Investment & Financial Services Association Ltd

27 February 2004

Ms Helen Owens
Presiding Commissioner
Productivity Commission
Locked Bag 2, Collins Street East
Melbourne Victoria 8003
(email: dda@pc.gov.au)

Dear Commissioner

Review of Disability Discrimination Act 1992

We are now submit our third submission to your inquiry, this submission addressing the draft finding and recommendations contained in the Commission's Draft Report released in October 2003.

This third submission, specifically refers to the draft findings & recommendation that has an impact on the life insurance industry and should be read in conjunction with our previous two submissions.

Should you wish to discuss further, please do not hesitate to contact David Micó or myself on (02) 9299 3022.

Yours sincerely

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Third Submission to Productivity Commission
Review of the Disability Discrimination Act 1992

1. Introduction

This is a further submission by the Investment and Financial Services Association (IFSA) to the Productivity Commission's review of the Disability Discrimination Act 1992 (the "Act").

IFSA is a national not-for-profit organisation that represents the retail and wholesale funds management and life insurance industries. IFSA has over 100 members who are responsible for investing approximately $655 billion on behalf of over 9 million Australians.

The list of issues set out below focuses on some of the findings, recommendations and requests set out in the Productivity Commission's ("Commission") draft report on the Act.

2. Input into the findings, recommendations and requests of the Productivity Commission

2.1 Draft finding 7.4

This finding discusses confidentiality of conciliated agreements. It is IFSA's view that there is a need to maintain confidentiality of any such agreements. Without such confidentiality, many disputes are unlikely to settle as one or more of the parties may be unwilling to have the settlement exposed in public. There are various commercial realities that may impact on a party's desire to settle a dispute. Making those public may discourage a party from entering into the settlement.

2.2 Chapter 8 request for information

The Commission seeks information on the costs and benefits of complying with the Act. There are two aspects to the question which we have provided comment on. The first deals with the impacts generally on policyholders and insurers and the second group looks at the costs of delivering the right outcomes for all applicants.

Costs to new policyholders

In relation to the insurance industry, section 46 of the Act provides that it is not unlawful to discriminate against another person in various situations. In IFSA's view this exception is required for various purposes, including costs. If insurers were not permitted to discriminate on the basis of section 46, the premiums charged to other policyowners would dramatically increase. It is highly likely that insurance cover would become unaffordable for a large proportion of the population. There is also the question of fairness to other policyowners if premiums in general are increased, as policyowners would have to cross-subsidise those who would previously have been discriminated against.

Costs to tax payers

Currently, a very small percentage of the population does not have access to any insurance. This makes insurance affordable for most Australians. Giving equal access to all Australians would require a higher degree of cross-subsidisation. Premiums for all policyholders would increase. A greater number of the currently insurable population would choose, or be forced, to opt out of insuring themselves due to affordability issues. This would increase the weighting of high-risk people in the insured population increasing the premiums even further. The cycle would perpetuate to the point at which insurance ceased to be an option for the majority of the population. As this evolved, the costs of financial protection for individuals in the event of death or disablement would increasingly fall on taxpayers.

Costs to insurers

Whether premiums increased and people opted out of insurance, or insurers attempted to keep premiums at affordable levels, the financial losses would threaten the viability of the insurance companies.

Costs to existing policyholders

Increases to existing policyholders' premiums may force them to lapse their policies, even if able to and are prepared to continue paying premiums, if their insurer is financially crippled, they will be left unprotected and with nothing to show for their years of premium contributions.

Costs of research

The costs of doing research and the subsequent investigation into disabilities on how they impact on mortality and morbidity, while a standard part of risk rating, would increase accordingly.

Costs of developing underwriting guidelines

Costs associated with the development of underwriting guidelines and ensuring that the data backing them are "actuarially or statistically significant or based on other information on which it is reasonable to rely".

