

Ms Elizabeth Eldridge
Executive Director, Legal and Equity
Department of Justice
GPO Box 4356
MELBOURNE VIC 3001

18 April 2008

Dear Ms Eldridge

REVIEW OF EXEMPTIONS AND EXCEPTIONS IN THE EQUAL OPPORTUNITY ACT 1995

We refer to your letter of 29 February 2008 and thank you for the opportunity for the Insurance Council of Australia Limited¹ (Insurance Council) to participate in the Exceptions Review of the *Equal Opportunity Act 1995 (Vic)* (EOA) and to provide comments on the Consultation Paper. The Insurance Council confines its comments to point 3 of the Consultation Paper and in relation to general insurance addresses Question 3: "Are the exceptions reasonable limitations on the right to equality? If so, how can they be justified?"

Lawful Discrimination Underpins the Economic Viability of Insurance

The basic principle that underpins the successful operation of insurance models is rigorous risk assessment to determine acceptability criteria and pricing for insurance policies. For instance, risk profiles differ for men and women, and different age groups and premiums need to be adjusted accordingly. Pursuant to the risk assessment approach, premium calculation is based on statistical and/or actuarial data to allow the insurer to appropriately reserve for future liabilities.

Lawful discrimination enables insurance to be provided to consumers on the most affordable basis. The exceptions for insurance services under EOA, the *Sex Discrimination Act 1984* (Cth) (SDA), the *Age Discrimination Act 2004* (Cth) (ADA) and the *Disability Discrimination Act 1992* (Cth) (DDA) avoid a situation where insurers impose higher premiums on those in low risk demographics than otherwise necessary in order to cover the costs of those in high risk demographics.

Any removal or amendment of these important exceptions, which prevented premiums from being calculated in line with the risk involved, may well result in higher premiums for all insureds in the affected classes of insurance. This would likely exacerbate the already high levels of under insurance and non insurance found in Victoria and throughout Australia.

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. 2007 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross premium revenue of \$28.2 billion per annum and has assets of \$82.2 billion. The industry employs approx 60,000 people and on average pays out about \$70 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).

Consistency between State and Federal Anti-Discrimination legislation is important and should not be weakened

The exception for insurance services under the Victorian EOA (s41) provides that discrimination is lawful where:

- (a) the discrimination is permitted under the SDA or the DDA; or
- (b) the discrimination is based on:
 - (i) actuarial or statistical data on which it is reasonable for the insurer to rely; or
 - (ii) if there is no such data, or other data on which it is reasonable to rely, and is reasonable having regard to that data and any other relevant factors; or
- (c) if neither of the above paragraphs applies, the discrimination is reasonable having regard to any relevant factors.

Commonwealth legislation, such as the SDA, DDA and ADA also prohibits discrimination in Victoria. Although there are slight differences, the Commonwealth Acts set out materially similar conditions which must be satisfied in order to rely on the exemption for insurance services.

Currently, there is interest in either harmonising the various state and Commonwealth anti-discrimination laws or establishing a national anti-discrimination regime administered by the federal government. Any changes to the exceptions under EOA would be inconsistent with this move towards greater uniformity. Furthermore, any changes to the insurance exception under EOA would result in increased compliance costs for insurers which operate in multiple jurisdictions. These costs inevitably are passed on either directly or indirectly to the consumer.

The Current Insurance Exception is Reasonable – It is Not a Blanket Exception

Extensive case law has established what is and is not unlawful discrimination in the area of insurance. The case law shows that there is not a blanket exception and that it must be reasonable in all the circumstances or based on statistical/actuarial data. Additionally, the onus of proof is on the respondent to prove the validity of the differentiation.

The Insurance Council notes that in countries, such as Canada which have enshrined the protection of human rights in legislation, the exception for insurance to anti-discrimination laws still exists and is not considered a violation of human rights where it can be shown that the discrimination is reasonably based.

Finally, we are advised by our member companies that very few discrimination related complaints are lodged through their internal dispute resolution processes.

In light of the above, the Insurance Council submits that the current exception in relation to insurance provided in the EOA is a reasonable limitation on the right of equality under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. Accordingly, we submit that there is no need to alter the current exception for insurance services.

If you require any further information regarding this submission, please do not hesitate to contact John Anning, General Manager, Policy – Regulation on (02) 9253 5121, or janning@insurancecouncil.com.au

Yours sincerely



Kerrie Kelly
Executive Director & CEO