

Insurance Unit
Financial System Division
Treasury
Langton Cres
Parkes ACT 2600

Via Email: genetictestinglifeinsurance@treasury.gov.au

31 January 2024

Dear Mr Preston,

Re: Use of genetic testing results in life insurance underwriting

The Financial Advice Association of Australia¹ (FAAA) appreciates the opportunity to provide feedback on the Treasury's consultation on the *Use of genetic testing results in life insurance underwriting*.

In providing this submission, we note that the expertise of the FAAA and our members is in relation to life insurance financial advice, assisting clients with understanding and measuring risk in their financial position, recommending strategies to manage these risks in relation to their personal financial position, and assisting in recommending, applying for and claims management of life insurance products. We have, therefore, limited our response to questions relevant to these areas in the discussion paper.

Nonetheless, many of our members are life insurance experts, with a deep understanding of life insurance products in the market and how to find the best solution for their clients. They are also very knowledgeable on the underwriting process and the potential implications for clients with existing health issues or family history, which may impact their clients' ability to obtain life insurance or being subject to exclusions or premium loadings. We address this further below.

The use of genetic testing results in life insurance underwriting is a very sensitive issue. Not all of the debate is well-informed. We seek, in this submission, to provide more context and a balanced view, whilst acknowledging that this is a delicate issue, particularly for those, including our members and their clients, who have experienced an illness such as cancer.

¹ The Financial Advice Association of Australia (FAAA) was formed in April 2023, out of a merger of the Financial Planning Association of Australia Limited (FPA) and the Association of Financial Advisers Limited (AFA), two of Australia's largest and longest-standing associations of financial planners and advisers.

The FPA was a professional association formed in 1992 as a merger between The Australian Society of Investment and Financial Advisers and the International Association of Financial Planning. In 1999 the CFP Professional Education Program was launched. As Australia's largest professional association for financial planners, the FPA represented the interests of the public and (leading into the merger) over 10,000 members. Since its formation, the FPA worked towards changing the face of financial planning, from an industry to a profession that earned consumer confidence and trust, and advocated that better financial advice would positively influence the financial wellbeing of all Australians. The AFA was a professional association for financial advisers that dated back to 1946 (existing in various forms and under various names). The AFA was a national membership entity that operated in each state of Australia and across the full spectrum of advice types. The AFA had a long history of advocating for the best interests of financial advisers and their clients, through working with the government, regulators and other stakeholders. The AFA had a long legacy of operating in the life insurance sector, however substantially broadened its member base over a number of decades. The AFA had a strong focus on promoting the value of advice and recognising award winning advisers over many years. The AFA had strong foundations in believing in advocacy for members and creating events and other opportunities to enable members to grow and share best practice.

Background

We note that much of the commentary, media and public perceptions around the A-GLIMMER (Australian Genetics & Life Insurance Moratorium – Monitoring the Effectiveness and Response) report appear to only be in relation to life insurance as a type of insurance that pays a benefit in the event of death (or terminal illness), and often does not consider the wide variety of personal risk insurance products offered in the Australian market. This is important, as there are different underwriting considerations with products such as total and permanent disability (TPD), trauma (or critical illness) and individual disability income (or income protection) insurance.

We also note that Australian life insurance products are legally required to be offered on a guaranteed renewable basis (explained further below), unlike other jurisdictions highlighted in the A-GLIMMER report and consultation paper. Information provided and considered during the underwriting of a product can have significant long-term impacts on the sustainability of life product offerings.

Sustainability of the insurance market is clearly very important, and our members have expressed concern with the continued decline in the number of life insurers in the market, reduction in product availability, and significant increases in premium pricing for consumers in recent years. Any policy decisions made by the Government concerning life insurance regulations need to carefully balance sustainability in relation to the prudential outcomes and risks they impose on the entire risk pool, particularly regarding adverse selection risk and the availability of life insurance products to the Australian public. Our members are strongly interested in ensuring that existing clients are not subject to material premium increases due to decisions that could flow from policy change in this area.