Costs of investigating

Investigating applications that are for conditions or combinations of conditions not covered in standard manuals so that insurers can make the best effort to offer terms to everyone applying for insurance. There are cases where often a large body of experiential data does not exist and so considerable investigative work is required. This includes extreme underwriting such as required to be undertaken in NZ. Examples of investigations undertaken are given in section 2.9.

Costs of complaints

The costs of responding to complaints, attendance at HREOC and the research and investigation required to meet the Act's standard of proof and complaints procedure all add to expense of doing business which are passed back to all policyholders.

2.3 Draft finding 8.5

This finding considers regulatory burden of the complaints-based system. It is IFSA's view that an allegation of discrimination must necessarily be made by way of complaint. Imposing disability "standards" would be extremely difficult to prepare, implement and then police. It would be necessary to require insurers to provide insurance cover to a person with disability (a), (b) or (c), but not to person with disability (d). This would necessarily lead to disputes about who might fall within the relevant standard and whether the standard was appropriate. This would be further complicated as, with medical developments, appropriateness of classification could change relatively rapidly.

2.4 Draft finding 8.6

It is most likely that costs incurred in bringing and dealing with complaints under the Act will greatly increase if disability standards exist, due to the complexity that such standards classification will introduce. The system may come to resemble the litigation system, with expert evidence.

One solution to the problem would be government funding of the costs for charging the same rate to higher risks – subsidies for insuring on similar terms.

2.5 Draft recommendation 9.1

It is recommended that the definition of disability be amended to include medically recognised symptoms where a cause has not been identified or diagnosed. It is IFSA's submission that the definition, if amended, would first require definition of the term 'symptoms' which would be problematical eg would it be limited to things that can be seen and measured? Without appropriately defined limits, it is difficult to see how any amendment would be appropriately policed. It is likely that the parties would adduce conflicting medical evidence and a resolution to the complaint would be extremely difficult. This would be further complicated by debate as to the meaning of the term 'symptoms'.

There is also a recommendation to amend the disability definition to include genetic abnormalities and conditions. There is no definitive definition of "genetic". Again, this would lead to problems of evidence.

There is also a recommendation to amend the disability definition to include behaviour that is a symptom or manifestation of a disability. In addition to issues of definition, behaviour may be subjectively controlled, so adoption of this recommendation would lead to problems of evidence.

Insurers do underwrite based on a reported history of symptoms that have not been diagnosed, and often the uncertainty of the cause has a greater bearing on an insurer's decision. Undiagnosed symptoms can be the first sign of a serious condition and it is often upon experiencing symptoms that people first think of purchasing insurance. As an insurer cannot subsequently cancel a policy once it has accepted an application, a decision would normally be deferred until a diagnosis has been made

2.6 Draft recommendation 9.2

This is a recommendation to amend the definition of direct discrimination to clarify what constitutes circumstances that are "not materially different" where the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability. In IFSA's view it would be extremely difficult to come up with an exclusive list of what constitutes "materially different" and cover all possibilities. It seems in such an instance that the current "reasonableness" test is appropriate.

In terms of the insurance industry, it is IFSA's submission that insurers must have the ability to raise a reasonable fee for additional cost of underwriting people with disabilities. The alternative would be to increase everyone's premiums, and the points raised with regard to Chapter 8, Costs (see section 2.2 above) make this economically unsustainable.

2.7 Draft recommendation 9.3

In IFSA's submission, reversing the onus of proof so that the respondent has to prove that the requirement or condition is reasonable having regard to the circumstances of the case, is very dangerous. It is generally very unusual for a party defending a complaint or action to have to prove that its action was reasonable. The party complaining ought to be required to prove their case.

2.8 Draft finding 10.5

IFSA supports the finding that a partial exemption for insurance and superannuation is appropriate. The report considers that the scope of the exemption is uncertain. However, in IFSA's view it would not be possible to draft an exemption that covers every possible scenario.

