before the cost of claims is known.	Regular reviews should be conducted to adjust pricing as required.	High
Certain funding may require specific budget appropriation		Low
Cover design risk		
If coverage (i.e. limits, deductibles) do not meet the requirements of NGOs, some may withdraw services	Early stakeholder consultation on design of cover to ensure it meets the core objective of retaining NGO OOHC and youth homelessness services in the specific jurisdiction. Early consultation with the sector will also help to identify the extent of potential gaps in cover.	Low
If cover design results in significant gaps and uninsured risk exposures (i.e. for historical periods) this could lead to some NGOs withdrawing services	Tiered deductible scale and case by case assessment can support smaller NGOs.	Low
Scope creep risk (i.e. cover provided to NGOs and services which are not intended to be covered).	Scope of cover should be clearly drafted in indemnity letters or in schedule to NGO service contracts.	Low
Market risk		
State and territory solutions may influence/hasten market exit by insurers currently offering some capacity, or deter insurers from considering participating in the future.	Solutions should seek to avoid providing cover that is more generous than reasonable commercial insurance for PSA risk. Pricing should, as far as is possible, reflect the cost of providing cover.	Moderate

6 Scheme costing

This section has been redacted.

7 Reliances and limitations

7.1 Key uncertainties and reliances

It is not possible to estimate with certainty the cost of providing insurance or indemnity for PSA claims to NGO providers of OOHC and youth homelessness services. Actual outcomes are heavily dependent on a broad range of largely unknown factors including the number of physical and sexual abuse victims, the number that will pursue civil litigation against an NGO and the ultimate cost of settling these claims. The cost outcomes for an individual jurisdiction will also be impacted by the model of service delivery in each jurisdiction as well as the design of the insurance or indemnity solution including the nature of coverage, eligibility criteria, deductibles and limits and administrative processes adopted. There is limited information on which to develop assumptions and significant extrapolation from known statistics using judgement has been required.

Deviations from our estimates, which are likely to be material, are normal and are to be expected. These uncertainties are heightened due to the very long-term nature of PSA claims.

In many respects, our estimates assume a continuation of the environment and behaviours observed in the data and information provided to us, often relying on much smaller samples of observed experience to draw conclusions and estimates for the much larger national environment. It is quite possible and likely that one or more deviations from these observations could produce a financial outcome materially different from our estimates.

We have relied on the accuracy and completeness of information provided to us by the NSW DCJ, the IJWG, the NGAG and the various stakeholders that we have consulted with throughout this engagement. We have not independently verified the information but have reviewed it for general reasonableness. The reader of this report is relying on the various providers of this information and not Finity for the accuracy and reliability of the information provided. If any information is inaccurate or incomplete our advice may need to be revised and the report amended accordingly.

7.2 Distribution and use

This report is being provided for the sole use of the NSW DCJ and the IJWG for the purposes stated in Section 1.

At the request of the NSW DCJ, we have consented to the public release of this report. Third Parties should recognise that the furnishing of this report is not a substitute for their own due diligence and should place no reliance on this report which would result in the creation of any duty or liability by Finity to the Third party.

Finity has performed the work assigned and prepared this report in conformity with its intended utilisation by a person competent in the areas addressed and for the stated purposes only. Judgements about the conclusions drawn in this report should only be made after considering the report in its entirety, as the conclusions reached by a review of a section or sections on an isolated bases may be incorrect.

This report should be considered as a whole. Finity staff are available to answer any queries, and the reader should seek advice before drawing any conclusions on any issue in doubt.

Appendices

A Costing analysis

This section has been redacted.

