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International Human Rights and Anti-Discrimination Branch
Attorney-General's Department
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1 February 2012

Dear Sir/Madam

**CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS:
DISCUSSION PAPER**

We refer to your letter of 28 September 2011 and thank you for the opportunity for the Insurance Council of Australia (Insurance Council) to participate in the Consolidation of Commonwealth Anti-Discrimination Laws Project through meetings with relevant officers of the Departments of Attorney General, Finance and Deregulation and attendance at the Sydney Stakeholder Forum on 18 November 2011.

The Insurance Council is the representative body of the general insurance industry in Australia.¹ General insurers provide insurance products ranging from those usually purchased by individuals (home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

We welcome the opportunity to provide a submission on the Discussion Paper and the Insurance Council confines its comments to the Exceptions and Exemptions chapter and specifically the second part of question 20: *Should the consolidation bill adopt a general limitations clause? **Are there specific exceptions that would need to be retained?***

The Insurance Council supports the consolidation project's intention to provide clearer and more consistent anti-discrimination legislation, to make it easier for individuals and business to understand their respective rights and obligations². We submit the retention of an insurance exemption in the consolidated law is necessary to achieve this in the area of general insurance.

This submission outlines the relationship between a lawful ability to reasonably discriminate, or differentiate on the basis of risk, to the provision of affordable general insurance. As we consider an insurance exemption must be retained, the Insurance Council does not support a general limitations clause applying to general insurance.

¹ Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. September 2011 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$35.1 billion per annum and has total assets of \$113.9 billion. The industry employs approx 60,000 people and on average pays out about \$104 million in claims each working day.

² Attorney-General's Department (September 2011) *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, p. 5, para.3.

Insurance exemptions – decisions must be reasonable

Exemptions for insurance are provided in the following Commonwealth Acts:

- Sex Discrimination Act 1984 (Cth) (SDA) – section 41;
- Age Discrimination Act 2004 (Cth) (ADA) – section 37;
- Disability Discrimination Act 1992 (Cth) (DDA) – section 46.

It is important to note the exemptions do not provide a blanket exemption for insurance from the operation of the Acts. Rather, the exemption only applies to the refusal to offer, or a restriction on the offer based on actuarial or statistical data (upon which it must also be reasonable to rely). In the case of the ADA and DDA, where no such data is available or can be reasonably obtained, the exemption applies to reasonable discrimination based on other relevant factors.

Further, insurance exemptions provide a means to manage risks lawfully and differentiate on the basis of risk, for example by application of an exclusion or a premium loading. Differentiation on the basis of risk is essential to the initial sale of insurance, whereas a decision on a claim generally depends on the terms of the insurance purchased.

Risk assessment underpins insurance affordability

The Insurance Council is concerned a general limitations clause, in lieu of an insurance specific exemption, would create unnecessary uncertainty and leave the risk assessments essential to insurance exposed to legal challenge. Such uncertainty would negatively impact on the affordability of insurance, with the majority of consumers cross subsidising the increased risk of a few, as well as the cost of reinsurance and capital reserves required by insurers.

Rigorous risk assessment determines the underwriting criteria and pricing for insurance and is the basic principle that underpins the successful operation of insurance models. It allows the insurer to offer insurance at a price appropriate to the insured and enables the insurer to put aside reserve funding for future liabilities and estimate the required level of reinsurance. It also allows insurers to target certain risks and provide a broad range of insurance products for the community.

Key risk factors, predominantly based on actuarial and statistical data, may include the type of motor vehicle being insured and the location of a residence. Depending on the nature of the risk being assessed, risk profiles may also differ for men and women and for different age groups, with premiums adjusted accordingly. For example:

- **Motor insurance** - Premiums reflect the risk attached to the age and sex of the insured driver. Younger drivers typically have less driving experience and are more likely to engage in high risk behaviour, with male drivers presenting a greater risk than female drivers. For example: While speeding-related crashes involve all age groups, over 50% involve male drivers aged between 17 and 39 years.³
- Other criteria will also influence motor premiums, for example: driving record, claims history, whether a car is used for private or business purposes, is subject to finance, and the agreed value of the car. Individual circumstances may also be considered such as whether a driver has completed a driver skill/safety course.
- **Home building and contents insurance** - Premiums may reduce with age. For example: Retirees may present a decreased risk of burglary, occupying the home more often. Premiums may also take into account other factors such as whether an alarm is installed on the property.