To this point, when considering the A-GLIMMER report and this consultation, very few of our risk specialist members noted any experience or history of their clients ever asking about genetic testing, being asked for genetic testing information or having their premiums affected by either the availability or lack of a genetic test. For example, one member identified 6 instances of providing genetic test results to the life insurer on behalf of the clients of his business related to over 1,290 applications over an 18-month period. Two other members both had only 1 instance each in 20+ years of assisting clients exclusively in life insurance advice. These were cases where clients had undertaken genetic testing themselves, either voluntary genomic analysis or following a clinical diagnosis of symptoms. No clients had ever mentioned warnings provided by the treating medical practitioner, geneticist, or researcher concerning a test's potential impact on life insurance availability. There appears to be little evidence of consumer harm within the current framework, where life insurance financial advice is sought and provided to clients. Our members also explained that the detail of underwriting questions asked and medical reports requested by life insurers in relation to the individual's personal and family medical history, as part of the application process, would suggest there is virtually no gap where having undertaken genetic testing would result in a further negative impact (either denial of cover, exclusions or premium loadings) for a consumer, which appears to be confirmed in the data provided by life insurers.

Life insurers hold a special and privileged position in relation to the Disability Discrimination Act 1992 through the current lawful discrimination sections of the Act. This recognises that there is a fine balance between protecting the life insurance pool from adverse selection risk and discriminating against those who are carriers of adverse genes.

The type of genetic test undertaken and the usefulness of the test type in relation to actual client outcomes are important considerations. Any laws, regulations or standards in this area must distinguish between genetic tests with analytical validity versus clinical validity versus clinical utility². Insurers should not be able to discriminate based on the customer undertaking genome analysis, for example, as these tests are not considered to have clinical validity or utility. Equally, where genetic testing has been commissioned privately by the individual for personal reasons (such as obtaining or keeping a personal record of their genetic makeup without a medical purpose, learning about ancestry or understanding medication responses) or as part of blind scientific research studies, such genetic tests should not be utilised in insurance, as they are unlikely to have clinical utility. For similar reasons it makes sense to continue the current practice that life insurers cannot ask for genetic tests to be undertaken, nor ask customers about genetic tests their family members have undertaken.

That said, life insurers should have the ability to appropriately discriminate where adverse selection bias could put the prudential sustainability and premium stability of the insurance pool at risk. This debate involves an important tradeoff between the rights of people applying for life insurance and those who are already part of the insurance pool that the new people are applying to join, where the existing policy holders might end up paying more as a result of the introduction of people with higher risk profiles.

We also need to be conscious of the future impact of technology and research developments. Genetic testing could become substantially more reliable in the future. In that case, a blanket ban on the use of genetic testing results could place life insurers at a substantially greater risk of adverse selection. Thus, it is important to view this issue with an eye and flexibility to change based on what could happen in the future.

Life Insurance Characteristics in Australia

The two most significant types of life insurance in Australia are individually advised and group life insurance (often offered through superannuation). The products available in these two markets are very different. As discussed above, individually advised business is individually underwritten, and guaranteed yearly renewable, with financial advisers often involved. This means that while the life insurer can consider the risks of an individual before offering cover, they cannot vary the terms and conditions once the cover is in place. The only lever the life insurer has is premiums; however, premiums can only change based on the overall pool of clients and not at the individual client level. This means that a client who develops a serious health condition, can retain their existing insurance without the risk of an exclusion or premium loading being added. This is a very important attribute and one that many clients value and carefully hold onto.

On the other hand, group insurance is subject to change (sometimes annually), and the terms and conditions can change materially over time. The other important attribute is that group insurance policies are typically not underwritten, provided the level of cover is below a certain threshold that is known as the Automatic Acceptance Limit. Only clients who seek cover above that level are typically subject to underwriting, and the cover could be refused or subject to exclusions or premium loadings, similarly to individually advised policies.

