ABI CODE OF PRACTICE - RESPONDING TO CIVIL CLAIMS OF CHILD SEXUAL ABUSE

AUGUST 2021

Introduction and summary

This ABI Code of Practice: Responding to Civil Claims of Child Sexual Abuse has been produced with the aim of improving certain aspects of the civil claims process that are within insurers' control for victims and survivors of child sexual abuse. It addresses issues identified by the Independent Inquiry into Child Sexual Abuse in its Accountability and Reparations Investigation Report, including insurers' approaches to limitation (the law requiring that certain civil claims, including child sexual abuse claims, must be brought within three years of the incident or three years from the date the claimant turns the age of 18) and apologies, and also other areas of the civil claims process that may have caused distress for victims and survivors, including the use of confidentiality agreements.

This Code has been developed by a group of insurer representatives with expertise in the handling of child sexual abuse claims. The powerful testimonies of victims and survivors during the public hearings of the Independent Inquiry, including their experiences of the civil claims process, have helped shape it. For some insurers, this document codifies existing good practice which may already form part of their approach to handling child sexual abuse claims.

Broadly, this Code provides that insurers will:

- Recognise that pursuing a civil child sexual abuse claim can be intimidating and distressing for victims and survivors, and handle such claims appropriately and with sensitivity.

- Not seek to defend child sexual abuse claims on the basis of limitation or consent other than in exceptional circumstances.

- Seek to resolve the claim without the need for the claimant to undergo assessments by multiple medical experts.

- Never prevent or discourage their policyholder from apologising to a claimant, and will never require a claimant to agree to confidentiality terms as a condition of settlement of a child sexual abuse claim.

1. Purpose, scope and application

1.1 This ABI Code of Practice: Responding to Civil Claims of Child Sexual Abuse ('the Code') sets out certain steps that ABI members will take when responding to civil claims of child sexual abuse, in order to achieve an empathetic, compassionate and respectful approach, as well as consistency and transparency in claims handling (while recognising the individual circumstances of each claim).

1.2 This Code was published on 17 August 2021 and is effective for new and ongoing child sexual abuse claims from that date. It will be reviewed and, where appropriate, updated periodically and may be withdrawn if the ABI considers it appropriate to do so. A review and changes to the Code may be appropriate as a result of future findings and recommendations of the Independent Inquiry into Child Sexual Abuse, which is due to publish its final report in 2022.

1.3 This Code applies to ABI member firms who provide, or who have previously provided, insurance which covers civil claims for child sexual abuse. A list of ABI members can be found here: https://www.abi.org.uk/about-the-abi/abi-members/

1.4 This Code does not purport in any way to replace the legal or regulatory requirements of insurers, with which firms will and must always comply.

1.5 Some ABI members may have developed their own principles or guidelines for handling child sexual abuse claims which are specific to their own business. This Code is intended to complement, not replace, those.

1.6 Some ABI members may have transferred insurance policies that may cover claims for child sexual abuse to another organisation, or have arrangements in place that means decisions about how child sexual abuse claims are handled rest with another organisation. ABI members will, wherever possible, encourage those organisations to comply with this Code.

1.7 Insurers who instruct third parties to support them in the handling of child sexual abuse claims should seek to ensure that those third parties adhere to this Code.

2. Terminology/definitions

2.1 Throughout this Code the terms 'claimant' and 'claimants' are used to describe victims and survivors who have made a civil claim of child sexual abuse.

2.2 Where this Code refers to 'Insurers' or 'ABI members' it is referring to those firms who are participating in this Code.

3. Background to insurers' involvement in child sexual abuse claims

3.1 Civil child sexual abuse claims may be made against the alleged perpetrator of abuse or they may be made against an organisation who was responsible, either for the claimant or for the conduct of the alleged perpetrator. Those organisations may have bought insurance which covers their liability for at least part of the claim. Others organisations will, at times, not have bought insurance, or they will have insurance but with a large uninsured excess or low limits of cover. For those reasons, insurers have no involvement in many claims for child sexual abuse. In those claims where an insurer is involved, this Code addresses the insurer's role where it is investigating or defending any part of a civil child sexual abuse claim.

