

NEW ZEALAND SOCIETY OF ACTUARIES

GUIDANCE NOTE NO. 3

THE HUMAN RIGHTS ACT 1993

Paragraphs in italics are included to clarify interpretation but do not form part of the Guidance Note.

Scope and Purpose

This Guidance Note sets out considerations that bear on the actuary's professional work in providing advice or reports in relation to the exceptions allowed under the Human Rights Act 1993 ("the Act") for either Insurance or Superannuation Schemes.

Such advice may be required when launching new products, revising the terms of existing products, or in the rating of individual cases.

The Guidance Note was first issued in April 1997 and modified in August 2002. It is a Guidance Note rather than a Professional Standard as the Act is relatively recent and experience with it, its scope, and implications, along with case law, is slowly emerging.

Actuaries must take appropriate steps to satisfy themselves that the particular situations on which they are advising or reporting are covered by the exceptions specified in the Act.

If in doubt, the actuary should either seek to clarify the situation or qualify his or her advice, opinion or report accordingly.

Background

The Act prohibits discrimination on the grounds of sex, marital status, religious or ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment or family status and sexual orientation in employment and in the provision of goods and services.

Section 65 covers indirect discrimination and prohibits any conduct, practice, requirement or condition that although not apparently in contravention of any other provision of the Act has the effect of treating any person or group of persons differently on one of the prohibited grounds unless good reason is established for it.

Sections 48 and 70 provide certain exceptions in relation to insurance and superannuation schemes respectively for discrimination on the grounds of sex, age, or disability:

Different terms or conditions may apply on the grounds of sex, age or disability if the different treatment is based on actuarial or statistical data upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness.

In the case of individuals who have a disability where no such data is available different terms or conditions may apply if the different treatment is based on reputable medical or actuarial

advice or opinion, upon which it is reasonable to rely, whether or not contained in an underwriting manual.

In both cases the different treatment must be reasonable having regard to the applicability of the data or advice or opinion, and of any other relevant factors, to the particular circumstances.

Guidance

This guideline is to assist actuaries in providing advice concerning the justification for exceptions under sections 48 and 70 of the Act. In this context those that the actuary is advising may include:- the actuary's employer, a consulting client, a party justifying a difference in treatment, a party opposing a difference in treatment, the Human Rights Commission, or as an impartial expert witness.

When providing advice in relation to the Act, actuaries should take steps to ensure they are familiar with the legislation, the guidelines issued by the Human Rights Commission and case law as it develops.

There are two situations where the Act permits exceptions relating to actuarial data or opinion. These are set out below along with a discussion of the likely issues involved in a justification for exception.

(a) Different treatment based on actuarial or statistical data, upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness

The actuary should be prepared to justify his or her reliance on, and the relevance of, the data to the Human Rights Commission or in Court. The justification may be examined by the Government Actuary under the Act or an actuary acting for another party.

Justification may be required for both whether there should be a difference in treatment at all, and for the extent of any difference in treatment.

Justification should comprise both quantitative and qualitative aspects.

In setting out quantitative arguments the actuary should pay regard to relevant local experience as well as published tables and overseas experience.

The actuary should be aware, particularly in the case of disability, that not only is experience in certain areas changing rapidly but that local data collection and analysis is increasing both in quantity and quality. In any particular case the actuary can be expected to justify why available local statistics were or were not taken into account.

The actuary should have regard to the credibility of the data being used both in a statistical and in a qualitative sense. In particular the actuary should be able to quote the source of the data or table and have appropriate regard to:-

- (i) the composition of the group giving rise to the data

- (ii) the period to which the data relates
- (iii) any qualifications on the collection or analysis of the data
- (iv) the size of the data sample
- (v) the construction methods employed in deriving smoothed rates from data
- (vi) any projections used in the table construction

Justification should be provided as to why the actuary considers it to be reasonable to apply particular statistics or tables to a group other than that included in the underlying experience of those statistics or tables if that is the case.

For example: (i) an actuary may use relationships between population and insured life tables in order to draw reasonable conclusions about insured lives experience at older ages, (ii) qualitative arguments may also be required to justify the application of overseas experience to New Zealand.

Credible local, office or scheme experience or particular circumstances may be used either in their own right or to adjust published statistics or tables if the use of such data can be reasonably justified. The actuary may also wish to take account of trends in the data.

- (b) Where no such data is available, different treatment may be made in respect of persons with a disability based on reputable medical or actuarial advice or opinion, upon which it is reasonable to rely, whether or not contained in an underwriting manual.**

Actuaries providing advice or opinion on which others may rely for the purposes of this part of the Act may be asked to justify their advice and opinion in a similar manner to that outlined in (a).

Actuaries relying on such advice or opinion should take such steps as necessary to satisfy themselves that data as outlined in (a) is not available and should ensure, as far as possible, that the provider of such advice or opinion understands the purpose for which the advice is sought and that it may be relied on for the purpose of obtaining an exception under the Act.

Actuaries should take such steps as necessary to ensure that they are satisfied that it is reasonable for them to rely on such advice or opinion for the purposes of the Act.

If reliance is placed on information contained in underwriting manuals, care should be taken to establish that the information is up to date and can be demonstrated to be reasonable, and also whether adjustments are required to take account of local conditions and experience.

In justifying a difference in treatment, and thus an exception under the Act, it is up to the actuary to use his or her professional experience and judgement. Any justification must be documented.

It is possible that opinions on another actuary's work in this area may be required from time to time. Paragraph 16 of the Professional Code of Conduct should be adhered to in such cases.