² "Analytical validity refers to a test's ability to measure the genotype of interest accurately and reliably. Clinical validity refers to a test's ability to detect or predict the clinical disorder or phenotype associated with the genotype. Clinical utility of a test is a measure of its usefulness in the clinic and resulting changes in clinical endpoints." Grosse SD, Kalman L, Khoury MJ. *Evaluation of the validity and utility of genetic testing for rare diseases*. *Adv Exp Med Biol*. 2010;686:115-31. doi: 10.1007/978-90-481-9485-8_8. PMID: 20824443. <https://pubmed.ncbi.nlm.nih.gov/20824443/>

It is also important to understand the underwriting process. Life insurers are taking on significant financial risk in insuring consumers, and thus, in the underwriting process, can ask specific questions about a person's health situation and their family history, and ask the individual to undertake tests such as blood tests or consult with a doctor. In our view, this is both necessary and reasonable in the context of the risk being undertaken. In insurance, pricing is dependent upon the level of risk presented by an individual. Unlike general insurance, where the location of a house or car is something that drives risk and is publicly available, health information is very private and carefully protected.

This provides important context regarding how financial advisers work with their clients. For example, a client who develops a significant health issue or becomes aware of a family history of health issues, will often be encouraged by their financial adviser to retain their existing insurance. If the client does not currently have insurance and they form the view that these health issues will prevent the client from getting individually advised cover, then they may suggest that the client obtains insurance through a group policy via superannuation, where they can apply within the Automatic Acceptance Limit.

The deeper relevance of this is that someone who already has insurance can undertake genetic testing, knowing that the results will not impact their ability to retain their existing cover. It is also important to consider that those customers who are most likely to be interested in pursuing genetic testing, are often doing so because they have become aware of a family health issue (such as a cancer diagnosis). This information, whether it be a history of cancer or another form of serious hereditary condition, is otherwise discoverable in the underwriting process based on the family history questions life insurers already ask. So the people who are considering seeking genetic tests are often those who have existing family health factors that are already discoverable in the underwriting process. This available and disclosable information will already impact their ability to obtain life insurance, so genetic tests have the potential to assist them to avoid exclusions or premium loadings – for example if the test confirms the absence of a known risk factor (such as the BRCA mutation known to be associated with some cancers).

A final observation is that the Australian life insurance system operates in a significantly different manner to the jurisdictions identified in the A-GLIMMER report and through the discussion paper. As discussed above, individual life insurance policies in Australia are offered on a guaranteed renewable basis, based on the customer's initial underwriting. This is not typically the case in the other jurisdictions mentioned (for example, the UK and Canada), which have enacted bans on using genetic test results but don't operate with guaranteed renewal policies. Adding policy settings, even if or just because they have been enacted in other jurisdictions, that may adversely affect the financial health of life insurance pools, is likely to put additional pressure on their economic viability and increase the risk of premium shocks, leading to fewer Australians being able to afford and maintain coverage. Further significant reductions in life insurers, lives insured, new business volumes, and in-force premiums, on top of consumers experiencing further significant increases in premiums, will apply further pressure on an industry that appears to be already in a difficult position.

RESPONSES TO CONSULTATION QUESTIONS

Question 2 - Which aspects of the current Moratorium provide inadequate protections for consumers: consumer and industry awareness, financial thresholds, compliance by life insurance industry, or other?

Our members have not identified any negative impacts or inadequacies of protections for clients in the context of the current Moratorium's effectiveness.

It was noted by several members that clients with familial cases of Huntington's disease faced the difficult decision of whether to test or not, balancing the relief of a potential 'no' result against the impact of a positive result on their lives.

Conversely, in other genetically linked diseases (such as breast cancer), a "positive" genetic test is not a diagnosis that will definitively lead to a clinical outcome based on current genetic testing technology. An increased risk might be identified, but not a definite prediction.

As genetic testing technology continues to develop, accuracy is likely to improve. For this reason, flexibility to change the moratorium in the future may be required to manage new technologies, increased usage of genetic testing, and create a more accurate linkage between a gene being present and clinically linked morbidity and/or mortality.