3.2 A number of parties, including the insurer, might have a role in investigating or addressing a child sexual abuse claim. While the insurer can only influence their own conduct or that of any third parties who represent them in the circumstances, insurers will seek to set a positive example to others involved and will maintain the standards set out in this Code, even if others involved are falling short.

3.3 The potential involvement of representatives both for the claimant and the insurer can mean that the insurer does not have any direct contact with the claimant. However, the insurer should ensure that any third party it engages to represent it in a child sexual abuse claim, such as its own lawyers, observes the standards set out in this Code and that the same standards are observed whether they are dealing with the claimant direct or through the claimant's representative.

3.4 Claimants making child sexual abuse claims are very often represented by others. Those representatives may be well-versed in the litigation process and child sexual abuse claims in particular. In all cases where a claimant is unrepresented, but even in those cases where they have representation, references to the litigation and pre-litigation processes should seek to use plain and easy-to-understand language.

4. Claims handling principles

4.1 Recognising the sensitive nature of child sexual abuse claims and responding with appropriate empathy and compassion.

Aim: to recognise that pursuing a civil child sexual abuse claim can be intimidating and distressing for claimants, and insurers should handle such claims appropriately and with sensitivity.

While the civil claims process often necessitates the insurer or its representatives making enquiries, seeking evidence and carrying out investigations to validate the claim, the process need not be, and insurers should endeavour to avoid it being, combative.

Insurers recognise that the civil process can be distressing for claimants pursuing a child sexual abuse claim, and will endeavour to carry out any necessary investigations sensitively and by suitably qualified experts.

Insurers' approach to communications with claimants and their representatives should reflect the fact that they are seeking to investigate the circumstances to establish whether that particular insurance policy responds to the claim, and whether a settlement is appropriate.

This overall aim could be achieved by insurers -

4.1.1 Ensuring that individuals handling civil child sexual abuse claims have the appropriate skills, training and capability to treat those claims with empathy and sensitivity.

4.1.2 Seeking, so far as possible, to use neutral language in written communications to claimants and their representatives – even when they disagree with something claimed – recognising that such communications may be read by or to a claimant.

4.1.3 Where a claimant is not legally represented, suggesting that they consider seeking legal representation (this may involve referring them to the Association of Child Abuse Lawyers (ACAL)) from an individual or firm with expertise in representing victims and survivors of child sexual abuse. Where the claimant cannot or chooses not to obtain legal representation, insurers will continue to deal with their claim and will pay particular attention to using easy to understand language in communications.

4.2 Limitation and the use of consent as defences to child sexual abuse claims

Aim: Insurers will not seek to defend child sexual abuse claims on the basis of limitation or consent unless their initial investigations indicate that this is appropriate in the exceptional circumstances of the particular case

The circumstances of child sexual abuse are such that a claimant, for understandable reasons, may not raise allegations about the abuse they suffered for many years after it took place. Any claimant bringing a child sexual abuse claim long after the alleged abuse may be concerned that their claim may fail because of limitation, notwithstanding the courts' power to disapply the

three-year limitation period. While the courts will consider a range of factors to determine whether to disapply limitation, a significant factor is whether in doing so the passage of time means that the defendant's ability to defend the claim has been prejudiced and a fair trial would not be possible. Insurers will also be guided by this approach when considering limitation, which they will only use as a defence to a claim in exceptional circumstances. Limitation will never be used as a tactical defence by insurers.

Insurers consider limitation on a case by case basis and expect that, in the majority of child sexual abuse claims, they will conclude that limitation is not an issue. In order for an insurer to reach this conclusion, they will need to investigate the availability of evidence and witnesses to validate the claimant's allegations. Therefore, the fact the claim has been brought 'out of time' and that limitation may be an issue is often referred to by the insurer in the reply to the claimant's initial letter of claim. However, where it is, insurers will seek to be as clear as possible with the claimant and their representatives about the steps they need to take and the information required to determine whether limitation is an issue. Insurers routinely agree to requests for limitation moratoriums, where they are able to do so, in order to relieve some of the pressure on claimants and their representatives. Insurers will also endeavour to make a swift determination on whether limitation is an issue and if they are satisfied that it is not, they will communicate this explicitly to the claimant or their representative at the earliest opportunity. Where it is an issue, insurers will provide a written explanation to the claimant and their representatives as to why they consider that the claim cannot fairly proceed due to the passage of time.

