**2023/2024**

**WA State Government Deed of Indemnity for Physical and Sexual Abuse**

**Clauses detailed within the Template**

**RECITALS**

A. The State (acting through the Department of Communities) has engaged the Service Provider to provide Out of Home Care and/or Youth Homelessness Services to the State under the Services Agreement.

B. The Service Provider has advised the State that the Service Provider is not able to secure insurance covering the Service Provider's civil liability for Physical and Sexual Abuse Claims where the injury was caused by Service Provider Personnel in connection with the provision of the Services.

C. The Treasurer has agreed to indemnify the Service Provider in respect of the Service Provider's civil liability for Physical and Sexual Abuse Claims where the injury was caused by Service Provider Personnel in connection with the provision of the Services on the terms and conditions specified in this Deed.

**OPERATIVE PROVISIONS**

**Indemnity**

The indemnity covers uninsured Physical and Sexual Abuse Claims on and between the dates of 1 December 2022 to 30 June 2023 on and from the date that the Service Provider provides the State with an Uninsurable Risk Notice, the State agrees, subject to the limitations, exclusions and other terms specified in this Deed, to indemnify and keep indemnified the Service Provider from any Loss arising from Physical and Sexual Abuse Claims made against the Service Provider.

**Exclusions from Indemnity**

The indemnity in clause 1 of this Deed does not extend to:

(a) the first [$50,000] of the Loss incurred by the Service Provider in connection with each Physical and Sexual Abuse Claim;

(b) any Loss incurred by the Service Provider in connection with each Physical and Sexual Abuse Claim which exceeds [$1,000,000]; and

* + 1. (c) any Loss incurred by the Service Provider which exceeds [$20,000,000] in the aggregate in connection with Physical and Sexual Abuse Claims during the Relevant Period;

(d) any Loss incurred by the Service Provider in connection with a Physical and Sexual Abuse Claim if, at the date of:

(i) the actual or alleged Child Physical Abuse or Child Sexual Abuse; or

(ii) the Physical and Sexual Abuse Claim, the Service Provider:

1. had committed an Event of Default (as defined in the Service Agreement);
2. was in breach of any of its obligations under the Services Agreement (including a failure to obtain an assessment notice under, or otherwise comply with, the *Working with Children (Criminal Record Checking) Act 2004* (WA));
3. had engaged in conduct involving a wilful breach of duty in relation to the person making the Physical and Sexual Abuse Claim; or
4. had committed a dishonest, fraudulent, wilful or malicious act or omission in relation to the person making the Physical and Sexual Abuse Claim or in connection with the Physical and Sexual Abuse Claim;

(e) any Loss in connection with a Physical and Sexual Abuse Claim where the Service Provider Personnel who caused, or is alleged to have caused, the injury which is the subject of the Physical and Sexual Abuse Claim is a Known Perpetrator;

(f) any Loss incurred by the Service Provider in connection with any criminal suit or action against the Service Provider or Service Provider Personnel;

(g) any Loss which is precluded from indemnification under any law;

(h) any Loss incurred by the Service Provider which consists of punitive damages, aggravated damages or exemplary damages; or

(i) any Loss against which the Service Provider is entitled to be indemnified under a contract of insurance held by or for the benefit of the Service Provider, whether that policy of insurance is in force at the date of this Deed or is entered into after the date of this Deed and provides retrospective cover or claims made cover (or both).

1. **Process for claiming under Indemnity**

(a) As a condition precedent to the Service Provider's right to be indemnified under this Deed, the Service Provider must:

(i) notify the State as soon as practicable after the Service Provider becomes aware of any event or incident occurring which gives rise, or is likely to give rise, to a Physical and Sexual Abuse Claim against the Service Provider;

(ii)notify the State within 14 days after a person makes a Physical and Sexual Abuse Claim against the Service Provider;

(iii) not admit liability for or settle any Physical and Sexual Abuse Claim; or

(iv)not incur any costs or expenses in connection with a Physical and Sexual Abuse Claim,

without the prior written consent of the State, including in respect of the amount described in clause 2(a) of this Deed.

(b) The State is entitled at any time to take over and conduct in the name of the Service Provider the defence or settlement of any Physical and Sexual Abuse Claim, including in respect of the amount described in clause 2(a) of this Deed.

(c) The State may make any investigation that the State deems expedient and in respect of any matter for which an indemnity is claimed by the Service Provider.

(d) The Service Provider agrees togive all such information and assistance to the State as the State may require.

(e) The State may settle any action, proceeding, claim or demand against the Service Provider as the State deems expedient in its sole and absolute discretion.

1. **Uninsurable Risk Notices**

During the Relevant Period:

1. the State may review the adequacy and appropriateness of the Uninsurable Risk Notice taking into account current prudent insurance practice;
2. the State may require the Service Provider to obtain and provide to the State an updated Uninsurable Risk Notice at any time; and
3. if the Service Provider is unable to provide the State with an updated Uninsurable Risk Notice within 30 days after receiving a request under clause 4(a) of this Deed, the rights and obligations of the State and the Service Provider under clause 1 of this Deed will cease.
4. **Subrogation**

If the State makes any payment pursuant to this Deed, the State shall be subrogated to the extent of such payment to all rights of recovery for that payment and the Service Provider shall execute all documents required and shall do all things necessary to secure and preserve such right of subrogation including the execution of such documents necessary to enable the State effectively to bring suit in the name of the Service Provider.