It is also appropriate to actively manage the financial thresholds over time, specifically the impact inflation has on monetary values. To this last point, the current thresholds have not been modified for a significant period of time. They are well under standard levels of cover for advised life insurance products to presently justify arguments of adverse selection bias. If financial limits remain, they should be indexed with inflation.

It is important to remember the deeper considerations facing a person who has discovered the existence of a family history with a serious health condition. For many, the decision to seek genetic testing can be a very challenging one. On the one hand, a result confirming the risk, where there is little ability to influence the ultimate health outcome, might be very disturbing (such as a positive Huntington's Disease diagnosis that may result in serious mental health consequences). In other cases, the test result may lead to the opportunity to make significant lifestyle changes that enable the person to reduce the risk of the specific health condition eventuating. Financial advisers work with clients facing these challenges, which is certainly not easy. The right path will depend very much on the suspected disease, the accuracy and predictive power of the test and the attributes and preferences of the individual involved. Pursuing genetic testing is not always the right outcome for everyone.

The FAAA, therefore, supports a framework that excludes certain genetic tests that do not have clinical merit and the retention of indexed monetary limits under which insurers cannot request genetic test results.

Questions 4 and 5 - Appropriateness and concerns of each proposed option

In considering questions 4 and 5, the FAAA offers the following observations.

- **Option 1 - No Government Intervention**

Industry codes such as the Life Insurance Code of Practice are efficient ways for industries to make promises, set expectations, and, over time, raise standards above legally required minimums set by the Government. They can build trust with customers and the community more broadly, as has been demonstrated through the improved outcomes and trust in the professionalisation of financial advice over the past several years through the introduction of the Financial Planners and Advisers Code of Ethics.

In saying this, such Codes need to evolve over time. Some industries manage this process well, others less so. Industry Codes benefit from the ability to be updated efficiently with shorter implementation timeframes (given the involvement of the industry in developing them) where there is acceptance and agreement of the industry and a need to address an immediate issue or consumer detriment. However, once established, it is typical for the frequency of updates to slow, given industries' preference not to make regular changes to how they operate. Competition issues can also surface when an industry collaborates on implementing Code clauses. Additionally, the ability for Codes to change behaviour and outcomes comes down to the quality of the Code Monitoring body, which imposes compliance costs and penalties and may vary in its speed and perceived fairness.

ASIC Code approval (i.e. Section 1101A of the Corporations Act 2001) is another option that can further enhance consumer and community trust. ASIC Code approval offers the benefit of ASIC consultation, oversight and enforceability beyond just Code monitoring bodies and provides an additional layer of oversight and consumer protection. On the other hand, industries can also discontinue ASIC approval if the approved portion of the Code no longer suits their purpose or interests, which also removes the additional ASIC oversight (although we note this is rare in practice and has only occurred in cases when the Parliament has legislated an alternate arrangement).

- **Option 2 - Legislating a ban**

Legislating a blanket ban on genetic testing runs the risk of adverse selection bias, which is a significant concern, given the current sustainability issues in the Australian life insurance market. Legislation is also more complicated to amend and adapt as genetic testing technology changes and understanding genetic links to disease morbidity and mortality changes over time.

The FAAA believes that if legislation is the preferred implementation mechanism, it would be preferable to implement thresholds, modifications or exemptions via reviewable and disallowable instruments to ensure regular consultation on the effect and benefit of settings considered in a rapidly changing field like genetic testing. This also allows easier adjustments to financial limits in line with fluctuations in economic conditions and the financial position of consumers.

As noted above, it would be critical to consider the types of genetic tests subject to aspects of the ban. It should also allow for positive genetic testing outcomes (i.e. those that show the customer does not carry a gene that could cause increased morbidity or mortality risk) to positively impact the underwriting outcome for

the client (i.e. avoid or reduce loadings). For example, broad-spectrum consumer/over-the-counter genetic tests that only provide analytical utility are unlikely to provide helpful underwriting information to life insurers compared to existing family history questionnaires. Untargeted genetic testing for scientific research purposes, or where results are withheld from the individual, should equally not need to be provided by customers in the underwriting process.

