

## UNFAIR DISCRIMINATION AGAINST SUBJECTS OF ABUSE IN PROPERTY AND CASUALTY INSURANCE MODEL ACT

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**Introductory Note:** In addition to this model act, the NAIC drafted the following model acts regarding the unfair discrimination against subjects of abuse: The Unfair Discrimination Against Subjects of Abuse in Life Insurance Model Act, The Unfair Discrimination Against Subjects of Abuse in Disability Income Insurance Model Act, and The Unfair Discrimination Against Subjects of Abuse in Health Insurance Model Act.

### Section 1. Purpose

The purpose of this Act is to prohibit unfair discrimination by property and casualty insurers and insurance professionals on the basis of abuse status. Nothing in this Act shall be construed to create or imply a private cause of action for a violation of this Act.

**Drafting Note:** Consideration was given to including a private cause of action for a violation of this Act. It was concluded that a private cause of action is not inconsistent with the model and that a state legislature could find that a private cause of action is appropriate for that state.

### Section 2. Scope

This Act applies to all property and casualty insurers and insurance professionals involved in issuing or renewing in this state a policy of property and casualty insurance.

### Section 3. Definitions

**Drafting Note:** Each state may wish to ensure that the definition of “abuse” for the purposes of this Act does not conflict with the terminology descriptive of abusive behavior in state civil or criminal statutes in such a way as to lead to unintended meanings.

- A. “Abuse” means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner or caretaker:
- (1) Attempting to cause or intentionally, knowingly or recklessly causing another person bodily injury, physical harm, severe emotional distress, psychological trauma, rape, sexual assault or involuntary sexual intercourse;
  - (2) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm;
  - (3) Subjecting another person to false imprisonment; or
  - (4) Attempting to cause or intentionally, knowingly, or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another person.

**Drafting Note:** States should include appropriate corrective or clarifying language if their ordinary statutory meaning of “person” can be construed as implying legal capacity, since many subjects of abuse are minors and other subjects of abuse may be incapacitated.

- B. “Abuse-related claim” means a claim under a property and casualty policy for a loss resulting from an act of abuse.
- C. “Abuse status” means the fact or perception that a natural person is, has been, or may be a subject of abuse, irrespective of whether the natural person has incurred abuse-related claims.

D. “Commissioner” means the insurance commissioner of this state.

**Drafting Note:** Where the word “commissioner” appears in this Act, the appropriate designation for the chief insurance supervisory official of the state should be substituted.

E. “Confidential abuse information” means information about acts of abuse or abuse status of a subject of abuse, the address and telephone number (home and work) of a subject of abuse or the status of an applicant or insured as a family member, employer or associate of, or a person in a relationship with, a subject of abuse.

F. “Insurance professional” means an agent, broker, adjuster or third party administrator as defined in the insurance laws of this state.

**Drafting Note:** Many states license other categories of insurance professionals such as agencies, consultants and producers. Each state should review this definition for consistency with the terminology used in its licensing law.

**Drafting Note:** Unfairly discriminatory underwriting or claims handling practices of a company writing property and casualty insurance may be committed by insurance professionals when they refuse to process an application or a claim in violation of this act. There is no intent, however, to hold insurance professionals liable for the acts of insurers over which they have no control.

G. “Insured” means the party named on a policy or certificate as the individual with legal rights to the benefits provided by such policy.

H. “Insurer” means a person or other entity engaged in the business of property and casualty insurance in this state.

**Drafting Note:** States may wish to consider whether residual market mechanisms should be included in the definition of insurer.

**Drafting Note:** Each state may wish to consider the advisability of defining “insurance” or “property and casualty insurance” for purposes of this Act if the state’s present insurance code is not satisfactory in this regard. In some cases a cross reference will be sufficient.

I. “Policy” means a contract of insurance, including endorsements, riders or binders issued, proposed for issuance, or intended for issuance by an insurer or insurance professional.

J. “Subject of abuse” means a natural person against whom an act of abuse has been directed; who has current or prior injuries, illnesses or disorders that resulted from abuse; or who seeks, may have sought or had reason to seek medical or psychological treatment for abuse; or protection, court-ordered protection or shelter from abuse.

#### **Section 4. Unfairly Discriminatory Acts Relating to Property and Casualty Insurance**

**Drafting Note:** Because of the nature and consequences of the prohibited acts, this model provides that a single instance of prohibited conduct is a violation rather than defining a violation as a general business practice of prohibited conduct. States that choose to incorporate this model into their version of the Unfair Trade Practices Act (or other statute) under which those states define a violation as a general business practice should consider whether that approach provides sufficient protection to subjects of abuse.

A. It is unfairly discriminatory to deny, refuse to issue, renew or reissue; to cancel or otherwise terminate; restrict or exclude coverage on or to add a premium differential to a property and casualty insurance policy on the basis of the applicant’s or insured’s abuse status.

B. (1) It is unfairly discriminatory to:

(a) Exclude or limit payment for a covered loss or deny a covered claim incurred as a result of abuse by a person other than a co-insured; or

(b) Fail to pay losses arising out of abuse to an innocent first party claimant to the extent of such claimants’ legal interest in the covered property if the loss is caused by the intentional act of an insured, or using other exclusions or limitations on coverage which the commissioner has determined unreasonably restrict the ability of subjects of abuse to be indemnified for such losses.

(2) This section shall not require payment in excess of the loss or policy limits.

- (3) Nothing in this Act shall be construed to prohibit an insurer or insurance professional from applying reasonable standards of proof to claims under this section.

**Drafting Note:** Abuse-related claims are an indication of abuse status. States may choose to consider the use of abuse related claims history as an underwriting criterion prohibited as underwriting on the basis of abuse status.

**Drafting Note:** Insurers may include policy provisions providing that any payment required by this subsection may be recovered by the insurer from an insured if that abuse-related claim arose out of that insured's act of abuse.

**Drafting Note:** State law may differ regarding the payments to innocent first party claimants. When adopting this model, a state may want to consider this provision with regard to existing law.

