

21 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

RE: Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

The Financial Services Council (FSC) welcomes the opportunity to make this submission to the Senate Legal and Constitutional Affairs Committee in response to the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012 (the Bill)*.

The FSC represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advisory networks. The FSC has over 130 members who are responsible for investing \$1.8 trillion on behalf of more than 11 million Australians.

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Stock Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The FSC supports the consolidation of the existing Commonwealth Anti-Discrimination legislation into a single law and the principles underpinning the drafting including: lifting differing levels of protections to the highest current standard; resolving gaps and inconsistencies without diminishing protections; clearer and more efficient laws; enhancing protections where the benefits outweigh any regulatory impact; voluntary measures that business can take to assist their understanding of obligations and reduce occurrences of discrimination; and a streamlined complaints process.

Section 39 – Exceptions for insurance, superannuation and credit

Life insurance products play an important role in the community as they protect consumers (and their dependents) against the financial risks of premature death, disability (both permanent and temporary), trauma and in the case of annuity products, longevity. Given 95% of Australian families

do not have adequate levels of life and income protection insurance¹ and the devastating social and economic consequences caused by such high levels of underinsurance, prudent underwriting and risk assessment of applicants by life insurers is essential to ensure life insurance products remain affordable and accessible for consumers and the industry remains sustainable.

Therefore, the FSC welcomes Section 39 of the draft Bill which includes a specific exception in relation to the provision of insurance, superannuation and credit. This will ensure that the regulatory certainty and clarity that currently exists and enables insurers to appropriately assess risk and make distinctions on the basis of disability, age or sex will continue.

We have previously submitted in response to the Discussion Paper that the existing exemptions also provided significant consumer protection through the requirement that where an insurer does make a distinction on the basis of disability, gender or age they can only do so where the decision is supported by reasonable actuarial or statistical data or other relevant factors. We note that the draft Bill retains these provisions and the FSC supports this.

However, we note that section 39 also includes the following requirement, presently contained only in the Sex Discrimination Act:

(5) For the purpose of paragraphs (2)(c), (3)(c) and (4)(c), the condition is that either:

(a) the following subparagraphs are satisfied:

(iii) if the other person has given the first person a written request for access to the data—the first person has, within a reasonable period after the request is made, provided the other person with a copy of the data, or with reasonable access to the data; or

The FSC does not support the inclusion of this provision as currently drafted.

In the pricing and underwriting process, life insurers utilise a range of data sources including actuarial tables as an input to premiums, in addition to other sources - some of which are publicly available, others which are proprietary and therefore, commercially sensitive. Locally sourced data from the Australian Government Actuary, Australian Bureau of Statistics and other relevant data (for example, Australian Institute of Health and Welfare) including international data sources together with an insurer's own claims experience or the reinsurer's claims experience may also be used.

In addition to the commercially sensitive nature of the data used by insurers in setting premiums and pricing risks, it is often the case that the data used for underwriting and pricing is highly technical. Predictive modelling of data includes the use of statistical tools and leads to the creation of complex business rules and estimates of life expectancy and risk selection. The complexity of the data and/or complexity in the analysis and modelling of data is such that data is unlikely to be meaningful to an applicant or otherwise misunderstood. We submit that the requirement to provide such information directly to the customer, without disclosure and consumer understanding about the context and way in which an insurer utilises the data is likely to lead to confusion. The task of

¹ Lifewise/NATSEM 2010 Underinsurance Report: Understanding the Social and Economic Impact of Underinsurance

providing what may be highly technical data in a way that the individual can readily understand, and potentially to explain the same, may also present a significant administrative burden for life insurers.

It may also raise false expectations for consumers as an individual may mistakenly expect that he or she can produce a different set of data to counter an insurer's decision.

Importantly, we refer also to the possible inappropriateness of providing data directly to the customer, where such data concerns may include information about mortality rates and the likely development, progression and reduction of life expectancy in relation to a disease or health condition. Such information, in the context of an insurance application where a customer has a significant or serious health history, may be confronting and distressful to the customer. Guidance might be taken from the Commonwealth Privacy Act which recognises the ability of a corporation to withhold personal information where access would pose a serious threat to the life or health (including mental health) of an individual (National Privacy Principle 6.1 (a) and (b)).

In light of all the above considerations, the FSC believes it is appropriate for the legislation to require that an insurer must provide, or provide access to, the relevant actuarial or statistical data if requested to a court or to the Australian Human Rights Commission in relation to a matter under investigation. However this right is already reflected in the proposed section 107 of the legislation.

RECOMMENDATION

The FSC recommends proposed provision s39(5)(a)(iii) be deleted for the reasons given above.

We thank the Senate Committee again for the opportunity to comment on the draft Bill. Please contact me on _____ should you wish to discuss any aspect of this submission.

Yours Sincerely

Holly Dorber
Senior Policy Manager, Life Insurance