

31 January 2023

National Mental Health Commission  
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Email: [StigmaStrategy@mentalhealthcommission.gov.au](mailto:StigmaStrategy@mentalhealthcommission.gov.au)

Dear Sir/Madam

### Consultation: Draft National Stigma and Discrimination Reduction Strategy

The Actuaries Institute ('the Institute') welcomes the opportunity to comment on the draft National Stigma and Discrimination Reduction Strategy. The Institute is the peak professional body for actuaries in Australia and has a longstanding commitment to contribute to public policy debates where our members have relevant expertise. Our members work in a wide range of fields including insurance, superannuation and retirement incomes, enterprise risk management, data analytics, climate change impacts and government services.

### Previous Actuaries Institute work on mental ill-health

The Institute has a strong record of engaging on issues of discrimination in insurance pricing and underwriting and the impact of mental health and other health conditions upon the availability of insurance:

- In October 2017 the Institute published a Green Paper, [Mental Health and Insurance](#). The Green Paper identified eight 'root causes' of the systemic difficulties for the insurance sector in dealing with mental health coverage and identified nine areas where improvements can be achieved.
- In 2019 the Institute established an Anti-Discrimination Working Group to develop advice for actuaries – specifically around applying legislation to insurance contexts. This led to the 2020 publication, [The Australian Anti-Discrimination Acts: Information and Practical Suggestions for Actuaries](#). This publication addressed the practical application of the different Anti-Discrimination instruments, such as considerations around the appropriateness of data, the type of data that would be appropriate and how relevant factors may contribute to those considerations.
- The Institute also made [a submission to the Productivity Commission inquiry into Mental Health](#), held in 2019/2020. That submission reinforced the systemic issues faced by the life insurance sector when trying to maintain affordable and sustainable products that appropriately respond to mental health conditions.
- The Institute has recently developed a Guidance Resource on [Artificial Intelligence and discrimination in insurance pricing and underwriting](#). This was developed jointly with the Australian Human Rights Commission (AHRC).

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## General comments on proposed legislative changes

The Institute welcomes the priorities set out by The National Mental Health Commission Draft National Stigma and Discrimination Reduction Strategy, and work to support people to have equitable access to financial services and insurance.

The Institute's feedback does not comment on the particular priority actions 2.4a to 2.4i. In general, we regard these as consistent with the issues and direction highlighted in our 2017 Green Paper and building on the direction of a number of recent initiatives that have been taken.

Our feedback is focused on the proposal on page 21 of the Draft Strategy that a potential area for strengthening protections against mental health-related discrimination includes:

*"removing the 'other relevant factors' and 'unjustifiable hardship' tests from the insurance exemption under s46 of the Disability Discrimination Act 1992 (Cth), on basis that such provisions have not been applied in practice and are too vague to justify the exclusion of protection under a human right."*

## Specific feedback on proposed removal of 'other relevant factors'

The Institute is concerned that if 'other relevant factors' is removed, there could be an adverse impact on Australians' equitable access to insurance.

The Strategy asserts that the provisions 'have not been applied in practice'. The Institute questions this assertion – these provisions inform market practice and may not often be tested at law. The Institute notes that 'other relevant factors' have been an important topic addressed through various Institute and Australian Human Rights Commission publications.

Actuarial or statistical data is not always available. Where it may be lacking detail or not be immediately relatable to the condition, decisions then need to be based on what data exists, but also on unbiased expert knowledge, particularly derived from peer-reviewed medical research and the judgements of qualified experts.

Guidance from the Australian Human Rights Commission suggests that a relevant factor is any matter which is rationally capable of bearing upon whether the discrimination is reasonable, and may include:

- Medical opinions
- Relevant information about the particular individual seeking insurance
- Opinions from other professional groups
- Actuarial advice or opinion
- Practice of others in the insurance industry
- Commercial judgement

Under the current insurance exemption, reliance by an insurer upon actuarial or statistical data is subject to it being reasonable having regard to the matter of the data and other relevant factors. Therefore, the consideration of other relevant factors is required even where data is available.