- C. When the insurer or insurance professional has information in its possession that clearly indicates that the insured, applicant or claimant is a subject of abuse, it is unfairly discriminatory, by a person employed by or contracting with an insurer, to disclose or transfer confidential abuse information, as defined in this Act, for any purpose or to any person, except:
  - (1) To the subject of abuse or an individual specifically designated in writing by the subject of abuse;
  - (2) When ordered by the commissioner or a court of competent jurisdiction or otherwise required by law;
  - (3) When necessary for a valid business purpose to transfer information that includes confidential abuse information that cannot reasonably be segregated without undue hardship, confidential abuse information may be disclosed only if the recipient has executed a written agreement to be bound by the prohibitions of this Act in all respects and to be subject to the enforcement of this Act by the courts of this state for the benefit of the applicant or the insured, and only to the following persons:
    - (a) A reinsurer that seeks to indemnify or indemnifies all or any part of a policy covering a subject of abuse and that cannot underwrite or satisfy its obligations under the reinsurance agreement without that disclosure;
    - (b) A party to a proposed or consummated sale, transfer, merger or consolidation of all or part of the business of the insurer or insurance professional;
    - (c) Medical or claims personnel contracting with the insurer or insurance professional, only where necessary to process an application or perform the insurer's or insurance professional's duties under the policy or to protect the safety or privacy of a subject of abuse (also includes parent or affiliate companies of the insurer or insurance professional that have service agreements with the insurer or insurance professional); or
    - (d) With respect to address and telephone number, to entities with whom the insurer transacts business when the business cannot be transacted without the address and telephone number;
  - (4) To an attorney who needs the information to represent the insurer or insurance professional effectively, provided the insurer or insurance professional notifies the attorney of its obligations under this Act and requests that the attorney exercise due diligence to protect the confidential abuse information consistent with the attorney's obligation to represent the insurer or insurance professional; or
  - (5) To any other entities deemed appropriate by the commissioner.
- D. It is unfairly discriminatory to request information relating to acts of abuse or an applicant's or insured's abuse status, or to make use of that information, however obtained, except for the limited purposes of complying with legal obligations or verifying a person's claim to be a subject of abuse.
- E. Subsection C does not preclude a subject of abuse from obtaining his or her insurance records.

- F. Subsection D does not prohibit a property and casualty insurer from asking an applicant or insured about a property and casualty claim, even if the claim is abuse-related, or from using information thereby obtained in evaluating and carrying out its rights and duties under the policy, to the extent otherwise permitted under this Act and other applicable law.

**Section 5. Justification of Adverse Insurance Decisions**

An insurer or insurance professional that takes an action not prohibited by Section 4 that adversely affects an applicant or insured on the basis of claim or other underwriting information that the insurer or insurance professional knows or has reason to know is abuse-related shall explain the reason for its action to the applicant or insured in writing and shall be able to demonstrate that its action, and any applicable policy provision:

- A. Does not have the purpose of treating abuse status as an underwriting criterion; and
- B. Is otherwise permissible by law and applies in the same manner and to the same extent to all applicants and insureds with a similar claim or claims history without regard to whether the claims are abuse-related.

**Section 6. Insurance Protocols for Subjects of Abuse**

Insurers shall develop and adhere to written policies specifying procedures to be followed by employees and by insurance professionals they contract with, for the purpose of protecting the safety and privacy of a subject of abuse and shall otherwise implement the provisions of this Act when taking an application, investigating a claim, pursuing subrogation or taking any other action relating to a policy or claim involving a subject of abuse. Insurers shall distribute their written policies to employees and insurance professionals.

**Drafting Note:** States may wish to consider requiring insurers to develop procedures in consultation with domestic violence advocacy groups.

**Drafting Note:** States are advised that these policies and procedures should be subject to review as part of a market conduct examination or otherwise at the request of the commissioner.

**Section 7. Enforcement**

The commissioner shall conduct a reasonable investigation based on a written and signed [add any means by which the commissioner receives complaints] complaint received by the commissioner and issue a prompt determination as to whether a violation of this Act may have occurred. If the commissioner finds from the investigation that a violation of this Act may have occurred, the commissioner shall promptly begin an adjudicatory proceeding. The commissioner may address a violation through means appropriate to the nature and extent of the violation, which may include suspension or revocation of certificates of authority or licenses, imposition of civil penalties, issuance of cease and desist orders, injunctive relief, a requirement for restitution, referral to prosecutorial authorities or any combination of these. The powers and duties set forth in this section are in addition to all other authority of the commissioner.

**Drafting Note:** States may wish to delete this section if the substance of it already exists in state law.

**Section 8. Effective Date**

This Act is effective [insert date], and applies to all actions taken on or after the effective date, except where otherwise explicitly stated. Nothing in this Act shall require an insurer or insurance professional to conduct a comprehensive search of its contract files existing on the effective date solely to determine which applicants or insureds are subjects of abuse.

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*Chronological Summary of Actions (all references are to the Proceedings of the NAIC).*

*1997 Proc. 4<sup>th</sup> Quarter 25, 27-28, 168-169, 194-197 (adopted).*

*1998 Proc. 3<sup>rd</sup> Quarter 14, 83, 88-92 (amended and reprinted).*

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**This chart is intended to provide readers with additional information to more easily access state statutes, regulations, bulletins or administrative rulings related to the NAIC model. Such guidance provides readers with a starting point from which they may review how each state has addressed the model and the topic being covered. The NAIC Legal Division has reviewed each state’s activity in this area and has determined whether the citation most appropriately fits in the Model Adoption column or Related State Activity column based on the definitions listed below. The NAIC’s interpretation may or may not be shared by the individual states or by interested readers.**

**This chart does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Nor does this state page reflect a determination as to whether a state meets any applicable accreditation standards. Every effort has been made to provide correct and accurate summaries to assist readers in locating useful information. Readers should consult state law for further details and for the most current information.**

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**KEY:**

**MODEL ADOPTION:** States that have citations identified in this column adopted the most recent version of the NAIC model in a **substantially similar manner**. This requires states to adopt the model in its entirety but does allow for variations in style and format. States that have adopted portions of the current NAIC model will be included in this column with an explanatory note.