The draft report appears inconsistent with the draft finding that the current scope of the exemption is uncertain. 'Achieving Equality' in the Overview on page XXVIII states that the view of the Commission is that 'All relevant circumstances' must be considered when deciding if there 'is unjustifiable hardship'. This is consistent with the current working of the Act '…on which it is reasonable to rely'. The existing wording effectively excludes the two cited points in Draft recommendation 10.3 as neither of the two would be considered reasonable actions under the Act.

We do not consider that the proposed inclusions would impact on current practices although there may be a perception amongst some people that these events do occur, they are not part of sound underwriting practises.

It must also be remembered that the business of insurance is the business of pooling risks and the principle of mutuality means the grouping of similar risks rather than the specific pricing of each individual risk on its unique risk factors. The statistics and pricing basis developed result from the experience of a large group where statistically significant risk factors are identified and costs differences investigated to develop a premium rating basis that seeks to set a fair price for the known significant risks.

Underwriting expertise seeks to interpret each risks and disclosed factors and allocate them to the appropriate risk category to determine the appropriate premium rate. Where actuarial or statistical information is only available at a high level, but shows a risk to be significant, it should be reasonable to rely on that data when there is no other reasonable evidence that would allow a more accurate assessment of the risk. This is another reason why the existing wording of Section 46 should be maintained - to allow the use of other relevant information to determine a more appropriate assessment of a risk than might result from available statistical or actuarial data.

2.9 Draft recommendation 10.3

This is a recommendation that "other relevant factors" relied upon by insurers ought to be clarified and should not include, for example, stereotypical and unfounded assumptions. IFSA doubts that any clarification is necessary in this area and each case should be judged on its merits.

In IFSA's experience, insurers do not seek to discriminate on the basis of stereotypical assumptions that are not supported by reasonable evidence. If this should occur, the Act already provides sufficient protection for the consumer. IFSA is able to give some examples of potentially relevant factors applicable in applying this exemption.

Example 1 - Sex Workers

In 2003 an insurer was asked to look at a portfolio of 48 workers involved in the sex industry. For many years this industry was excluded due to the "moral risk". Since 1999 the industry has been legalised and thus "moral risk" was no longer an issue. A 3-month research project was undertaken by the insurer into the sex industry by way of internet studies and it was found that the risk for brothel workers was significantly better than those of street workers.

In view of this research and with the support of the reinsurers, the insurer was able to provide terms for Life cover only. These terms were not based on medical information, other than the research into sexually transmitted diseases but more a reflection of occupation, lifestyle and environment.

This is one example where terms were offered without case studies, actuarial or claims statistics.

Example 2 - Short Stature Condition

An application for disability cover was declined due to medical history (short stature condition), which is a rare congenital condition of bone growth deficiency where statistics were hard to obtain. Expert medical opinions were used to assist in classifying the risk. The Chief Medical Officer (CMO) advised that people with this condition, as a group, suffer a number of important medical problems that might lead to claims later on in life, eg. degenerative joint disease, instability of the spine and respiratory dysfunction.

Information on the condition was also obtained from internet medical sites which indicated increased morbidity later on in life. Based on the research undertaken it was reasonable to form the view that people with this condition have in general a higher morbidity expectation in the future.

Example 3 - Experimental Risks

Applicants with a very rare disorder or new disease where statistical data is not readily available are referred to as "experimental risks". The options available to assess the risk are:

- Access opinion from a renowned specialist in the particular field to obtain their educated view on the condition, treatment and any view the specialist may have on expected prognosis and associated risk factors such as type of medication, treatment and other co-mortalities/ morbidities like smoking status etc;

- Conduct an extensive search of various search engines and medical sites on the internet to obtain information relating to the disease/condition and to determine if there is data available on studies of people suffering the condition that can be converted to a loading with the help of an actuary; weigh the condition up against other impairments or conditions with similar symptoms, organs affected etc, in an attempt to arrive at a some basis or foundation to determine a rating.

