27 July 2007

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Human Rights Commission
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Dear Sylvia

## Human Rights Commission Insurance Guidelines

Thank you for the opportunity for the Investment Savings and Insurance Association ("ISI") to comment on the draft guidelines. We have appreciated being involved in the revision process and we welcome the development of the improved Guidelines.

In the context of our constructive dialogue in recent months the tone of the document is disappointing. The basis for this observation is that we feel that one of the primary purposes of the guidelines is to ensure the Human Rights Act and its specific exemptions are applied in such a way as to promote the expectation that all applicants for insurance will be treated with respect and equity. This needs to be both the perception and the reality. Consequently building public confidence and understanding in the insurance process is essential. We feel that the tone of the document does not support the growth of confidence, rather it acts to undermine confidence. Our real desire is that the public perceive the Human Rights Commission and the Insurance Industry working in harmony towards a shared goal of making affordable insurance available to as wide a group as possible. This is far preferable than the impression that can be created of an adversarial relationship where the Human Rights Commission adopts the role of an enforcer of a recalcitrant insurance industry. Our view is that the tone of the document leans towards the latter.

For example, the "Background" contains reference to the number of enquiries and number of complaints since 2002 without providing any real context within which those statistics might be considered. To have no complaints would be ideal but taken against the thousands of new policies written and the many claims settled over the review period, the actual result seems to be a very low level of complaints. While we appreciate your stated view that this is partly due to a lack of knowledge of the complaints process, there

is nonetheless no evidence in the statistics to suggest insurers are not complying with either the spirit or the letter of the existing guidelines.

Overall, we consider the draft as representing a missed opportunity. The implication of the draft is that insurers are guilty of poor practices and the role of the Commission is to expose that practice. This positioning does not promote confidence in the industry and perpetuates a stereotypical view of insurers as insensitive to the circumstances of particular groups, a view for which there appears to be limited supporting evidence. Instead we believe there is a more constructive positioning based on a proactive and ongoing partnership between the Commission and the Industry.
In our view the "purpose" of the guidelines includes the following:

1. To educate on the obligations of all private insurance (general, life, health and disability) under the Human Rights Act ("HRA").

2. Comment on the principles of underwriting as applies to the HRA.

3. Comment on the general principles of insurance contracts as applies to the HRA.

4. To provide clarity on the rights and obligations of all parties to an insurance contract as applies under the HRA.

5. Acknowledgement of the nature of private insurance (ie the contractual relationship between two parties).

We would argue that the low level of complaints coupled with our understanding of relatively low level of criticism resulting from submissions received by the Commission, clearly indicate there is no existence of a 'crisis' and we would request that all implied references that there are problems within the industry and non-compliance with the Act should be removed.

We believe it is unhelpful that the draft guidelines contain particular reference to disabilities such as 'mental disability'. The same could be said for chronic disability, epilepsy and other subsets of illness. The commentary draws attention to this subset in isolation. While mental illness is topical in the media and politically, a specific reference risks reducing the efficiency of the guidelines in the longer term.

ISI members also believe the guidelines would provide a great document to include commentary on the obligation of the applicant for insurance to provide all relevant information relating to health and disability.

We would encourage the redrafting of the document to improve the tone and to include our specific comments as listed below:

**Specific concerns**

***Background, page 1*** – We disagree that there are "…a number of legal cases which provide concrete guidance on interpreting aspects of the Act." Most of the cases referred to in the document are foreign cases, notably Bassanelli. In addition, the section on *Reasonableness*, page 9 makes the comment "There is no relevant case law locally…" [One might argue that the cases discussed actually fail the principles embodied in the guidelines around being relevant to the purpose for which they are used.]

***Background, page 1 –How insurance works, page 2*** – Insurers consider factors other than age, health and family history in assessing risk. Gender is a factor as are smoking status and hazardous pursuits. Some of these factors are prohibited grounds for discrimination but others are not. The guidelines are an appropriate place to mention this to expand understanding of what the Act covers.

***The Guidelines, page 4*** – There is no evidence that there has been "…an unprecedented increase in mental illness…". We do accept that there has been a significant increase in *the diagnosis of* mental illness – you will be aware that this does not necessarily imply an increase in incidence

***Deferral, page 6*** – As an industry we do use 'deferral' judiciously and only where the circumstances require such an approach. There is some concern at the statement that a decision "should be able to be made within several months" as in practice this is simply not possible. We would resist attempting to specify time limits as each case must be treated on its merits. We also note that it is often not possible to provide cover with an exclusion while the risk is being quantified. This is especially the case with multi-system diseases where the extent of the disease as it relates to the risk is largely unknown.

