

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
By email: info@alrc.gov.au

16 December 2013

Dear Sir/Madam

EQUALITY, CAPACITY AND DISABILITY IN COMMONWEALTH LAWS

The Insurance Council of Australia¹ (Insurance Council) appreciates the opportunity to respond to the Issues Paper released by the Australian Law Reform Commission (ALRC) for its inquiry “*Equality, Capacity and Disability in Commonwealth Laws*” (Issues Paper).

The existence and operation of the exemptions applying under Commonwealth and State/territory anti-discrimination law have received considerable public and political attention over recent years. There have been a number of recent inquiries which dealt with these matters. In particular, the need for a specific insurance exemption was considered as part of the project to consolidate Commonwealth anti-discrimination legislation. A range of relevant issues were also ventilated as part of the ALRC’s inquiry into “*Grey Areas: age barriers to work in Commonwealth Laws*”.

For the same reason that the Insurance Council participated keenly in previous inquiries, we welcome the opportunity to discuss the insurance exemption provided under section 46 of the Disability Discrimination Act 1992 (Cth) (the Act). It is only through public debate that the insurance exemption will be understood and accepted by the community at large. Through its Anti-Discrimination Working Group, the Insurance Council seeks to engage with a wide range of stakeholders in order to maximise access for affordable insurance to all sectors of Australian society.

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 2013 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$40.4 billion per annum and has total assets of \$112.6 billion. The industry employs approximately 60,000 people and on average pays out about \$92.5 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 Attachment sets out the Insurance Council's responses to Questions 29, 30 and 31 which concern insurance.

If you have any questions or comments in relation to our submission please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on tel: 02 9253 5121 or email: janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

Question 29

In what ways, if any, do Commonwealth laws or legal frameworks relating to insurance deny or diminish the equal recognition of people with disability before the law and their ability to exercise legal capacity?

The Insurance Council considers that the Commonwealth laws and legal frameworks concerning insurance do not reduce the equal recognition of people with disability. The exemptions provided to insurers under the Act and other Commonwealth legislation provide a means to manage risks appropriately by allowing differentiation on the basis of risk, for example by application of exclusion or a premium loading.

Insurers do not have a blanket exemption from the operation of the Act. Rather, the exemption only justifies refusal to provide cover, or a restriction on the offer of insurance where it is based on actuarial or statistical data upon which it must also be reasonable to rely. Where no such data is available or cannot be reasonably obtained, the Commonwealth Age and Disability Discrimination Acts allow an exemption to apply to reasonable discrimination based on other relevant factors. .

Question 30

What changes, if any, should be made to the insurance exemption under the Disability Discrimination Act 1992 (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

The Insurance Council considers that the current legislative regime is appropriate. It requires insurers to provide actuarial or statistical information upon request by the AHRC (section 107 of the Act). Insurance Council members advise that the AHRC does use this power and insurers take their responsibilities seriously in responding to any requests from the Commission.

In relation to the satisfactory operation of the insurance exemptions, it is worth noting that the number of complaints to the AHRC about all insurance is very low, 15 and 7 (for **both** insurance (life and general) and superannuation) for 2012-13 and 2011-2012 respectively². This compares to the 34 million personal classes of general insurance policies which were issued or renewed in 2011-2012 (the most recent period for which this figure is available)³.

Question 31

What additional guidance or supporting material relating to the application and operation of the insurance exemption under the Disability Discrimination Act 1992 (Cth) would assist people with disability?

The AHRC has "Guidelines for Providers of Insurance and Superannuation" in place for the Act. The Guidance is a useful aid for insurers and covers a range of issues identified in the Issues Paper such as:

- Actuarial and statistical data;

² AHRC Annual Report 2011-12, Table 29: Disability Discrimination Act – complaints received by area, page 138.

³ Financial Ombudsman Service, Annual Review of General Insurance Code of Practice, page 31.

- What is reasonable to rely upon; and
- What constitutes “Other relevant factors”.

As the Disability Guidance dates from 2005, the Insurance Council considers that there would be merit in reviewing it to see whether it needs to be updated. It is likely that much of the Guidance would require little change. However, there is widespread concern in parts of the community that there is insufficient justification for some of the differentiation which takes place in insurance. Consequently, the Insurance Council believes that the sections in the Guidance on the actuarial and statistical data needed to justify use of the exemption and the reliance on other relevant factors would benefit from stakeholder debate and possible expansion.⁴

The Insurance Council has raised with the AHRC the possibility of reviewing the Disability Guidance but we understand there is currently no intention to do so while the ALRC inquiry is in progress.

⁴ At the Insurance Council's suggestion, AHRC has invited the Insurance Council and other stakeholders to develop guidance in relation to the use of the insurance exemption in the Age Discrimination Act 2004 (Cth). Substantive discussions should get underway in the new year.