³ NSW Roads and Traffic Authority, (October 2011) *Road Users Handbook*, p. 39.

- **Sickness and accident** – Premiums reflect information⁴ on the likelihood of particular age groups to have accidents; including chances of an accident leading to hospitalisation; the average length of time spent in hospital and the cost of hospital treatment; as well as the likelihood of death of particular age groups following an accident.
- **Travel insurance** – Premiums will take into account a range of factors including age, the destination and duration of travel and any pre-existing medical conditions.

Preferred insurance exemption model for consolidated law

The Insurance Council submits an appropriate model insurance exemption for the consolidated law is provided by the recently reviewed Victorian Equal Opportunity Act 2010 (EOA), refer section 47 in **attachment**. Our submission also draws upon previous Insurance Council submissions made to the Victorian Scrutiny of Acts and Regulations Committee's *Inquiry into Exceptions and Exemptions to the Equal Opportunity Act 1995 (Vic)*.⁵

The EOA provision is similar to the ADA and DDA provisions but provides a specific focus on discrimination based on actuarial or statistical data and 'any other relevant factors'. The Australian Human Rights Commission's (AHRC) Guidelines⁶ provide some examples of what may constitute other relevant factors for the purposes of the DDA:

- **Medical opinion** – it may be reasonable to rely upon the opinion of a medical practitioner on a medical matter.
- **Opinions from other professional groups** - It may also be reasonable to rely on the opinion of other professionals with relevant experience, for example occupational therapists, physiotherapists, clinical psychologists or mobility trainers.
- **Actuarial advice or opinion** – Actuarial opinion may be helpful in interpreting medical studies or making allowances for differences in degree of disability between an individual applying for insurance and the study population.
- **Information about the individual seeking insurance** – Information about the particular person seeking insurance will often be relevant to refer to where it is available, in assessing whether the person presents a higher or lower risk than the average person with the disability concerned.
- **Commercial judgment** - Assessing the likelihood of an insurance claim can sometimes go beyond medical and statistical probability. There may be circumstances where it is reasonable for an insurer to consider an individual's propensity or incentive to make a claim at the time that it is assessing the overall risk of insuring someone with a particular disability.

Practice of other insurers in the industry, and other relevant commercial practice including by reinsurers, may be taken into account in deciding what is reasonable.

Adopting the EOA model will positively impact on compliance costs for insurers and support the Government's aim of providing clearer and more consistent legislation.

⁴ For example, information from the Australian Bureau of Statistics and the Australian Institute of Health and Welfare.

⁵ Insurance Council submissions dated 18 April 2008, 15 July and 4 September 2009.

⁶ Human Rights Commission, (Revised 2005) *Guidelines for Providers of Insurance and Superannuation*.
http://www.hreoc.gov.au/disability_rights/standards/insurance/insurance_adv.html accessed 18 January 2012.

Low incidence of discrimination complaints against general insurers

Insurance Council members report an exceptionally low incidence of discrimination complaints received through their internal dispute processes.

For the financial year ending 30 June 2010, there were almost 36 million general insurance policies issued⁷. Of those policies issued, in 2010-2011:

- 4 of the 297 complaints made under the ADA to the AHRC related to the area of 'superannuation, insurance';
- 8 of the 2176 complaints under the DDA related to area of 'superannuation, insurance';
- There were no complaints listed for insurance under the SDA.⁸

Where a complaint is made, our members consider the existence of the exemption helps to clarify the insurer's lawful decision making processes. The exemption also helps insurers satisfy obligations they have to explain to consumers the reasons they may have been denied or offered insurance on particular terms.⁹

As there has been no suggestion of consumer detriment arising from the current operation of the Commonwealth exemptions in relation to general insurance, and having regard to the importance of the exemption to the affordability of insurance, the Insurance Council submits a specific insurance exemption must be provided in any future Commonwealth consolidated anti-discrimination law.

If you require any further information, please contact Mr Anning on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

⁷ Financial Ombudsman Service, *Overview of the Year 2009/2010*, p. 32 [2011: statistics not available at time of writing].

⁸ Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) *Annual Report 2010-2011*.

⁹ Section 75 of the Insurance Contracts Act 1984 (Cth) requires the insurer to provide upon request reasons for the refusal of insurance. It is a penalty offence under the IC Act not to do so. The General Insurance Code of Practice provides that if the insurer cannot offer insurance, it will provide reasons, refer to another insurer or the Financial Ombudsman Service or NIBA and make available information about the insurer's complaints handling process if the consumer is unhappy with the decision.

