

The Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
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Attention: Ms Julie Dennett

By email: legcon.sen@aph.gov.au

31 January 2013

**SUPPLEMENTARY SUBMISSION: HUMAN RIGHTS AND
ANTI-DISCRIMINATION BILL 2012 – EXPOSURE DRAFT LEGISLATION**

The Insurance Council of Australia (Insurance Council)¹ is pleased to provide a supplementary submission to our 21 December 2012 submission (no.420) to the Legal and Constitutional Affairs Legislation Committee's (Committee) inquiry into the *Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation* (Exposure Draft).

We note *beyondblue* and the Mental Health Council of Australia appeared before the Committee on 23 January 2013 to discuss submission no. 586 (the Joint Submission), which relates specifically to the Exposure Draft's proposed section 39. As the Insurance Council did not have the opportunity to appear, we offer the comments below on the amendments proposed by the mental health organisations.

The Insurance Council would like to assure the Committee that its members take very seriously their responsibilities under the existing insurance exceptions to Commonwealth anti-discrimination legislation. Insurance Council members are keen to ensure that all groups in Australian society have the access they need to general insurance. To this end, the Insurance Council and its members have engaged with organisations representing senior Australians and those with a mental illness on how more insurance could be provided to those with special needs. The Insurance Council has also undertaken a number of initiatives to improve disclosure of information about policies and the availability of information on the providers of particular types of insurance.

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. 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 2012 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$37.9 billion per annum and has total assets of \$115.7 billion. The industry employs approx 60,000 people and on average pays out about \$116 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

The Insurance Council remains keen to work with the mental health sector to consider opportunities to improve the availability of general insurance for those with mental illness. For example, we are willing to discuss improving the precision with which mental illness is described by the medical profession and the need for improved data in order to help insurers price the risk relating to mental illness claims. Progress on these matters would provide insurers with data with which they could better assess the risk of providing insurance for those with a mental illness.

As explained in our previous submission, the Insurance Council opposes section 39(5)(iii) of the Exposure Draft which sets out a requirement to provide data, upon written request, to an individual consumer. In addition to the significant commercial sensitivity issues, we remain concerned that data provided to an individual consumer may have limited value, as interpreting the data without appropriate expertise may be difficult. It also has the potential to confuse or possibly concern the individual, for example where data reflects medical/mortality statistics. Consequently, we do not support amendments proposed by the mental health sector which relate to this proposed obligation.

The Insurance Council is concerned by the impression provided to the Committee that the insurance industry is disregarding its existing obligations under current legislation in relation to the exception and mental health. We are unaware of the Australian Human Rights Commission (AHRC) identifying any systemic issues in regard to any of the existing insurance exceptions.

It is worth noting that in 2011-2012, 14 of the 207 complaints made under the Anti-Discrimination Act (ADA) to the AHRC related to the area of 'superannuation, insurance (both life and general)' and that 7 of the 1249 complaints under the Disability Discrimination Act (DDA) related to area of 'superannuation and insurance'; and there were no complaints listed for insurance under the Sex Discrimination Act (SDA). This low level of complaint needs to be seen in the context of there being approximately 36 million general insurance policies issued annually. The small number of complaints received by the AHRC about insurance as a whole does not point to a problem that warrants imposing a serious compliance burden on insurers.

The Joint Submission claims the proposed amendments are not anticipated to have the effect of creating additional regulation or unnecessary burdens for the insurance industry. The Insurance Council submits that this is not the case.

Although insurers have obligations under the Insurance Contracts Act 1984 (section 75), to provide reasons, when requested, for cover offered on less advantageous conditions than that provided to other consumers and under the General Insurance Code of Practice to provide reasons when cover is declined, it is not the case, as claimed at page 4 of the Joint Submission, that the proposed amendments reflect existing statutory obligations.

We submit the proposed amendments in the Joint Submission represent unnecessary and additional administrative and compliance burdens. For example, the proposals would:

- ***require the insurer to apply to the AHRC to explain why provision of data to consumers upon request is unreasonable;***

As this proposal would apply generally to the use of the exemption on the basis of age, gender or disability, the potential number of individual requests for data is very large. Individual approaches by insurers to the AHRC for relief from having to supply the actual data would represent significant administrative work for both the insurer and the AHRC.

As noted in our previous submission, the Insurance Council supports the provision of information to justify the use of the insurance exception. However, we consider it is appropriate for the statistical and actuarial data to be requested by and provided to the AHRC (or other court or tribunal).