***Cost of assessment, page 6*** – This proposal is potentially confusing for the public and is unlikely to work in practice for the industry. The Act does not prohibit insurers from charging customers for the costs of assessing a risk and the guidelines should not be promoting an alternative approach as this will create confusion and tension between the public and insurers. The proposal to charge a higher premium upfront, rather than a fee for further medical evidence, which could be reduced once the further evidence becomes available is unlikely to work in practice. Without the necessary data, underwriters would in most cases be unable to quantify the risk and assess an appropriate higher premium. This proposal attempts to avoid the issue of customers having to pay high fees upfront for medical reports, and then being offered extreme terms which are not taken up. It may be that a very small proportion of customers are in fact not insurable on terms that would be regarded as affordable, as was discussed at the recent meeting, and a different remedy may be required, eg amendment to the legislation.

The suggested approach, that insurers should rate or load higher and then reduce this when information about the actual risk becomes available, appears to be a direct contradiction of Section 48(1) (b) that enquires into the reasonableness of the

discriminator in relying on the data in those circumstances. In particular, the general principle is that an effort should be made to tailor decisions to individual cases and conditions. Insurers must be prepared to explain why they have arrived at certain decisions and to acknowledge any limitations of the data on which decisions are based.

We have marked up suggested wording for this section on the attached copy of the Guidelines.

I believe the whole concept around ‘Cost of Assessment’ is flawed. The reality is that even where the client has not been charged for the work required to assess their case, the take up is reported as very low or even zero. In other jurisdictions it would be clear that the result would be ‘uninsurable’, or in NZ that the result would be an excessive premium. The difference is that the rules in NZ force us to undertake the work to be precise, even though the outcome is highly predictable. The ‘solutions’ proposed by the draft guidelines do not address the fundamental issue, just find different methods for papering over the cracks.

***Pre-existing conditions, page 8*** – Not all insurance contracts are entered into on the basis of a thorough medical examination, prior to commencement, and appropriate exclusions. Some contracts simply exclude pre-existing conditions and an investigation as to whether the condition was pre-existing is carried out at claim time. This means that symptoms suffered prior to commencement but without any definitive diagnosis do not require a deferral but may or may not be covered in the future.

Some members of the industry are uncomfortable with the statement “A decision to exclude a pre-existing condition should be based on information about an individual’s particular circumstances not on a formula involving stereotypic assumptions about applicants”. We fully concur that individual circumstances are taken into account but likelihood must also be part of the consideration given that it is often impossible to be definitive with regard to cause and effect in such a complex structure as the human body/mind.

***Reasonableness, page 9*** – We do not consider the reference to “alleged discriminator” to be appropriate and most ask that this be removed. It would be sufficient in this context to refer to “the insurance company”.

***Medical advice or opinion, page 9*** – the provision of medical advice or opinion by the “person’s medical practitioner with their consent” raises significant issues in terms of objectivity, independence and competence to assess medical status in relation to insurance risk. Doctors often act as their patients’ advocate and relying solely on their advice or opinion would be inappropriate. It is entirely appropriate that their knowledge of their patient is factored into the process but some objective analysis is required.

***Medical advice or opinion, page 10*** – The final paragraph of section 4.2 states that “Insurers need to be aware…”. In our view, insurers are well aware of the specialist

skills required and the Guidelines should perhaps refer to the need for *applicants* to be similarly aware.

***Other relevant factors, page 10*** – We believe that the Guidelines' interpretation of commercial considerations and their relationship to individual cases is too narrow. This interpretation would mean that an individual case must be accepted unless it would result in unprofitable business. Insurance companies' main concern in this area is that, in the absence of reinsurance, a book of cases could build up into a risk profile which compromises their solvency and hence the security of the benefits of all policyholders. It is unlikely that a single case would compromise solvency, but the systemic acceptance of risks without reinsurance support may.

***Mental Disability, page 10*** - Underwriters advise that they do assess mental illness in the same way as a physical disability in that reputable medical and actuarial statistics are used as guidelines, and they also use psychiatric studies. All cases are assessed on an individual basis and all information such as treatment, and who treated them is taken into account. Nevertheless, we intend taking steps to develop better communication with organisations such as the Australian and New Zealand College of Psychiatrists and others.

***Reinsurance, page 12*** – The comment that insurers may have to offer cover without reinsurance is a concern. Being compelled to offer cover without the support of reinsurance presents broad implications in terms of the viability of the entire industry. We repeat our view that a very small proportion of customers are in fact uninsurable and the correct remedy would be to amend the legislation to recognise this fact. If New Zealand were aligned with other key markets, where the ability to assess risk and make appropriate decisions is not artificially constrained, the issue around reinsurance would not exist.

In conclusion, we would repeat that whilst a number of our comments may appear negative, we are not negative to the review. In fact we consider the review to provide a positive opportunity to provide clarity and greater certainty for all parties.

We are happy to expand any of the points raised.

Yours sincerely

Vance Arkinstall
**CHIEF EXECUTIVE**