Investment & Financial Services Association Ltd

Submission in response to the Human Rights and Equal Opportunity Commission's Draft Revision of their Insurance & Superannuation Guidelines under the Disability Discrimination Act 1992

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1 Executive Summary

1.1 Investment and Financial Services Association

The Investment and Financial Services Association (IFSA) is a not-for-profit national peak body representing the superannuation, investment management, and life insurance industries. IFSA has over 100 member companies who invest over $725 billion dollars on behalf of more than 9 million Australians.

IFSA's mission is to play a significant role in the development of the social, economic and regulatory framework in which our members operate, thereby assisting members to serve their customers better.

IFSA acts as the collective voice of its members when they deal with governments, media and the community. It works closely with legislators, regulators and other key stakeholder groups to promote industry efficiency and ensure an effective and workable regulatory environment.

1.2 Introduction

IFSA welcomes the opportunity to provide comment on the Human Rights and Equal Opportunity Commission's (HREOC) draft revision of the guidelines for providers of Insurance and Superannuation under the Disability Discrimination Act 1992 (DDA).

This submission is in response to the request for comments made 18 October 2004 for input on the draft revision of the guidelines. This response focuses on voluntary life insurance and group risk products that protect consumers against the risks of death, disability and trauma (also referred to as Critical Illness) issued by registered life insurers.

Life insurers may also issue 'group risk' products to employers, associations and superannuation funds that automatically provide their employees and/or members with compulsory life insurance while they are in active employment with the employer or are an active member of the association or superannuation fund.

Products issued by general insurance companies such as travel insurance or sickness and accident are outside the scope of this submission.

1.3 Conclusion

IFSA supports the general thrust of the revised Guidelines.

IFSA believes that in order to avoid confusion and prescription, the type of insurance and relevant product needs to clearly be shown (ie General Insurance – Travel or Life Insurance - Income Protection) otherwise the comments, examples or cases will be seen to apply to all insurance and all products.

The life insurance industry, i.e. life insurers and reinsurers, needs to know that it can rely on the guidelines and that commercially produced underwriting manuals are a reasonable basis for making underwriting decisions. An agreed process is required to establish that an underwriting manual is reasonable to rely upon (eg certification by the source company's Appointed Actuary) so that the practice of asking for data underpinning the manual is not required for each circumstance in which a manual is relied upon.

IFSA seeks a meeting with HREOC to further discuss the proposed guidelines.

2 Insurance & Superannuation Guidelines

2.1 Life Insurance

In IFSA's initial submission on the review of the guidelines, a profile was provided which includes the products currently being offered, the guiding principles of insurance and a description of the structure, regulation and underwriting practices. Many of our comments on the draft revision relate back to our submission of 5 January 2004.

2.2 Co-operation

IFSA welcomes the intent of the guidelines to give providers of insurance & superannuation guidance only and not prescription. Our concern remains that the guideline will not have legal status and therefore cannot be relied upon in a court of law. Notwithstanding this reservation, IFSA will join with HREOC and others in a spirit of closer co-operation to improve the effectiveness of the guidelines.

2.3 Section 1 Introduction

IFSA recommends that the paragraph starting 'Coverage by the DDA….' be rewritten, as the DDA is to cover all forms of insurance, whereas the paragraph only mentions products. In addition, the reference to 'standard' and 'low cost policies' is not the most appropriate words to use in this context.

Suggested change: Coverage by the DDA is very broad: it includes all forms of general, health and life insurance issued by registered insurers and includes underwritten and non-unwritten applications and policies issued by insurers.

2.4 Section 3 Unlawful discrimination

To provide a balance in this section IFSA recommends that the heading be changed to 'Discrimination' and the subject matter then reflect what is lawful and unlawful discrimination. IFSA also recommends that examples of both lawful and unlawful conduct are provided in a separate section in an appendix to assist in the general readability and flow of the document.

In regard to bullet point 3 – "discriminating in the manner that goods, services or facilities are provided", IFSA submit that as the focus of these guidelines is the provision of insurance and superannuation, only access to products as opposed to access to premises is relevant, thus references to access to premises should be deleted. Access to premises does not fit unless you also intend to provide guidance to intermediaries on providing access for consumers who attend an intermediary's premises.

The last paragraph of section 3 should be moved elsewhere as a note to readers, which will allow the focus to stay on the subject and aid the flow and readability of the guidelines.

The current draft has removed reference to 'how to discriminate lawfully' and this section (Section 9 from the original) gave useful information regarding alternative assessment options such as premium loadings and altered terms. IFSA recommends that this section be re-included.