### **Moderation of discriminatory actions**

The removal of the reference to other relevant factors would require insurers to rely solely on the actuarial and statistical data, that may be inadequate or uncertain. This may lead to a greater discriminatory action, such as a change to product design (e.g. exclusion of, or limit on, specific risks) whereas other relevant factors such as medical opinion, actuarial judgement or market practice would suggest a price differentiation would be sufficient.

### **Impact on sustainability**

Insurers balance the pool of risk that they insure. When done effectively and fairly, risk differentiation maximises the availability of private insurance, increases the transparency to consumers of what insurance covers, particularly at the time of claim, and helps ensure the overall cost of insurance is affordable.

The Institute is concerned about the potential impact of this proposed change on the sustainability of insurance coverage for mental health and other disabilities. This proposed change may reduce access to comprehensive and more transparent insurance for those who have experienced mental ill-health with these impacts going beyond mental health conditions.

### **Application to rare, new and developing risks**

The use of 'other relevant factors' allows insurers to provide cover to consumers with rarer conditions as well as to respond to developing risks. By their nature, 'other relevant factors' are broad as they need to accommodate the uniqueness of individuals and cannot necessarily be foreseen.

A potentially unintended consequence of the proposed legislative change is the impacts beyond the assessment of mental-ill health conditions and impact on other medical and physical conditions. A topical example is a new virus for which data is not available, but for which medical reports have assessed a high risk for disability. The proposals could prevent this being underwritten until sufficient data is collected. At an extreme, the increased risk could lead to a withdrawal of cover being available to consumers until the data requirements can be met, leading to greater risk for Australians through underinsurance.

Actuarial guidance recommends fairness be applied in the use of these factors. Removing this provision will have potential consequences through product availability and pricing. Further, as data becomes available, the use of 'other relevant factors' will revert to assessing the reasonableness of relying upon the data.

### **Barriers to entry**

Existing market participants can have a strong advantage through their collected data which increases barriers to new entrants if the latter are restricted to using data.

The AHRC Guidelines acknowledge that practice of others in the insurance industry may be considered as a relevant factor. This requires caution in order to not simply perpetuate historical practice or assumptions.

Without an open insurance market, where new entrants can offer products on similar terms as existing participants and innovate, the Strategy will not meet the priority to improve equitable access to financial services and insurance.



## Alternative proposals

A more sustainable path forward is to improve the application of the exemption, rather than remove components. The following are alternative proposals that would more appropriately address the concerns raised in the draft Strategy, and mitigate some of the side-effects highlighted above, while still improving equitable access to financial services and insurance.

- Strengthening of Industry Codes such as the 2023 proposed changes to the underwriting of mental health conditions in the life insurance sector.
- Strengthening and expanding the existing guidance – the [AHRC's Disability and Discrimination Guidance](#). We note that the Queensland Human Rights Commission recently published a [review](#) of the state's Anti-Discrimination Act that included a recommendation along these lines (refer recommendation 41). Such additional guidance should aim to narrow the usage of the broad term 'relevant factors' whilst seeing a balance between fairness and the appropriate functioning of the insurance market. Guidance should also be regularly reviewed to remain contemporary.
- The scope or definition of 'actuarial or statistical data' could be broadened via explicit guidance to include some of the considerations outlined above. This may be more challenging to draft than guidance over 'other relevant factors' since the matters we discuss above perhaps do not exclusively relate to actuarial or statistical data.
- Additional examples could be published through joint industry and government body work undertaken to agree fair and reasonable uses of 'other factors' (and 'unjustifiable hardship').

The Institute would be pleased to discuss this submission. If you would like to do so, please contact the Institute's chief executive officer, Elayne Grace on (02) 9239 6100 or [elayne.grace@actuaries.asn.au](mailto:elayne.grace@actuaries.asn.au).

Yours sincerely,

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