**RELATED STATE ACTIVITY:** Examples of Related State Activity include but are not limited to: older versions of the NAIC model, statutes or regulations addressing the same subject matter, or other administrative guidance such as bulletins and notices. States that have citations identified in this column **only** (and nothing listed in the Model Adoption column) have **not** adopted the most recent version of the NAIC model in a **substantially similar manner**.

**NO CURRENT ACTIVITY:** No state activity on the topic as of the date of the most recent update. This includes states that have repealed legislation as well as states that have never adopted legislation.

<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Alabama		ALA. CODE § 27-55-3 (2000).
Alaska		ALASKA STAT. § 21.36.430 (1997/2001).
American Samoa	NO CURRENT ACTIVITY	
Arizona		ARIZ. REV. STAT. ANN. § 20-448 (1996/2001).
Arkansas		ARK. CODE ANN. § 23-86-306 (1998).
California		CAL. INS. CODE §§ 10144.2 and 10144.3 (1996/1998).
Colorado		COLO. REV. STAT. § 10-3-1104.8 (1998).
Connecticut		CONN. GEN. STAT. § 38a-816 (18) (1995/2003).
Delaware		DEL. CODE ANN. tit. 18, §§ 2302(5); § 2304(24); § 2304(25) (1996); BULLETIN 09-005-IB (2009).
District of Columbia	NO CURRENT ACTIVITY	
Florida		FLA. STAT. § 626.9541 (1976/2014).

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<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Georgia		GA. CODE ANN. § 33-6-4 (1972/2002).
Guam	NO CURRENT ACTIVITY	
Hawaii		HAW. REV. STAT. § 431:10-217.5 (1998).
Idaho	NO CURRENT ACTIVITY	
Illinois		215 ILL. COMP. STAT. 5/155.22a (1997/2004).
Indiana		IND. CODE §§ 27-8-24.3-1 to 27-8-24.3-10 (1996).
Iowa		IOWA CODE § 507B.4 (1955/2002).
Kansas	KAN. STAT. ANN. § 40-2404 (1955/2001).	
Kentucky		KY. REV. STAT. ANN. §§ 304.12-211 (2000); § 304.17a-155 (1998).
Louisiana	NO CURRENT ACTIVITY	
Maine		ME. REV. STAT. ANN. tit. 24-A, § 2159-B (1996/2001).
Maryland		MD. CODE ANN., INS. § 27-504 (1957/1997).
Massachusetts		MASS. GEN. LAWS ch. 175, § 95B (1996); § 108G; § 120D; MASS. GEN. LAWS ch. 176A, § 3A; MASS. GEN. LAWS ch. 176B, § 5A; MASS. GEN. LAWS ch. 176G, § 19 (1996).
Michigan		MICH. COMP. LAWS § 500.2246 (1956/1998); § 500.3406j (1956/1998); § 550.1401 (1980/2003).
Minnesota		MINN. STAT. § 72A.20 (1967/2002).
Mississippi	NO CURRENT ACTIVITY	



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<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Missouri		MO. REV. STAT. § 375.1312 (1999/2013) (group).
Montana		MONT. CODE ANN. § 33-18-216 (1997).
Nebraska	NEB. REV. STAT. §§ 44-7401 to 44-7410 (1998) (portions of model).	
Nevada		NEV. REV. STAT. § 689B.068 (1997).
New Hampshire		N.H. REV. STAT. ANN. § 417:4 (1947/2004).
New Jersey		N.J. STAT. ANN. §§ 17:29B-16 to 17:29B-19 (2003); N.J. ADMIN. CODE §§ 11:4-42.1 to 11:4-42.5 (1996/2004) (group).
New Mexico	N.M. STAT. ANN. §§ 59A-16B-1 to 59A-16B-10 (1997) (portions of model).	N.M. CODE R. §§ 13.7.5.1 to 13.7.5.17 (1999) (insurers' duty in regard to confidential abuse information).
New York		N.Y. INS. LAW § 2612 (1996).
North Carolina		N.C. GEN. STAT. § 58-68-35 (1997).
North Dakota		N.D. CENT. CODE § 26.1-39-24 (1999).
Northern Marianas	NO CURRENT ACTIVITY	
Ohio		OHIO REV. CODE ANN. § 3901.21 (1970/1999).
Oklahoma	NO CURRENT ACTIVITY	
Oregon		OR. REV. STAT. § 746.015 (1967/2010).
Pennsylvania		40 PA. CONS. STAT. §§ 29-103 to 29-105 (1974/1996).

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<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Puerto Rico	NO CURRENT ACTIVITY	
Rhode Island	R.I. GEN. LAWS §§ 27-59-1 to 27-59-7 (1997); §§ 27-60-1 to 27-60-7 (1997).	
South Carolina	NO CURRENT ACTIVITY	
South Dakota		S.D. CODIFIED LAWS § 58-18B-27 (1995/1997) (small group).
Tennessee	TENN. CODE ANN. §§ 56-8-301 to 56-8-306 (1996).	
Texas		TEX. INS. CODE ANN. §§ 544.151 to 544.158 (2005).
Utah		UTAH CODE ANN. §§ 31a-21-501 to 31a-21-506 (1997/2013).
Vermont	NO CURRENT ACTIVITY	
Virgin Islands	NO CURRENT ACTIVITY	
Virginia		VA. CODE ANN. §§ 38.2-508 (1986/2013).
Washington		WASH. REV. CODE ANN. § 48.18.550 (1998).
West Virginia		W. VA. CODE § 33-4-20 (1997).
Wisconsin		WIS. STAT. § 631.95 (2000).
Wyoming	NO CURRENT ACTIVITY	

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### Proceeding Citations

Cited to the Proceedings of the NAIC

In July 1994 the NAIC Executive Committee reviewed a resolution that had recently been adopted by the National Association of Attorneys General (NAAG). The chair suggested that members of the NAIC evaluate in their respective states whether victims of domestic violence were subject to exclusions for the costs of treatment under applicable insurance policies so that the NAIC can determine appropriate action. **1994 Proc. 3<sup>rd</sup> Quarter 52-53.**