In addition, implementation of a Pre-Action Protocol, which sets out the steps parties should take before court proceedings are started, specific to abuse claims would achieve early exchange of relevant information and documentation, and go a long way to eradicate at the earliest possible stage any uncertainties about whether there remained any question regarding limitation. A draft Pre-Action Protocol was developed by insurers in 2017 and in 2018 a subcommittee of the Civil Procedure Rule Committee was formed to advance this. It is hoped that this can be progressed, and a Protocol implemented, in the near future to facilitate a more streamlined and less adversarial claims process.

Insurers also recognise that consent is never an appropriate defence to child sexual abuse claims where the victim was under the age of 16 at the time of the abuse. They also recognise that there can be a significant power imbalance between the victim of abuse and the abuser where the claimant was aged 16 or over at the time of the acts in question, and therefore will consider very carefully whether such a defence is appropriate in such claims.

This overall aim could be achieved by insurers –

4.2.1 Setting out at an early stage in the claim whether there is a need for any investigations to establish if limitation may be an issue in the claim and, where there is such a need, that this does not determine that it will indeed be an issue for the claim.

4.2.2 Agreeing to requests from claimants and their representatives for extensions to limitation and to limitation moratoriums where they are able, at the outset of a claim.

4.2.3 Commencing and completing investigations into limitation at the earliest opportunity,

4.2.4 Communicating to the claimant or their representative clearly and explicitly and at the earliest opportunity where the insurer concludes after its investigations that limitation is not an issue.

4.2.5 Only raising limitation as a defence in exceptional circumstances, which may include where they reasonably believe that on balance a court would not disapply limitation because a fair trial would not be possible.

4.3 Use of experts

Aim: to seek to resolve issues without the need for multiple experts for the assessment of a claimant's psychiatric and/or physical injuries.

While it is often necessary for a claimant to be assessed by a medical expert to evidence their child sexual abuse claim, insurers recognise that it can be a distressing part of the claims process.

Therefore, insurers will endeavour where possible to agree a joint expert with the claimant or their representative in order` to seek to avoid the need for multiple experts.

This overall aim could be achieved by insurers -

4.3.1 Engaging with the claimant and their representatives early in the claims process about the use of experts and offering, wherever possible, the use of a joint expert.

4.3.2 Where the instruction of a joint expert is not possible, considering raising questions of the claimant's own expert as an alternative to the instruction of their own expert.

4.3.3 Instructing their own expert only where it is not possible or appropriate to instruct a joint expert and when asking questions of the claimant's own expert has not resulted in resolving the issues in dispute.

4.4 Redress and settlement of child sexual abuse claims

Aim: to consider and, where they are able, facilitate all forms of redress requested by a claimant, including apologies, acknowledgement of the abuse, financial redress and emotional support, and not require confidentiality as a condition of settlement.

Although the civil claims process is designed primarily to deliver financial compensation to a claimant, insurers recognise that other forms of redress can be just as or even more important for victims and survivors of child sexual abuse.

In particular, apologies and/or an acknowledgement of the abuse suffered can be of significant importance for victims and survivors. Those apologies are only likely to be meaningful where they are made by the organisation responsible for the abuse suffered by the claimant. Where the claimant wishes to receive an apology from the insurer's policyholder, the insurer will never discourage its policyholder from doing so.

Insurers will never require a claimant to agree to confidentiality terms as a condition of settlement of a child sexual abuse claim and every effort will be made to dissuade policyholders from insisting upon confidentiality as a condition of settlement. There may be instances where a claimant asks that details of the claim are kept confidential and, where this is at the request of the claimant, an insurer will respect this.

This overall aim could be achieved by insurers -

4.4.1 Offering interim payments or part settlement of the claimant's claim where aspects of the claim are not in dispute.

4.4.2 Insurers will consider requests for interim payments to enable claimants to pursue, for example, necessary treatments, receive emotional support or meet educational needs and will meet those requests wherever they are able.

4.4.3 Insurers will never prevent or discourage their policyholder from apologising to the claimant.

4.4.4 Insurers will never require a claimant to agree to confidentiality terms as a condition of settlement of a child sexual abuse claim, and insurers will actively discourage their policyholder from doing the same.