DISABILITY DISCRIMINATION ACT 1992 (CTH)

46 Superannuation and insurance

- (1) This Part does not render it unlawful for a person to discriminate against another person, on the ground of the other person's disability, by refusing to offer the other person:
- (a) an annuity; or
 - (b) a life insurance policy; or
 - (c) a policy of insurance against accident or any other policy of insurance; or
 - (d) membership of a superannuation or provident fund; or
 - (e) membership of a superannuation or provident scheme;
- if:
- (f) the discrimination:
 - (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
 - (ii) is reasonable having regard to the matter of the data and other relevant factors; or
 - (g) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.
- (2) This Part does not render it unlawful for a person to discriminate against another person, on the ground of the other person's disability, in respect of the terms or conditions on which:
- (a) an annuity; or
 - (b) a life insurance policy; or
 - (c) a policy of insurance against accident or any other policy of insurance; or
 - (d) membership of a superannuation or provident fund; or
 - (e) membership of a superannuation or provident scheme;
- is offered to, or may be obtained by, the other person, if:
- (f) the discrimination:
 - (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
 - (ii) is reasonable having regard to the matter of the data and other relevant factors; or
 - (g) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.

AGE DISCRIMINATION ACT 2004 (CTH)

37 Superannuation, insurance and credit—actuarial data etc.

Superannuation and insurance

- (1) Subsections (2) and (3) apply to the following:
- (a) an annuity;
 - (b) a life insurance policy;

- (c) a policy of insurance against accident or any other policy of insurance;
 - (d) membership of a superannuation or provident fund;
 - (e) membership of a superannuation or provident scheme.
- (2) This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's age:
- (a) in respect of the terms or conditions on which the annuity, policy or membership is offered to, or may be obtained by, the other person; or
 - (b) by refusing to offer the annuity, policy or membership to the other person; if the condition in subsection (3) is satisfied.
- (3) The condition is satisfied if:
- (a) the discrimination:
 - (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
 - (ii) is reasonable having regard to the matter of the data and other relevant factors; or
- Note: The Commission and the President can require the disclosure of the source of the actuarial or statistical data (see section 54).
- (b) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.

54 Power to require source of actuarial data or statistical data

- (1) Subsection (2) applies if a person has acted in a way that would, apart from paragraph 37(3)(a) or subsection 37(5), be unlawful under Part 4.
- (2) The President or the Commission may give the person a notice in writing, as prescribed, requiring the person to disclose to the President or to the Commission, as the case may be, the source of the actuarial or statistical data on which the act of discrimination was based.
- Note: Failure to comply with the requirement is an offence under section 52.

SEX DISCRIMINATION ACT 1984 (CTH)

41 Insurance

- (1) Nothing in Division 1 or 2 makes discrimination by one person (in this subsection called the **insurer**) against another person (in this subsection called the **client**) unlawful if:
- (a) the discrimination is on the ground of the client's sex; and
 - (b) the discrimination is in the terms on which an insurance policy is offered to, or may be obtained by, the client; and
 - (c) the discrimination is based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely; and
 - (d) the discrimination is reasonable having regard to the data; and
 - (e) if the client gives the insurer a written request for access to the data—either:
 - (i) the insurer gives the client a document containing the data; or
 - (ii) the insurer:

- (A) makes a document containing the data available for inspection by the client at such time or times, and at such place or places, as are reasonable; and
 - (B) if the client inspects the document—allows the client to make a copy of, or take extracts from, the document.
- (1A) Paragraph (1)(e) does not apply if the Commission has, under section 44, granted an exemption from the operation of that paragraph.
- (2) In this section:
- insurance policy*** includes an annuity, a life assurance policy, an accident insurance policy and an illness insurance policy.

EQUAL OPPORTUNITY ACT 2010 (VIC)

47 Exception — insurance

- (1) An insurer may discriminate against another person by refusing to provide an insurance policy to the other person, or in the terms on which an insurance policy is provided, if—
- (a) the discrimination is permitted under—
 - (i) the Sex Discrimination Act 1984 of the Commonwealth; or
 - (ii) the Disability Discrimination Act 1992 of the Commonwealth; or
 - (iii) the Age Discrimination Act 2004 of the Commonwealth; or
 - (b) the discrimination—
 - (i) is based on actuarial or statistical data on which it is reasonable for the insurer to rely; and
 - (ii) is reasonable having regard to that data and any other relevant factors; or
 - (c) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.