At the next NAIC meeting a commissioner described the practices of eight large insurers that were underwriting health, life and mortgage disability policies on the basis of medical records that revealed domestic violence experiences in the history of the applicants. After this fact was pointed out in a press conference, most of the insurers cited announced that they would no longer underwrite on the basis of a domestic violence history. The commissioner said a review of the extent of the practice in her own state showed that such practices by insurers were subtle, and were arguably allowed by state law. She suggested it would be appropriate for the NAIC to endorse the “sense” of the NAAG resolution and to develop a model act addressing unfair insurance practices and domestic violence. She suggested that the NAIC should take a leadership role to stop such unfair insurance practices. **1994 Proc. 3<sup>rd</sup> Quarter 10-11.**

Another commissioner expressed reluctance to support the NAAG resolution, citing a number of problems with it. A third commissioner agreed with that assessment, but did encourage the NAIC to take whatever action was appropriate to address unfair insurance practices against victims of domestic violence. **1994 Proc. 3<sup>rd</sup> Quarter 11.**

The chair of the Accident and Health Insurance Committee suggested referring this issue to that committee with a charge to develop a model law. The Plenary voted to follow that recommendation; although a member pointed out that this issue was broader than health insurance. **1994 Proc. 3<sup>rd</sup> Quarter 11-12.**

A working group was appointed by the Accident and Health Insurance Committee to study the issue of policy declination based on an applicant’s history of being a victim of domestic violence. **1994 Proc. 3<sup>rd</sup> Quarter 578.**

When reviewing a first draft, the members of the working group decided to draft several alternative provisions so that the states could elect to suggest legislation for enactment into law or to promulgate regulations pursuant to statutory authority already granted to the insurance commissioner. **1994 Proc. 4<sup>th</sup> Quarter 706.**

Early in 1995 a hearing was held to solicit further information on domestic violence. The public hearing provided valuable information and background on the incidence and frequency of such unfair discrimination. **1995 Proc. 1<sup>st</sup> Quarter 509.**

Several federal legislators indicated an interest in developing a federal prohibition of discrimination by insurers against insureds who were victims of domestic violence. Their drafts also included a private cause of action for consumers as well as federal preemptive language. **1995 Proc. 2<sup>nd</sup> Quarter 574.**

One insurance department surveyed insurers and found that 28% of the companies responding to the survey considered domestic violence as an underwriting criterion. The survey also revealed that life insurers used this criterion significantly more than accident and health insurance companies. **1995 Proc. 2<sup>nd</sup> Quarter 575-579.**

A funded consumer representative noted that 13 states had domestic violence legislation pending; states were acting independently without a model law as a guide. She said the legislation proposed differs from state to state in covered lines of insurance and definitional language. She urged the working group to complete a model law as soon as possible. **1995 Proc. 2<sup>nd</sup> Quarter 575.**

In August 1995 the working group, which reported to the Accident and Health Insurance Committee, discussed whether to break out health, disability, life and property/casualty separately. The working group agreed to do initial drafts of a life and a property/casualty model and get input from the Market Conduct and Consumer Affairs Subcommittee on how to proceed. **1995 Proc. 3<sup>rd</sup> Quarter 726.**

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A representative of a property and casualty insurer expressed concern over the development of the model and indicated it was difficult to understand how domestic violence situations apply to property and casualty policies. It may be clear in life and health insurance situations, but there are questions regarding the appropriateness of applying these provisions to property and casualty policies. She expressed concern about interference with the contractual relationship between the policyholder and the insurer. A regulator responded that, at an earlier hearing, examples were presented of situations of unfair discrimination in property and casualty insurance. **1996 Proc. 3<sup>rd</sup> Quarter 214.**

#### Section 1. Purpose

The drafters of the model discussed the need for a purpose section. A regulator said the purpose section spells out exactly what the model act is intended to do. **1997 Proc. 2<sup>nd</sup> Quarter 181-182.**

An industry representative suggested changing Section 1 to refer to "... the basis of abuse *status*" because the purpose of the model acts was to prohibit discrimination on the basis of abuse status, rather than on the mental or physical condition that was a result of the abuse. A regulator commented that the purpose of the models is to prohibit discrimination against subjects of abuse and she saw the change as substantive. The working group decided to make the change. **1998 Proc. 2<sup>nd</sup> Quarter I 117-118.**

Following Section 1 is a note referring to a private cause of action. An early draft contained an alternative provision providing for a private right of action. **1995 Proc. 2<sup>nd</sup> Quarter 575, 583.**

After discussing issues related to the private cause of action option for the states, it was agreed that a statement would be drafted clarifying that, at the discretion of the legislature, states might want to consider this remedy. **1995 Proc. 3<sup>rd</sup> Quarter 726.**

A number of parties questioned the inclusion of the drafting note as being inconsistent with the state regulation of insurance and as subjecting an insurer to monetary penalties for a single violation of the Act. A regulator opined that it may be appropriate for states to allow a violation of this Act to lead to a private cause of action. **1996 Proc. 3<sup>rd</sup> Quarter 219.**

Just before adoption of the model, a regulator expressed concern over the private cause of action discussion in the model. He said the Unfair Trade Practices Act contains specific language and suggested that similar language be incorporated in this model to make it consistent. Another regulator concurred, saying the drafting note in the model could be interpreted to indicate support for a private cause of action, when clearly that was not the drafters' intent. **1997 Proc. 4<sup>th</sup> Quarter 166.**

When the working group was considering its charge to create consistency between the four models on discrimination, an early discussion centered on the differing treatment of the issue of a private cause of action. The property and casualty model was drafted to prohibit a private cause of action, but the other three were not. An insurer representative said the drafting note suggesting a state's consideration of including a private cause of action had been left in the property and casualty model inadvertently and should be deleted. A consumer advocate responded that the inclusion of the drafting note was not an oversight and that the prohibition against a private cause of action should not be incorporated into the other three models. **1998 Proc. 2<sup>nd</sup> Quarter I 117.**

The working group concluded that a private cause of action was not inconsistent with the model and that a state legislature could find a private cause of action appropriate for that state. The working group decided to include the language and the drafting note in all four models. The model act clearly did not provide for a private cause of action, but the drafting note clarified that including a private cause of action would not necessarily conflict with the model. **1998 Proc. 2<sup>nd</sup> Quarter I 117.**

#### Section 2. Scope

When reviewing an early draft, staff was asked to review the scope section to ensure that the broadest application of the draft would be available to the states. **1994 Proc. 4<sup>th</sup> Quarter 706.**

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**Section 2** (cont.)

