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Senate Standing Committees on Legal and Constitutional Affairs  
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*Attention: Ms Julie Dennett*

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

21 December 2012

### **INQUIRY INTO THE HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012 – EXPOSURE DRAFT LEGISLATION**

Thank you for your letter of 23 November 2012 inviting the Insurance Council of Australia<sup>1</sup> (Insurance Council) to provide a submission to the Legal and Constitutional Affairs Legislation Committee's (Committee) inquiry. We welcome the opportunity to provide this submission on the *Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation* (Exposure Draft).

The Insurance Council is the representative body of the general insurance industry in Australia. Our members provide general insurance products such as those 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 support the inclusion of an insurance specific exception in the Exposure Draft at section 39. The ability for insurers to lawfully discriminate is integral to the assessment of risk and the provision of affordable insurance to the whole community. The proposed exception, albeit subject to a three year review like other exceptions in the Exposure Draft, will provide the immediate certainty necessary for our members to continue to appropriately price and structure general insurance products.

A key concern however is the Exposure Draft's requirement for the provision of data to an individual upon written request. While the Insurance Council does not challenge the provision of data by our members to the Australian Human Rights Commission (the Commission) or another judicial body, in order to substantiate that the terms of the exception are being satisfied, we have serious concerns about the utility of providing commercially sensitive information to an individual consumer. Our concerns are detailed in the **Attachment**.

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<sup>1</sup> 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.

The statistical and actuarial data held by our members for underwriting and regulatory compliance purposes may comprise intellectual property including for example pricing algorithms. Accordingly, as the Insurance Council is not privy to the detail of this information, our comments on the Exposure Draft's statistical and data requirements under proposed section 39 are general in nature.

We would like to emphasise that the fundamental objective of insurers is to provide insurance which manages risk for an appropriate price. The current exceptions do not provide a blanket exemption for insurance from the operation of the Acts but rather provide a means to manage risks lawfully and differentiate on the basis of risk at the initial point of sale of insurance, for example by application of an exclusion or a premium loading. This contrasts with a decision on a claim which will generally depend on the terms of the insurance subsequently purchased.

It is also the case that while some premiums may increase due to risk rating factors, such as age, other premiums for insurance products may decrease. For example, home building and contents for retirees who may be more likely to be present in the premises, reducing the risk of theft.

If you wish to discuss further any of the issues raised in this submission, please contact the Insurance Council's General Manager, Regulatory Policy, Mr John Anning

Yours sincerely

Robert Whelan  
Executive Director & CEO

**Data upon written request – commercial sensitivities**

We note the Exposure Draft's insurance exception is modelled on section 41 of the Sex Discrimination Act 1984 (Cth) (SDA) as the 'highest current standard' across current Commonwealth anti-discrimination laws. The proposed condition to be satisfied for the exception to apply at section 39(5)(b)(iii) is significantly different to the model used in the current Age Discrimination and Disability Discrimination Acts. The Exposure Draft states:

(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;*** (our emphasis)

As noted above, the Insurance Council does not object to the provision of information in support of the insurance exception. We submit however the relevant data should only be required to be provided to the Commission (or other judicial body such as Court or Tribunal) and where requested, consideration should be provided to maintaining some data as commercial in confidence.

Our members advise the data which is relied upon in some product areas involves a substantial component of in-house developed data which is commercially sensitive. There is significant concern therefore that the Exposure Draft could compel the release of insurer's intellectual property such as rating and underwriting information which is commercially sensitive and form the basis upon which an insurer has priced a retail product, without an appropriate opportunity for the data to be treated as commercial in confidence.

Insurance Council members report limited experience with requests made under section 41 of the SDA. (Apart from discrimination on the basis of gender not being common in general insurance, discrimination complaints in relation to insurance across all of the Acts remain consistently low<sup>2</sup>.) It is our understanding that it is the Commission's practice to provide the individual with a copy of relevant data relied upon for the exemption. However, we are also advised that the Commission has considered and granted requests to maintain confidentiality of data which is specified by the insurer as commercially confidential. In those instances, we understand the Commission will discuss the data generally but not provide the full detailed data to the individual.

Similarly, it is the experience of other members that due to the commercial sensitivities of product portfolios, data may be aggregated and provided by affidavit to the Commission by an actuary and/or product manager. Typically the affidavit includes aggregated data of risk factors (on the basis that the underwriting process is intellectual property and commercially sensitive) and a breakdown of cost by reference.

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<sup>2</sup> There are approximately 36 million general insurance policies issued. Of those policies issued, in 2011-2012: 14 of the 207 complaints made under the ADA to the AHRC related to the area of 'superannuation, insurance'; 7 of the 1249 complaints under the DDA related to area of 'superannuation and insurance'; and there were no complaints listed for insurance under the SDA.

