



1 February 2012

Assistant Secretary
International Human Rights and Anti-Discrimination Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2000

By email: antidiscrimination@ag.gov.au

Dear Sir/Madam

RE: Consolidation of Commonwealth Anti-Discrimination Laws

Thank you for the opportunity to comment on the issues raised in the *Consolidation of Commonwealth Anti-Discrimination Laws* discussion paper.

The Financial Services Council (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 welcomes the consolidation of the Commonwealth Anti-Discrimination Laws and supports the principles underpinning the project which include: a reduction in complexity and inconsistency in regulation; maintaining existing anti-discrimination protections in federal legislation; ensuring simple and cost-effective mechanisms for resolving complaints; and clarifying and enhancing protections where appropriate.

In particular, we note the current exemptions contained in existing Anti-Discrimination Legislation in relation to insurance and superannuation are not the focus of the Discussion Paper or the specific questions posed therein. The FSC welcomes this approach and submits that the current exemptions

for life insurance and superannuation in the *Sex Discrimination Act 1984* (SDA), *Disability Discrimination Act 1992* (DDA) and *Age Discrimination Act 2004* (ADA) remain appropriate and are consistent with community standards and expectations of the life insurance industry. Therefore, the FSC recommends that these specific exemptions should be retained in the Consolidated Act.

Background and current experience

Life insurance plays an important role in the community as it protects 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.

Individual life insurance in Australia is voluntary and is risk-rated through the insurance underwriting process and importantly, the majority of policies issued are guaranteed renewable². Evidence-based underwriting that takes into account an individual's risk profile ensures that the premiums paid by each policyholder reflect their risk relative to the whole pool. This is a fundamental principle of voluntary insurance and means that insurers necessarily assess an individual's application for life insurance on the basis of a range of criteria including their current state of health, health history, family medical history, habits, travel, residence, occupation and pastime activities etc.

The inclusion of a specific exemption in relation to the provision of insurance and superannuation in the Consolidated Anti-Discrimination Act is necessary to 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 gender remains. We note that the existing exemptions also provide 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. The FSC supports the inclusion of these provisions in the Consolidated Act.

Statistics from the Australian Human Rights Commission highlight the effectiveness of the current exemptions in protecting consumers and supporting the insurance and superannuation industries. In 2010-11 of the 2,152 complaints received by the Commission under Anti-Discrimination legislation just 12 related to insurance or superannuation.³ Eight complaints were made under the DDA, four were made under the ADA and there were no complaints made under the SDA in relation to life insurance or superannuation in 2010-11.

General exemption

The FSC does not support the introduction of a general limitations clause in place of the existing specific exemptions in the Consolidated Act as proposed in the Discussion Paper. Regulatory certainty and clarity is essential to ensure the affordability of insurance for consumers and for the

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

² Policies are issued as guaranteed renewable meaning that the insurer must renew cover up to the end of the term of the policy, regardless of any change in the insured's risk profile.

³ Australian Human Rights Commission Annual Report 2010-11.

sustainability of the life insurance industry. As stated by the Productivity Commission in its report following a review of the DDA, and referenced in the Discussion Paper, we submit that a general limitations clause is likely to lead to uncertainty and increased litigation for both insurers and consumers. Ultimately, regulatory uncertainty and the need for interpretation of legislation by the courts will lead to an increase in the cost of insurance to consumers which will exacerbate the already significant underinsurance issue in Australia.

However, we recommend that a specific exemption be included in the Consolidated Act. For clarity, the FSC is not seeking to broaden the existing exemptions or extend the exemption to include racial discrimination.

An appropriate insurance and superannuation exemption in the Consolidated Act could be one similar to the exemption clauses in the DDA. The drafting of the DDA is modern and easier to apply in practical situations. The proposed drafting which is mainly based on Section 46 of the Disability Discrimination Act 1992 (and also section 38 of the Age Discrimination Act) is included as Attachment A.

Harmonisation between Commonwealth/State legislation

The consolidation of the Commonwealth Anti-Discrimination Legislation also presents a unique opportunity to work towards harmonisation between State and Commonwealth Anti-Discrimination Legislation. Harmonisation is preferred by the industry as it provides the greatest clarity and certainty around the obligations on insurers, along with greater consistency for consumers.

We submit that harmonisation could be achieved through an additional provision in the Consolidated Commonwealth Act. That provision would be that the specific exemption applies across State and Federal Anti-Discrimination Legislation. The FSC would welcome the opportunity to consult further with both State and Federal governments to discuss this issue.

Insurance and superannuation industries as employers

Finally, as large employers, FSC Members welcome consolidation of the Commonwealth Anti-Discrimination legislation, with its intent to simplify the regulatory framework, and thereby reduce compliance burdens on companies.

Thank you for the opportunity to make this submission and we welcome the opportunity to provide further feedback on the draft consolidated legislation.

Please contact me on (02) 9299 3022 if you would like to discuss any aspect of this submission.

Yours sincerely

Holly Dorber
Senior Policy Manager

ATTACHMENT A

Proposed drafting of superannuation & insurance exemption in Consolidated Act (largely based on the DDA 1992)

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 age, sex or disability by refusing to offer in respect of the other person:

- (a) an annuity; or
- (b) a life insurance policy or cover; 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 age, sex or disability, in respect of the terms or conditions on which:

- (a) an annuity; or
- (b) a life insurance policy or cover; 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 in respect of 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.

(3) This Act does not make unlawful anything done by a person in direct compliance with:

(a) a Commonwealth Act (or a provision of a Commonwealth Act) relating to any one or more of the matters listed in paragraphs (2)(a), (b), (c), (d), or (e) above; or

(b) a regulation or any other instrument (or a provision of a regulation or instrument) that:

(i) relates to any such matters; and

(ii) is made under a Commonwealth Act.