Several comments were received asking if the property and casualty version of the model was intended to apply to reinsurance. The chair indicated it was intended to apply to all insurers, including reinsurers. **1996 Proc. 3<sup>rd</sup> Quarter 214.**

Reinsurers felt they should be excluded from the model because they have no direct contact with the policyholder and do not get involved in risk evaluation. **1996 Proc. 4<sup>th</sup> Quarter 330.**

During development of the model the chair asked the group to consider whether or not the model applies to surplus lines brokers. A representative from a surplus lines association said he was unaware of any problem in the surplus lines market where subjects of abuse had faced discrimination. He opined it would be unfair to make surplus lines brokers responsible for the actions of underwriters over whom the brokers have no control. **1997 Proc. 1<sup>st</sup> Quarter 122.**

Another representative of a surplus lines association said that brokers represent the insureds and try to get the best deal for them. The chair asked if surplus lines brokers can cancel or otherwise terminate an insured's policy. The association representative responded that that decision is made by the carrier. The working group members agreed that the model applies to surplus lines brokers because the carriers are technically not conducting business in the state. A regulator pointed out that brokers need to be within the purview of the act because of the protections regarding the communication of confidential information related to an abuse victim. **1997 Proc. 1<sup>st</sup> Quarter 122.**

Later during the development of the model, discussion again returned to the issue of applicability to surplus lines brokers. A regulator questioned whether the working group should be attempting to regulate surplus lines brokers. The regulators voted to remove the specific reference to surplus lines in the definition of insurer so that the model act does not apply to surplus lines brokers. **1997 Proc. 2<sup>nd</sup> Quarter 170.**

**Section 3. Definitions**

A. When the process of drafting the model was nearly concluded, concerns were raised about whether to include the term “recklessly” in the definition. Consumer advocates preferred that it be included because they did not want those who have been victims not to have the protection of the Act because the abuser said that he did not intend to cause harm. The definition including the word “reckless” has been incorporated in many states. One regulator cautioned that the term may sweep into the Act situations that the subcommittee may not want to include. **1996 Proc. 4<sup>th</sup> Quarter 278.**

B. The definition of abuse-related claim was originally a part of all four domestic violence models, but was deleted from the other three because it only had relevance in the property and casualty context. **1996 Proc. 2<sup>nd</sup> Quarter 762.**

C. The working group discussed the need to create a definition of abuse status. Working group members discussed the issue of whether all underwriting and limitations based on abuse-related medical conditions should be prohibited or whether the model should attempt to prohibit only underwriting that is based on abuse status, and that all medical conditions should be treated equally under state law. It was suggested that, for the model to clarify that all medical conditions would be treated the same, the burden of proof should be on the insurer to demonstrate compliance. **1995 Proc. 3<sup>rd</sup> Quarter 726.**

There was disagreement over the inclusion of the word “perception” in the definition of abuse status. An insurer representative commented that this would create a need to differentiate between what an insurer is thinking and what an insurer knows. If it is the underwriter's perception that someone has been abused, that would trigger various provisions in the model. Another responded that the real issue would arise in situations where an insurer wrongly takes an action based on the belief that a person is a subject of abuse. Because of the single instance standard of the model, there was great concern that an insurer would have to defend its action based on what it perceived. **1996 Proc. 4<sup>th</sup> Quarter 278.**

An industry representative questioned whether the definition is ambiguous with references to the “perception” of abuse status and whether a person “may be” a subject of abuse. He questioned whether the language is necessary. A consumer representative responded that this subsection directly addresses discrimination, whether or not the abuse is actual. She added that a company ought not be able to discriminate because it thinks the person may be the subject of abuse in the future. The

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**Section 3C (cont.)**

insurer said the language is vague enough to cause problems for insurers. He said the working group should draft carefully so it does not encourage fraud. **1996 Proc. 4<sup>th</sup> Quarter 330.**

F. The working group creating consistency between the four discrimination models considered the inclusion of producers in the definition of insurer. A regulator suggested deleting agents, brokers, producers and adjusters from the definition of insurer and include a new definition of licensee to incorporate them back into the model. **1998 Proc. 2<sup>nd</sup> Quarter I 118.**

G. The drafters discussed whether the definition was meant to encompass additional parties or just the named insured. The group decided to clarify the language. **1997 Proc. 1<sup>st</sup> Quarter 128.**

H. An insurance industry representative expressed concern over including agents, brokers and adjusters in the definition of insurer. Independent agents would be liable and may not even know it. There was also discussion as to whether the definition would include banks, and the chair responded that it would. Agreement was also reached that surplus lines brokers would be included. **1997 Proc. 1<sup>st</sup> Quarter 128.**

Representatives from insurers expressed concern later in the drafting process that the definition of insurer still included producers. They pointed out that producers do not have control over the actions of insurers and should not be held accountable for the acts of the insurers. A regulator responded that producers are often given leeway to act independently in selecting potential applicants for insurance. **1997 Proc. 2<sup>nd</sup> Quarter 184.**

When the model was amended in 1998 during an effort to create consistency between the four models, the reference to producers was deleted and a new Subsection F created to reference insurance professionals. “Insurance professional” was added where necessary in the text of the model. **1998 Proc. 3<sup>rd</sup> Quarter 88.**

J. There were suggestions for ways to change this definition. The chair declined to do so, saying it was sufficiently broad to ensure that any party who was the subject of abuse would be covered under the model act. **1996 Proc. 3<sup>rd</sup> Quarter 218.**