On the other hand, diagnostic tests for specific conditions with clear scientific evidence of links between genetic make-up and morbidity and mortality outcomes (such as Huntington's disease) should be reasonable to be considered by the life insurer to negate the adverse selection risk and the sustainability of the risk pool. Again, as genetic technology advances and scientific and clinical understanding improves, the legislative instruments must be reviewed and updated. Again, we have only a small number of examples of our members' clients who had undertaken genetic tests being asked for genetic test results and where they have, this has so far been leading to positive underwriting outcomes.

- **Option 3 - Legislating a financial limit**

Again, given the rapid technological and scientific changes occurring in genetic testing, if a legislated financial limit is considered, it would be preferable to set the threshold through reviewable and disallowable instruments to ensure regular review is conducted.

However, restricting legislation or legislative instruments to financial limits would provide less opportunity to consider amendments that may be required around specific genetic conditions or improvements in genetic testing technology and are, therefore, a less holistic outcome than option 2.

It is important to note that from a practical and financial perspective, all feedback from members noted the current financial thresholds are too low and should be increased significantly.

- **FAAA Conclusion**

The complexity of life insurance, the variety of product types and the use of genetic testing in health being regulated under the Corporations Act, the Disability Discrimination Act, numerous federal and state health Acts and regulators, and scientific research oversight bodies create significant complexity in relation to how a legislative solution can operate, under which legal framework and how the different sectors will interact to agree on and maintain an appropriate legislative framework covering the genetic, scientific, medical and financial implications.

The FAAA's recommendation is for the life insurance industry to self-regulate through the Life Insurance Code of Practice, with the addition of requiring ASIC Code approval over the moratorium. The combination of:

- self-regulation,
- ASIC code approval (where an obligation would exist to have the approved Moratorium section of the Life Code independently reviewed every 3 years and could therefore include genetic expertise to make recommendations), and
- the Life Code Compliance Committee's collective oversight of the development, implementation, and monitoring of ongoing consumer outcomes

offers the most flexibility to ensure the thresholds in relation to financial limits and genetic test types remain appropriate and should lead to improvement in consumer trust, community perception, and the reputation of the life insurance industry over time.

Any failure to comply with or appropriately adapt the Moratorium in the Life Code over time will lead to justifiable criticism of the industry and pressure from consumers, the regulators, and Parliament to improve the Moratorium or justifiably, at that point, lead to a legislative ban.

The FAAA notes the recent transition of the Life Code from the Financial Services Council to the Council of Australian Life Insurers. The industry should be given the time in good faith to consult on, amend, and seek ASIC approval over the Moratorium, given the limitations and adverse outcomes either on the medical and research community, existing life insurance customers, or the sustainability of the industry that other proposed solutions entail.

However, should the Government seek to implement a legislative solution, as noted, the FAAA recommends that it be implemented through disallowable instruments with 3-year review cycles to encourage review and update of financial thresholds, consideration of technology advances and a review of consumer outcomes. Of the two proposed legislative models, the FAAA considers Option 3 (legislating a financial limit) the more appropriate model for implementation today.

Question 6 - Is there any evidence to suggest that Government intervention may give rise to adverse selection?

While the discussion paper points to research in other jurisdictions concerning adverse selection bias, as we have highlighted, there are differences in the Australian life insurance industry from those highlighted (for example, the UK). Firstly, life insurance in Australia is offered as guaranteed renewable, based on the initial disclosure and underwriting of the customer. This places significantly more importance on the role of initial disclosure and underwriting and increases the potentially negative impact of adverse selection in this market.