1. **Relationship with Service Agreement**
2. Where any inconsistency occurs between the provisions contained in this Deed and the Service Agreement, the Service Agreement shall where possible be read down to resolve the inconsistency.
3. If the inconsistency remains incapable of resolution by reading down, the inconsistent provisions shall be severed from the Service Agreement without otherwise diminishing the enforceability of the remaining provisions of the Service Agreement.
4. For the avoidance of doubt, the Service Provider must comply with all insurance requirements under clause 5 of the General Provisions for the Purchase of Community Services By Public Authorities, forming part of the Service Agreement (or any other clause providing for insurance requirements which forms part of the Service Agreement) except for those the subject of any Uninsurable Risk Notice.
5. **Notices**

Notices under this Deed must be given in accordance with the requirements for giving notices under the Services Agreement.

1. **Costs**

Except as otherwise provided in this Deed, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Deed.

1. **Governing Law**

This Deed is governed by the law in force in the State of Western Australia.

The State irrevocably submits to the exclusive jurisdiction of the courts exercising jurisdiction in Western Australia, and any court that may hear appeals from any of those courts, for any proceeding in connection with this Deed, subject only to the right to enforce a judgment obtained in any of those courts in any other jurisdiction.

**8. Interpretation**

8.1 Definitions

The following definitions apply unless the context requires otherwise.

***AFSL Insurance Broker*** means an insurance broker which holds an Australian Financial Services Licence within the meaning of the *Corporations Act 2001* (Cth).

**Child** means a person under 18 years of age.

**Child Physical Abuse,**of a person, means an act or omission in relation to the person, when the person is a Child, that is Physical Abuse.

**Child Sexual Abuse**, of a person, means an act or omission in relation to the person, when the person is a Child, that is Sexual Abuse.

**Deed** means this deed.

**Defence Costs** means that part of the Loss consisting of reasonable costs, charges and expenses incurred in the defence of actions, claims or proceedings and appeals therefrom and the costs of appeal, attachment or similar bonds, or in relation to any formal inquiry, but excluding the costs of defending a criminal action where the Service Provider is found guilty.

**Known Perpetrator** means a perpetrator who has been the subject of a criminal conviction for Physical Abuse, Sexual Abuse or an offence under Chapter XXXi of *The Criminal Code* (WA) or equivalent legislation in another jurisdiction where the Service Provider is aware, or ought reasonably to have been aware, of such criminal conviction.

**Loss** means the total amount which the Service Provider becomes liable to pay on account of all Physical and Sexual Abuse Claims, including, but not limited to, damages, judgments, settlement costs and Defence Costs, but does not include fines or penalties imposed in a criminal suit or action or any other fines or penalties or any punitive damages imposed by final adjudication.

**Physical Abuse** means an assault as defined in section 222 of *The Criminal Code* (WA).

**Physical and Sexual Abuse Claim** means a claim, cause of action, suit, demand or proceedings against the Service Provider that relates, directly or indirectly, to a personal injury of the person to whom the claim, cause of action, suit, demand or proceedings accrue, where:

(a)the injury results from:

Child Physical Abuse;

Child Sexual Abuse; or

Child Physical Abuse and Child Sexual Abuse,

by Service Provider Personnel in connection with the provision of the Services; and

(b) the injury occurs during the Relevant Period.

**Relevant Period** means the period commencing on the date from which the Service Provider has an Uninsurable Risk and ending on 30 June 2024.

**Service Agreement** means the Service Agreement(s) listed below:

|  |  |  |
| --- | --- | --- |
| Service Agreement Title | Commencement  Date | Contract Reference |

**Service Provider Personnel** means all officers, employees, agents and subcontractors of the Service Provider, and all officers, employees or agents of subcontractors, engaged in relation to the provision of the Services.

**Services** means the services to be provided by the Service Provider as specified in the Service Agreement.

**Sexual Abuse** means actual or attempted contact or non‑contact acts or omissions by a perpetrator against a person to seek or obtain physical or mental sexual gratification, whether immediate or deferred in space and time.

**Uninsurable Risk** means the Service Provider is not able to effect, maintain and keep in force a contract of insurance which:

(a) isunderwritten by an insurer which has been approved by the Australian Prudential Regulatory Authority or a reputable and solvent overseas insurer regulated by a body equivalent to the Australian Prudential Regulatory Authority;

(b) covers and indemnifies the Service Provider against its liability for Physical and Sexual Abuse Claims which occur during the term of the Service Agreement; and

(c) has an excess, deductible or self-insured retention payable by the Service Provider for each claim of not less than $50,000.

**Uninsurable Risk Notice** means a written notice:

(a) from an AFSL Insurance Broker which states the Service Provider has an Uninsurable Risk; or

(b)from the Service Provider whichstates the Service Provider has an Uninsurable Risk and to which is attached documentation from an AFSL Insurance Broker confirming that the Service Provider has an Uninsurable Risk.

8.2 Rules for interpreting this Deed

(a) Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Deed, except where the context makes it clear that a rule is not intended to apply.

(b) A reference to:

a document or agreement, or a provision of a document or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;

a party to this document or to any other document or agreement includes a permitted substitute or a permitted assign of that party; and

a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person.

(c) A singular word includes the plural, and vice versa.

(d) A word that suggests one gender includes the other genders.

(e) If a word is defined, a derivative of the word has a corresponding meaning.