**Section 4. Unfairly Discriminatory Acts Related to Property and Casualty Insurance**

The first drafting effort attached to the minutes included three alternative proposals: A draft model act, a draft model regulation, and a draft of amendments to the Unfair Trade Practices Act. **1994 Proc. 4<sup>th</sup> Quarter 699-705.**

One working group member reported that her state was considering amendments to its Unfair Trade Practices Act to address discriminatory practices against victims of domestic violence. She suggested that the working group proceed in that manner or that a drafting note be added to the model act to indicate that language accomplishing the same substantive treatment could be included in a state’s unfair trade practices law. **1995 Proc. 2<sup>nd</sup> Quarter 575-576.**

To clarify that unfair discrimination by insurers is at issue, the working group agreed to add the word “unfair” before the word “discrimination” in the model. **1995 Proc 3<sup>rd</sup> Quarter 726.**

Discussion took place on how to clarify that individual acts should be considered to be violations of the Unfair Trade Practices Act in this area, as opposed to the policy generally to consider patterns of practice as violations. Working group members discussed the importance of trying to build up some type of exception for violations in this area so that acts alone constituted violations. **1995 Proc. 3<sup>rd</sup> Quarter 726.**

The chair of the working group said that the drafting note to this section indicated that a single instance of prohibited conduct constituted a violation rather than defining that a general business practice of prohibited conduct must exist before a violation occurs. Comments received suggested that the note be modified so that single violations were not defined as prohibited conduct. A regulator responded that it is not unprecedented for a model law to define a single instance of prohibited conduct

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**Section 4** (cont.)

as being in violation of that law. He stated that the drafting note simply tells states to be aware that using the general business practice approach may not provide sufficient protection for subjects of abuse. **1996 Proc. 3<sup>rd</sup> Quarter 218.**

The subcommittee continued to debate the pros and cons of having a single instance of violation constitute a violation. An industry trade association representative said his concern was that the provisions of the model would affect many policy files and there was always the possibility a mistake could occur. A single instance standard would subject insurers to the full effect of the Act, even in situations when the action taken was admittedly a mistake. A commissioner responded that, because of the significance of the harm that could be inflicted on subjects of abuse as a result of insurers not complying with the Act, she supported keeping a single instance standard in Section 4. None of the subcommittee members were willing to make a motion to remove the single instance standard. **1996 Proc. 4<sup>th</sup> Quarter 279-280.**

After considerable debate, the regulators agreed to keep the single instance standard in the model. An insurance industry spokesperson expressed concerns that this provision would affect many policy files and there was always the possibility that a mistake could occur. She said insurers support the provisions of the model in situations where conscious actions are taken, but not where innocent mistakes occur. She expressed support for the “flagrant and in conscious disregard” standard of the Unfair Trade Practices Act. **1996 Proc. 4<sup>th</sup> Quarter 279-280.**

At its next meeting the working group again discussed the single instance standard. A regulator said the standard was incorporated into the model because an abusive act may be a life and death issue for the abused victim. An insurer responded that the discrimination in this act is the same type of discrimination that the Unfair Trade Practices Act was intended to eliminate and that a single instance standard was not warranted. A regulator responded that the general business standard of the Unfair Trade Practices Act does not provide enough protection for a victim of abuse. Another regulator opined that the standard was too strict because the single violation may be a minor inadvertent violation in the claims process. The working group agreed to consider a drafting note explaining why the single act standard was needed. **1997 Proc. 1<sup>st</sup> Quarter 129.**

Discussion turned to the single act standard again at the next meeting of the working group. Alternative language was presented, but did not receive much support. **1997 Proc. 1<sup>st</sup> Quarter 121.**

The working group reached consensus on retaining the single act standard with some instructions on the applicability of penalties. One regulator noted it was important to keep the single act standard because, by the time an insurance department can establish a general business practice, too much harm may have occurred already. **1997 Proc. 1<sup>st</sup> Quarter 122.**

A. An industry representative said that the term “unfair discrimination” caused tension and resentment unnecessarily because it connoted malice, ignorance or bias and its very usage was confrontational. He said unfair discrimination fails one or more of the following tests: (1) Is the discrimination actuarially justified? (2) Is the discrimination consistently applied? (3) Is the discrimination socially or politically unacceptable? **1996 Proc. 4<sup>th</sup> Quarter 329.**

An industry representative said regulators should not restrict the use of a reliable underwriting or rating factor if the factor is easily identifiable, easily collectible, a reliable predictor of loss and already in use. A proposal that restricts the use of a reliable underwriting/rating factor for the purpose of redressing social or political problems should demonstrate that there is no plausible non-insurance solution. **1996 Proc. 4<sup>th</sup> Quarter 329.**

A consumer representative said that using domestic abuse as an underwriting criterion is inappropriate because there is not sufficient evidence to actuarially support those guidelines. **1996 Proc. 4<sup>th</sup> Quarter 329.**

As the drafters struggled with the concepts in Section 4, they decided to break the major concepts into Subsections A and B. The first subsection would address the general prohibition against using abuse status as an underwriting or rating criterion and the second subsection would address the use of abuse-related claims as an underwriting or rating criterion. **1997 Proc. 2<sup>nd</sup> Quarter 182.**

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**Section 4A (cont.)**

An insurer representative said his company supported state legislation that took the approach of a non-discrimination law rather than an unfair discrimination law. He cautioned against a model provision that carves out victims of domestic abuse as a special class and gives them preference. It is not part of a liability policy to pay for intentional acts and the exclusion is included to provide incentives against wrongful acts. He suggested there is a significant risk of fraud in the model draft proposed. **1996 Proc. 4<sup>th</sup> Quarter 329.**

The working group discussed a request from a consumer representative to protect the innocent coinsured. If insurers were allowed to apply the intentional acts exclusion to victims of abuse, the victim would be penalized twice. **1997 Proc. 1<sup>st</sup> Quarter 122.**

The working group discussed what lines should be included in Paragraph (1)(b). The industry urged its applicability to residential property only, but a consumer advocate said it should encompass property, auto and commercial lines of insurance. **1997 Proc. 1<sup>st</sup> Quarter 123.**

An insurer representative said that to require general liability carriers to meet the requirements of the model act would create an administrative expense that would not be warranted. **1997 Proc. 1<sup>st</sup> Quarter 123.**