Secondly, the Australian life insurance market's financial health and sustainability appear precarious, as seen by the recent reductions in life insurers, lives insured, new business, and increases in premiums. Continued significant increases in premiums and the need for APRA regulatory intervention have put further pressure on the industry. Adding policy settings that may adversely affect the financial health of life insurance pools is likely to put additional pressure on their economic viability and lead to premium shocks, resulting over time in fewer Australians being able to afford and maintain coverage.

That said, as noted elsewhere the FAAA does not have any evidence of consumers making "adverse selection" decisions at present, however we envisage that this risk will increase over time.

Question 7 - Should there be any difference in the treatment of diagnostic and predictive genetic tests?

The FAAA does not have the technical knowledge to answer this question definitively. However, it is generally understood that there are important differences between diagnostic and predictive genetic tests and their benefits in analytical validity versus clinical validity versus clinical utility and a broad spectrum of outcomes for individuals carrying a specific gene or gene mutation across a population. We have noted

elsewhere that the technology supporting these tests is changing rapidly and those with expertise in this area must be involved in regular reviews of controls or codes in the life insurance industry.

Questions 9 and 10 - Enforcement Options

The regulatory body which oversees the enforcement of the implementation depends on which option the Government chooses to implement, of options 1, 2, and 3 proposed in the regulatory intervention section. In our view, options 1 and 3 are best regulated by ASIC, given ASIC otherwise jointly oversees the conduct of life insurers, with consumers having the ability to seek financial redress from AFCA and remediation of life insurers via the Life Code Compliance Committee. Option 2, however, may require a combination of enforcement bodies, given the medical and financial aspects this option may introduce.

Adding another regulatory body to the industry, such as AHRC, should ideally be avoided. Introducing a requirement for Treasury or ASIC to consult with or collaborate with the AHRC as regulatory instruments are reviewed and updated could achieve the desired outcome. Consideration could also be given to ensuring other government bodies are consulted, including the Australian Prudential Regulatory Authority (APRA), Australian Health Practitioners Regulatory Agency (AHPRA) and the National Health and Medical Research Council (NHMRC). These bodies can provide valuable input on the amendments to protect consumers appropriately, understand prudential impacts, and consider the latest clinical and research developments.

As noted, the FAAA recommends Option 1 (industry self-regulation via the Life Insurance Code of Practice, with the addition of ASIC oversight) as the most appropriate solution. Therefore, enforcement would be combined between ASIC and the Life Code Compliance Committee and allow AFCA to direct the compensation of consumers where fair consumer outcomes have not been achieved. Other options will likely introduce complexity, additional layers of regulation and cost (which will be passed on in the form of further premium increases) that registration and enforcement by non-financial service regulators entail.

Conclusion

The FAAA welcomes the opportunity to provide the Treasury with feedback on the proposed changes to regulating the genetic testing moratorium in Life Insurance.

While the FAAA understands the need for consideration to be given to different regulatory options for the protection of consumers, to support the development of scientific and medical advances to improve the health outcomes for individual Australians as a nation, and to ensure there is a viable and sustainable life insurance sector to manage financial risk associated with adverse health outcomes for Australians, care must be taken to not over or under regulate one area at the expense of the others.

We believe that there is a need to improve the existing moratorium both in terms of the types of tests that should and shouldn't need to be provided to life insurers as part of the underwriting process, and an increase to the financial thresholds of the current moratorium to better reflect the current life insurance market and international comparability, noting the unique differences in the regulatory settings Australian life insurers operate under. However, we believe that the industry is best placed to balance these conflicting pressures with the oversight of ASIC, by enforcing the moratorium as an enforceable code. Alternatively, regulation should, at this point, be limited to increasing the moratorium thresholds through disallowable and reviewable instruments.

The FAAA would welcome the opportunity to discuss the issues raised in our submission in more detail. Please contact myself, or FAAA's General Manager Policy, Advocacy and Standards, Phil Anderson on 02 9220 4500 should you have any questions.

Yours sincerely,



Sarah Abood
Chief Executive Officer
Financial Advice Association of Australia