The results of this research are used to determine an underwriting decision. In most experimental risk cases the applicant decides not to proceed which also means the disorder cannot be monitored to check the actual experience.

Example 4 – Diabetes

One insurer received a complaint from a diabetes sufferer relating to a refusal to offer cover. The underwriter relied on the reinsurer's manual when making the decision on this application, as is usual practice. The manual recommended a loading for life insurance and that disablement cover be declined.

The reinsurers provided international data to justify the recommendations in their manual. They quoted various relevant sources such as the National Diabetes Data Group and particular clinical studies. The insurer also sourced local information, for example a "Diabetes Facts" information sheet issued by Diabetes Australia. Other relevant factors were also considered, including the Academy of Life Underwriting training manual and information from The Australian Diabetes Society.

Summary

If an insurer does not have actuarial or statistical data on which to rely and seeks to discriminate based on other relevant factors, it will be up to the insurer to show that those factors are relevant and the discrimination is reasonable. In IFSA's submission this is an adequate test and can be adequately policed so that if an insurer seeks to rely on stereotypical assumptions, it will not succeed.

It does not appear to IFSA to be necessary to attempt to narrow or define what "other relevant factors" means. Each matter should be looked at individually and on its merits.

2.10 Draft finding 11.3

These findings concerning barriers to using the complaints process in the Act are common problems suggested about many dispute resolution mechanisms. In IFSA's view the process is a lot less complex and formal than it might otherwise be. Further, it is only appropriate that a complainant be required to prove their case and that the party against whom the complaint is made has the right to meet that complaint and be dealt with fairly.

2.11 Draft finding 11.7

It is IFSA's view that publicising outcomes without naming parties would be an appropriate option, providing that such publication includes all factors taken into account in reaching the outcome. This is necessary to ensure that the audience knows whether liability has been apportioned or not.

2.12 Draft recommendation 11.2

This recommendation suggests that there should be grounds for not awarding costs against complainants. Such grounds should be very carefully explored and views sought from different interested parties. At the very least, costs ought to be ordered against complainants who bring vexatious or frivolous complaints or abuse the relevant process.

HREOC and the State based organisations would be in a position to provide examples of frivolous / vexatious complaints such as the case of the intravenous drug users who, dissatisfied with the result of their complaint are seeking a Court hearing on why they are denied / charged more for life insurance.

2.13 Draft finding 11.12

IFSA has no objection to disability organisations and advocacy groups initiating complaints with the HREOC and in the courts on behalf of individuals. IFSA's view is that these would be subject to normal legal process. It is IFSA's view that, as individuals may in any event choose a representative to assist them in initiating any form of complaint, that there is no requirement to precisely define the terms 'disability organisation' or 'demonstrated connection'.

2.14 Draft recommendation 11.4

It is IFSA's view that there are serious dangers with the Commission initiating complaints and then handling such complaints. There is a distinct possibility that the party against whom a complaint is made would not be afforded necessary procedural fairness.

The PC may like to consider whether or not the HREOC should be restricted to reviewing systemic problems rather than initiating complaints on behalf of individual complainants.

If the HREOC is restricted to investigating or taking action in relation to the systemic issues, a damages award would be inappropriate. It would be more appropriate for the HREOC to be empowered to make mandatory orders preventing a party from carrying out the unlawful discrimination. If it is proposed that the HREOC be entitled to seek costs from respondents then, presumably, a successful respondent would be entitled to seek its costs from the HREOC.

It is IFSA's view that individual, rather than systemic, matters are best handled through the normal legal process in the courts.

2.15 Draft recommendation 12.2

The basis of the suggested amendment displacing general provisions of state and territory anti-discrimination legislation is not clear. Consultation with relevant parties would be appropriate to see whether state legislation ought to be amended and whether it would be appropriate to prevent parties from relying on rights created by state and territory legislation.