The working group agreed that the subsection should apply to all lines of property and casualty insurance. The group was cautioned not to take a homeowners policy and convert it into a bodily injury policy. A regulator said he did not believe it was the intent of Paragraph (1)(b) to permit a claim, which would otherwise be excluded under a homeowners policy, just because it was an abuse-related claim. **1997 Proc. 1<sup>st</sup> Quarter 123-124.**

All of the working group members concurred that the model act requires insurers to treat victims of abuse in the same way other applicants are treated, but the model does not require an insurer to apply a different set of standards when dealing with a victim of abuse. **1997 Proc. 2<sup>nd</sup> Quarter 167.**

As this subsection was being developed, the working group discussed extensively the case law on the intentional acts exclusion. One interested party said her research showed courts would uphold the exclusion if it was clearly stated in the policy language. A consumer advocate pointed out that another line of cases consider co-insureds to have separate property interests in an insured property. An industry representative said the latter is a minority view. Another suggested that regulators take care not to weaken the intentional acts exclusion through model language. A consumer advocate responded that the model will be changed if necessary when it is adopted by the individual states. **1997 Proc. 2<sup>nd</sup> Quarter 182.**

The chair summarized the discussion on the intentional acts exclusion by stating that it appeared there was general agreement that insurers could not exclude coverage for a loss if the loss was caused by someone other than a co-insured. The group then agreed to the language that ultimately became Subsection B(1)(a). **1997 Proc. 2<sup>nd</sup> Quarter 183.**

The working group discussed the addition of a drafting note to alert states to consider their own laws on the payment to innocent co-insureds. An interested party commented that the language of drafting notes is sometimes lost in the interpretation of model acts. She opined that the language acknowledging payment to innocent co-insureds who are victims of abuse indicates victims of abuse should be provided special treatment. She also suggested the language goes beyond eliminating unfair discrimination. **1997 Proc. 2<sup>nd</sup> Quarter 183.**

After many hours of meetings spent drafting model language, the group found it necessary to again discuss the issue of whether this model will create preferential treatment for victims of abuse. Interested parties did not agree on whether the model as drafted created preferential treatment. A regulator outlined the two choices before the working group: (1) an insurer cannot discriminate based on abuse status; or (2) property and casualty insurance is different than life and disability insurance and an insurer cannot discriminate on the basis of abuse-related claims. **1997 Proc. 2<sup>nd</sup> Quarter 180.**



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**Section 4A (cont.)**

When the model was being considered by the parent committee, representatives from the insurance industry again expressed their concern that the model was creating preferential treatment for victims of abuse. They pointed out that the incidence of fraud would likely increase if the provisions were retained in the model. At a minimum, they requested that the innocent co-insured be required to demonstrate he or she is a victim of abuse and the claim is predicated on domestic violence. A regulator pointed out that nothing in the model limited a company's ability to investigate a claim. Another regulator suggested amending the model to clarify that insurers have the ability to set the level of proof they will require. Language was added to Subsection B to address this issue. **1997 Proc. 4<sup>th</sup> Quarter 167.**

C. Early in the development of the model, the need for a confidentiality provision was recognized. The one contained in the June 1995 draft was a separate section defining discriminatory practices relative to domestic violence. The purpose of the section was to control access by insurers to medical information such that domestic violence information is not released. A regulator noted that the section was too narrow and would be redrafted to incorporate a voluntary waiver provision so that an applicant or an insured could waive confidentiality and make the information available to insurers. **1995 Proc. 2<sup>nd</sup> Quarter 575, 580-581.**

The provisions of Paragraph (3) were the subject of extensive discussion by the working group. Industry representatives indicated that the provisions as drafted [they were later changed] would not allow a company to distribute information in the normal course of business. Comments received from consumer representatives indicated that it was not considered to be in the normal course of business for companies to distribute information related to abuse, but only information related to the underlying medical condition of the applicant or insured. **1996 Proc. 3<sup>rd</sup> Quarter 212.**

The working group discussed the need for companies to have the ability to share information, particularly with regard to reinsurance agreements. A regulator pointed out that insurers have a legitimate need for this information and that there ought to be a way to provide it without violating privacy laws. **1996 Proc. 3<sup>rd</sup> Quarter 218.**

A representative of an insurance trade association stated that one problem with the proposed language was that it required that, when companies were transferring information for various reasons, including reinsurance, mergers and acquisitions, the companies review each file being transferred to ensure there was no information in it relating to abuse or abuse status. **1996 Proc. 3<sup>rd</sup> Quarter 213.**

A trade representative said the language in the section created problems with compliance, particularly if companies were required to black out or otherwise delete information in an applicant or insured's file related to abuse or abuse status. By doing so, the companies would be singling out those files, which would more easily be identified as files of subjects of abuse. The steps a company would take to delete information in files may, in fact, have the reverse affect of what the working group was trying to accomplish. **1996 Proc. 3<sup>rd</sup> Quarter 213.**

Another representative from a trade association also expressed concern with the language in this section. He suggested the working group might limit the application of this section prospectively so that insurers need not go back in files already in existence that might contain information related to abuse or abuse status. The working group chair responded that, because of the small number of files in which this type of information might be contained, it should not create a large administrative burden. The members of the working group agreed to leave the section unchanged. **1996 Proc. 3<sup>rd</sup> Quarter 213.**

Some expressed concern over the confidentiality provision with regard to third parties being subjected to the jurisdiction of the commissioner and the courts. This concern went to the fact that third parties that insurers may need to transfer information to may not wish to be held to the provisions of the act. This may result in some third parties deciding not to do business with those companies. **1996 Proc. 4<sup>th</sup> Quarter 280.**

A commissioner noted that she would not be able to reach third parties that are not engaged in the business of insurance. These entities need to be subject to enforcement by the courts. **1996 Proc. 4<sup>th</sup> Quarter 280.**