Rather than creating a potentially serious compliance burden for no additional benefit, the Insurance Council submits it would be more efficient for the AHRC to have the power, on its own motion and in response to complaints, to request data from an insurer. It goes without saying that the AHRC should be adequately resourced to be able to monitor compliance with the insurance exemption.

The AHRC is well placed to interpret data from an industry level (as opposed to an insurer level) and how this impacts on the underwriting of an individual policy. In considering the data, the AHRC could also perform an important educative role as risk factors become increasingly understood in the community.

- ***provide powers to the AHRC to require provision of the data to a consumer and/or a plain English explanation;***

This proposal would also involve significant cost for industry. In view of the Exposure Draft's sec 39(5)(iii), before the AHRC could use its proposed powers to require, as appropriate, the provision of data and/or a plain English explanation be provided to a consumer, the insurer would need to first apply to the AHRC where it considered such provision to be unreasonable.

In addition, requiring individual written explanations for decisions could be cost prohibitive for some insurance products. Travel insurance, for example, is a low cost, short term insurance product. The additional costs resulting from the proposed amendments could result in an unintended contraction of competition in the marketplace.

Should such an amendment nonetheless be considered favourably by the Committee, the Insurance Council submits that the Exposure Draft must also provide an avenue for the AHRC decision/direction to be reviewed or appealed.

- ***make it an offence not to provide the required information within 28 days;***

We query the demonstrated need for a specific industry related offence provision for the insurance exception, noting that other exceptions are proposed by the Bill and do not have offence provisions attached. We are unaware of any systemic issues relating to failures to respond to a direction of the AHRC.

- ***seek 'refinements' including clarification of 'other relevant factors' and require an insurer to provide an explanation of the specific factors taken into account and information on avenues of redress if consumer not satisfied;***

The Insurance Council submits that it would be impractical to attempt to define ‘other relevant factors’ in the legislation and for an insurer to be required to report exhaustively on how they have considered each factor. The Insurance Council suggests that it is also unnecessary. Guidance already exists under the DDA in relation to the concept of ‘other relevant factors’.

The Insurance Council is concerned by the impression provided to the Committee that industry has not been willing to adopt or consider the Guidelines. In fact, the Insurance Council’s recent response to the Australian Law Reform Commission’s Discussion Paper ‘Age Barriers to Work’ dated 30 November 2012 stated we would be pleased to co-operate with the AHRC and industry stakeholders in relation to its Proposal 4-4:

The Australian Human Rights Commission, in consultation with the Insurance Council of Australia and the Financial Services Council, should develop guidance material about the application of any insurance exemption under the Age Discrimination Act 2004 (Cth) or consolidated anti-discrimination legislation.

In addition, our 1 February 2012 submission to the Attorney General on the Consolidation project highlighted the usefulness of the current Guidelines which, as we understand it, were created in consultation with stakeholders and revised in 2005.

The Insurance Council remains willing to work with stakeholders to update the Guidelines under a consolidated law to provide a fuller explanation of ‘other relevant factors’. In updating the Guidelines, the Insurance Council would also be willing to explore the development of guidance on the amount of detail provided to an individual consumer when an insurer is explaining why cover is declined or provided at a higher premium under the insurance exception.

The Joint Submission proposes that “Before refusing cover to someone on the grounds of age, sex, or disability having regard to ‘other relevant factors’, an insurer must take into account the circumstances of the individual applicant”. In relation to general insurance, in particular mass marketed policies such as travel which are highly competitive and price sensitive, it would be prohibitively expensive for an insurer to underwrite on an individual basis, adding complexity and delays to the application process for the insurer and consumer alike. The increased cost would need to be reflected in the level of premiums generally.

We note that it is also proposed by the Joint Submission that written information should contain avenues of redress, if the consumer is not satisfied. Under current ASIC Regulatory Guidance, general insurers (and other financial service providers) are already obliged to treat expressions of dissatisfactions as complaints – which trigger the insurer’s complaints processes. As set out in our previous submission, the Insurance Council is concerned to avoid the potential duplication and confusion if an individual can access multiple complaints processes at the same time.

- ***Require insurers to provide each year to the AHRC the numbers of declined cover on the basis of age, sex or disability for the purpose of publication on the AHRC website/annual report.***

We are advised this information is not collected and would require costly system changes to provide. It is not clear from the proposal how and to what purpose the data would be collected that could justify the associated cost.

Yours sincerely

Robert Whelan
Executive Director & CEO