2.5 Section 4 The Exemption

By its very nature, insurance differentiates between people based on characteristics that they possess. The exemption provided under Section 46 of the DDA recognises this fundamental premise. IFSA supports the position that insurers should continue to be able to exercise the right to underwrite. By this is meant, insurers should be able to accept or decline to offer cover, depending on whether the risk that is to be insured, is acceptable to them. Insurers should not be required to provide insurance cover in circumstances where the risk is considered to be unacceptable. To do so could be potentially damaging to the continued economic viability of the insurance sector as a whole as well as to individual insurers.

Recent examples where an insurer has had to consider whether it would provide insurance cover include, determining whether to offer death and total and permanent disablement insurance to sex workers and whether to continue to exclude cover where death or illness arose from contracting AIDS or HIV. In each of these examples the insurer had to assess the risks of accepting such proposals on commercial and underwriting factors.

Sub-section 4.4 'What is reasonable'
When using examples it is important that they are either reflective of all types insurance or they are suitably qualified. For example, subsection 4.4 creates the wrong impression for some life insurance products, products which provide a benefit on diagnosis need to be assessed differently than those which provide a death benefit. While screening will hopefully detect a malignancy in the stages of the disease resulting in treatment and hence a possible reduction in the mortality risk for death cover, the contingency being covered under a critical illness product is the diagnosis of the disease, not death or even disability. The critical illness benefit is paid upon diagnosis.

Sub-section 4.61 'Underwriting Manuals'
While the commentary reflects the Bassanelli Federal Case, it should be noted that this case involved a general insurance travel product which by its nature is a limited product of a short duration. In contrast, the product features of life insurance are generally long term and are guaranteed renewable. This is another example of why there needs to be clear separation between different types of insurance.

IFSA accepts that the prognosis for certain diseases may have improved and may continue to do so with ongoing medical research and treatment advancement. Underwriting manuals provide ratings for individual conditions that have been based on numerous studies highlighting similar findings over many years. Hence, studies involving small sample

numbers over very short timeframes will not impact greatly on underwriting guidelines until consistent findings are evident for repeated similar studies over a number of years.

The life insurance industry needs to know that they can rely on the HREOC guidelines and that commercially produced underwriting manuals are a reasonable basis for making underwriting decisions. An agreed process is required to establish that an underwriting manual is reasonable to rely upon (eg certification by the source company's Appointed Actuary) so that the practice of asking for data underpinning the manual is not required for each circumstance in which a manual is relied upon.

Sub-section 4.71 'Medical opinion'
IFSA agrees that opinion needs to be given by a medical practitioner with detailed clinical knowledge of the disease in question. However the medical practitioner needs to also have a firm understanding of insurance principles and the risk assessment approach. Commonly the medical practitioner treating or being consulted by the patient does not understand that products offered by life insurers are non-cancellable and are guaranteed renewable for the duration chosen for the policy. While a medical practitioner can monitor a patient's condition and initiate changes in treatment to counter deterioration, the life insurer has no such opportunity. This sub-section also demonstrates the need to consider the different type of insurances. For example, the product features described here do not apply to general insurance products.

Sub-section 4.7.5 Commercial judgement
This sub-section refers to the practices of other insurers in the industry. IFSA believes that this should also include reinsurers. As the guidance covers all types of insurance, this paragraph should also be qualified to the extent that the party consulted must operate in the same product area and in the same market.

2.6 Section 7 Case examples

The cases presented should provide a balanced view and feature both those that favour insureds and those involving legitimate discrimination by insurers. The cases included in this section, although summaries do convey an impression that in every case the insurer must concede and possibly compromise the principles of life insurance.

IFSA also suggests that the examples provided should be wider than life insurance and that each example clearly shows the type of product and industry sector that it comes from. As the cases that appear will only be shown for illustrative purposes, there should be a strong statement in the section explaining their purpose including that they should not be relied upon as a precedent.

Further, it would be far better if more recent cases were used. Practices that were in place 3, 5 or 10 years ago might not be the same as those in place today, thus cases which pre-date 2000 may not be the most appropriate to use. For example, mental health exclusions are now commonly used which was not previously the case.

3 Industry Experience

Underwriting decisions based on non-standard prudential or commercial terms are offered where necessary, however the test of "reasonableness" of such discrimination should be the insurer's published internal guidelines that its' underwriters use, provided that such guidelines apply on the basis of setting a limit with respect to the rate of mortality or morbidity over the standard life on a consistent basis, regardless of the cause of the disability.

The current HREOC guidelines used by insurers confirmed that reliance on the underwriting manual is a reasonable basis for discrimination. However, in practice, the basis for confidently asserting an entitlement to rely on the exemption has required a chain of evidence showing the actual medical/clinical data relied upon, which is impractical, time consuming and expensive.

The consequence in individual complaint cases is a significant drain on professional resources associated with collating the objective statistical data that supports the rating in the manual, and is the reason why underwriting manuals must have greater acceptance in practice.