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**Section 4C (cont.)**

The working group discussed the need for fraud investigators to have access to confidential information about a victim of abuse. A new subparagraph was drafted for Subsection C(3) to allow an insurer to disclose confidential abuse information to a law enforcement officer or other governmental authority to protect the interests of the insurer in preventing or prosecuting fraud. After review of the Fraud Prevention Model Act, the group decided not to include a provision in the discrimination model. **1997 Proc. 2<sup>nd</sup> Quarter 168.**

**Section 5. Justification of Adverse Insurance Decisions**

When reviewing the first drafting efforts, one state regulator commented that many states allow insurance policies to preclude coverage for injury, damages or harm resulting from intentional acts, where the injury, damages or harm is expected or intended by the insured. He suggested that the intent of the model drafts appeared to reverse the effect of that policy language. **1994 Proc. 4<sup>th</sup> Quarter 699.**

Concern was expressed about the interaction between Sections 4 and 5. In order to clarify their relationship, the working group decided to reference Section 4 within Section 5. **1997 Proc. 1<sup>st</sup> Quarter 124.**

A regulator pointed out that Section 4 only prohibits adverse actions as defined in Section 4. Section 5 sets standards on how a company justifies an adverse action against someone making a claim under Section 4. Section 5 sets forth those actions as insurer may take, even though they may affect a victim of abuse. Section 5 is provided as a “safe harbor” for industry when dealing with subjects of abuse. **1997 Proc. 1<sup>st</sup> Quarter 124.**

An insurer representative presented a scenario of a person who flees his or her home because he or she is a victim of abuse. If the insurer does not insure vacant properties, can the insurer use the vacancy as an underwriting criterion in this situation? A commissioner responded that, if the cancellation reason is vacancy of the property, the cancellation would be acceptable. Another insurance association representative responded that Section 5 puts the insurer in a position of having to demonstrate why it made an underwriting decision. It sets up a notice requirement not necessary for other insureds. **1997 Proc. 2<sup>nd</sup> Quarter 179, 180.**

An interested party directed the working group’s attention to the language “knows or has reason to know” in Section 5. This language requires an insurer to notify the claimant of its decision if it knows or has reason to know the basis of the decision is abuse-related. It does not create an affirmative duty to find out if someone is a victim of abuse. **1997 Proc. 2<sup>nd</sup> Quarter 179.**

Just before adoption of the model, Section 5 was discussed again. The working group decided to delete language setting actuarial standards. The group decided these provisions were more appropriate for the other models that address medical conditions. **1997 Proc. 3<sup>rd</sup> Quarter 206.**

**Section 6. Insurance Protocols for Subjects of Abuse**

An early draft of the model contained a section prohibiting subrogation of claims resulting from abuse. **1995 Proc. 2<sup>nd</sup> Quarter 575, 581.**

A consumer advocate commended the drafters for including a provision requiring insurer protocols and asked that there be a section added to require insurers to consult with domestic violence advocacy groups. She expressed opposition to the removal of a provision on subrogation that was in an earlier draft. **1995 Proc. 4<sup>th</sup> Quarter 804-805.**

A regulator clarified that this section required insurers to develop policies that ensure the safety and privacy of a subject of abuse, but it does not ask insurers to guarantee their safety. **1996 Proc. 3<sup>rd</sup> Quarter 219.**

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**Section 6** (cont.)

A representative of an insurance trade association said the protocols in Section 6 were problematic. A regulator responded that the protocols work at two levels because they require insurers to develop written policies and also require insurers to ensure their employees adhere to these written policies. The trade representative responded that many companies already have such procedures in place. An evaluation of the model privacy act may show valid and adequate protections in place. A consumer representative said that model was written very broadly and did not address the specific concerns related to abuse. **1996 Proc. 3<sup>rd</sup> Quarter 219.**

An insurer representative questioned a requirement that insurers “ensure” the protection of subject of abuse with regard to privacy and safety. He asked if this created a duty with respect to third parties. **1996 Proc. 330.**

A consumer representative said the protocols in this section provide an opportunity for companies to educate their employees and others to ensure that a subject of abuse is protected. She indicated a strong need to protect victims from abuses and emphasized that the assistance of insurers in doing so is of utmost importance. **1996 Proc. 4<sup>th</sup> Quarter 330.**

As Section 6 was being developed, interested parties expressed concern about its applicability to independent contractors such as data processors. **1997 Proc. 1<sup>st</sup> Quarter 129.**

**Section 7. Enforcement**

One of the comments on this section inferred that it did not provide an insurer with adequate due process rights and that it should be deleted. A regulator responded that, unless this model was incorporated into the Unfair Trade Practices Act, it would be best to have a stand-alone enforcement section. After brief discussion, it was agreed that a drafting note would be incorporated at the end of the section to suggest that states delete this section if they have adequate enforcement and due process provisions in place in other state laws. **1996 Proc. 3<sup>rd</sup> Quarter 219.**

During the course of development of the model, regulators considered proposals for several penalty sections to replace Section 7. One proposal tried to separate isolated problems that called for minor penalties from those violations that would result in major penalties against the insurer. **1997 Proc. 2<sup>nd</sup> Quarter 169.**

The proposal also contained two sections that specified hearing provisions for the insured. Each section had different penalties based on the seriousness of the offense. A regulator suggested that, because of the wide latitude given the commissioner in the existing Section 7, the section should not change. Other regulators spoke in favor of retaining the existing section, with its broad authority. One regulator pointed out that states have their own administrative procedure act addressing the hearing process. The working group chair distributed a memo from one of her staff opining that the alternative language was not necessary for enforcement purposes and could conflict with existing state law. He noted that the Section 7 draft was tied to state administrative procedures, and opined there was no need to create a separate process for this statute. **1997 Proc. 2<sup>nd</sup> Quarter 169-170, 178.**

**Section 8. Effective Date**

The working group agreed to add language found in the life and disability versions to clarify that the insurer does not have a duty to conduct a review of its existing contract files to determine which insureds are subjects of abuse. **1997 Proc. 1<sup>st</sup> Quarter 130.**

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*Chronological Summary of Action*

*March 1998: Adopted model on discrimination in property and casualty insurance.*

*December 1998: Model amended to achieve consistency between four models on discrimination against victims of abuse.*

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