In addition to the key commerciality issue outlined above, the Insurance Council submits the requirement for the insurer to provide a copy of the data or reasonable access to the data to an individual consumer may have limited value, as interpreting the data without appropriate expertise may be difficult. It has the potential to confuse or possibly concern the individual, for example where data reflects medical/mortality statistics. Therefore it is considered more appropriate to provide the data to the Commission, which can consider and explain the data as necessary.

This approach is further preferred having regard to proposed section 197(3)(i) of the Exposure Draft which enables the Commission to give a direction to restrict publication in order to prevent the unreasonable disclosure of confidential commercial information.

The Insurance Council submits the administrative burden arising from the unlimited ability for individual consumers to request data under the proposed section 39 could also be significant. We are concerned about the potential impact on both insurer's complaints handling and internal dispute resolution processes, extending time and cost associated with these processes. This could negatively impact the effective management of complaints and industry compliance with other obligations such as those under the General Insurance Code of Practice.

For instance, there is concern that the Exposure Draft provisions will potentially extend to a request for data as part of the internal dispute resolution process. Our members are concerned they would need to ensure a suitably qualified and experienced person in the internal dispute process is available to respond to such requests. This may include seeking input from the relevant reinsurer or actuary, adding time and costs to the process. We are advised that some data may be sourced from appointed actuaries and reinsurers, which would need to be considered, interpreted and inserted into a written response.

It is submitted that the Exposure Draft should also make it clear that where an individual consumer has made a complaint which is being considered by an organisation's internal dispute resolution process, it must not also make a complaint about the same conduct to the Commission. This is consistent with proposed clause 90 which makes it clear that unless exceptional circumstances apply an individual will not be permitted to apply to multiple jurisdictions simultaneously.

The Insurance Council's previous submission to the Attorney General's Department dated 1 February 2012 on the Consolidation project proposed section 47 of the Equal Opportunity Act 2010 (Vic) as a possible model for the Exposure Draft. This model was legislated following a state parliamentary inquiry into exceptions and exemptions in the *Equal Opportunity Act 1995* by the Scrutiny of Acts and Regulations Committee throughout the course of 2008 - 2009. This Act has as its focus discrimination based on actuarial or statistical data and 'any other relevant factors'. There is no requirement to provide the actuarial or statistical data to an individual consumer. For the reasons outlined above, we again submit this Act would better serve as an effective insurance exception model for the consolidated law.

### **3 year review**

The Exposure Draft Explanatory Notes (para 208) states that the exception is:

'likely to be permitted under the general justifiable conduct exception. However, it has been retained to provide certainty to industry while a body of law develops in relation to

the concept of justifiable discrimination. Like all other exceptions, it will be subject to a review after three years...'

Although our strong preference is for a permanent exception modelled on section 47 of the Equal Opportunity Act (Vic), should the Committee recommend the current wording of the Exposure Draft exception remain, the Insurance Council submits the proposed three year review will need to provide an appropriate avenue to consider and address any unintended consequences of the legislation. We submit the review could also include issues arising from the changes proposed to the burden of proof.

As noted above, our members have limited experience with the operation of section 41 of the existing SDA. This heightens concern about the potential effect of the proposed obligation. General case law on the justifiable conduct exception which is not insurance specific is unlikely to be as helpful as insurance specific case law in terms of working out what insurers need to do in order to fall within the justifiable conduct exception.

Having regard to the low incidences of discrimination complaints concerning insurance and the rare occurrence of legal action, the Insurance Council queries whether three years will be a sufficient period of time for case law to be developed around the application of the justifiable conduct exception to insurance. The future review should therefore also consider the advantages of maintaining specific exceptions such as insurance.

### **Protected Attributes**

Our understanding is that the general intention of the Exposure Draft is to consolidate the existing anti-discrimination provisions as they relate to insurance. The Insurance Council would therefore appreciate confirmation and clarification in the draft legislation that those protected attributes such as pregnancy which are subject to the specific exceptions given to insurers under current legislation continue to be subject to the exception to be provided under section 39.

### **Other issues for clarification**

#### ***Definition of 'insurance policy'***

Section 39(b) currently reads 'a policy of insurance against accident or illness, or any other policy of insurance'. We suggest for clarity and consistency with other legislation (such as the Corporations Act 2001 and the Insurance Contracts Act 1984) the definition could instead read:

*"insurance policy means any of the following:*

- a) a contract of insurance including a contract of general insurance or a contract of life insurance;*
- b) an annuity"*

#### ***Operation of section 52***

Exposure draft section 52 provides that requesting or requiring information for a discriminatory purpose is unlawful conduct. We would like to clarify (as seems the intention from the Explanatory Notes pages 51-52) that in the hypothetical event that conduct is later found to be unlawful, the process of requesting the underwriting information does not become unlawful under section 52.