



public interest
ADVOCACY CENTRE

Mental Health and Insurance - Submission to the Productivity Commission Inquiry into Mental Health

23 January 2020

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

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1. Introduction

Since 2012, the Public Interest Advocacy Centre (PIAC) has been providing legal advice and representation to people who have experienced discrimination, or otherwise been treated unfairly, by general and life insurance providers on the basis of a mental health condition. PIAC has identified systemic problems with industry practices that are failing to protect vulnerable consumers from unlawful disability discrimination or other forms of unlawful or unfair behaviour.

People living with, or who have experienced mental illness in the past, find it substantially more difficult than others to access many forms of insurance, including life insurance. One in five Australians will be affected by mental illness in any 12 month period and 45% of Australians will experience a mental illness at some time in their life.¹ As such, it is a matter of broad public interest that insurers design, price and offer policies, and assess claims on existing policies, in reliance on robust evidence and contemporary understandings of mental illness.

PIAC welcomes this opportunity to comment on the Productivity Commission's draft report on mental health and is pleased that the Commission has recognised the significant issue of stigma and discrimination in the insurance sector in draft recommendation 20.2.

PIAC has made several previous submissions to inquiries related to this issue, including, most recently, to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry² and in November 2016 to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Life Insurance.³ This submission draws from those previous submissions and responds to the draft recommendations proposed by the Commission in respect of awareness of mental illness in the insurance sector.

2. Systemic discrimination

The Commission has identified, on page 810 of the draft report, existing legal protections relating to access to insurance products for people with mental illness, including disability discrimination legislation, insurance contracts legislation and industry standards and codes of conduct. Despite these protections, PIAC has identified through our work several ways in which insurance industry practices have the effect of discriminating against those with a past or current mental health condition.

In particular, PIAC's casework consistently shows that life insurers are limiting and denying cover following disclosure of a past or current mental health condition in applications for life insurance. Insurers appear to be basing those decisions on outdated understandings of mental health, or by conflating all mental health conditions into one category.

¹ Australian Bureau of Statistics (ABS), National survey of mental health and wellbeing: summary of results, Australia, 2007. ABS cat. no. 4326.0, available

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4326.0Main+Features12007?OpenDocument>

² Public Interest Advocacy Centre, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, (26 April 2018) available <https://piac.asn.au/2018/04/26/submission-to-the-royal-commission-into-misconduct-in-the-banking-superannuation-and-financial-services-industry/>

³ Public Interest Advocacy Centre, Submission to the Parliamentary Joint Committee on Corporations and Financial Services: Inquiry into the Life Insurance Industry (18 November 2016) available

PIAC comprehensively outlined its concerns in its submission in 2018 to the Banking & Financial Services Royal Commission. The Royal Commission did in fact consider a number of the issues raised in our submission relating to the handling of claims, and made several positive recommendations which will benefit consumers by improving the practices of insurers in the claims handling context.

However, the Royal Commission did not address the key issues raised by PIAC concerning the underwriting of policies. In our view, it is these underwriting practices which are at the root of unlawful discrimination, as the underwriting guidelines are almost always the actuarial and statistical data the insurer will rely on to support the existence of an exclusion on the policy. In our experience, insurers are never prepared to disclose the data behind their underwriting guidelines, and as such, we are unable to assess whether what appear to be overly broad exclusions comply with federal and state anti-discrimination laws.

2.1 Denying or limiting cover

PIAC's casework has shown that insurers frequently and routinely unreasonably deny cover and apply extremely broad mental health exclusions to policies that are not supported by evidence and do not reflect the risk posed by the applicant to the insurers. This is particularly so for life insurance products, where many life insurers are overestimating the risks involved in insuring people who can demonstrate a high level of functioning despite their mental illness. Clients who have been diagnosed with anxiety or depression, or post-natal depression, are having broad mental health exclusion clauses placed on their cover which will apply for the life of their cover.

Such practices are unlawful under state and federal anti-discrimination law. The DDA and equivalent State legislation prohibit insurers from discriminating on the basis of mental health. Section 46 of the DDA provides an exception for insurers where the discrimination is:

- a. based on actuarial or statistical data that is reasonable for the insurer to rely on; and
- b. the discrimination is reasonable having regard to that data and all 'other relevant factors'.

If there is no statistical or actuarial data available or reasonably obtainable to assess the risk, an insurer may justify its discrimination by relying solely on all 'other relevant factors'.

In the case of *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 193, the Victorian Civil & Administrative Tribunal found QBE unlawfully discriminated against Ms Ingram when it issued her with a travel insurance policy which included a mental health exclusion and when it relied on that exclusion to refuse to pay a claim. QBE failed to meet its obligations under discrimination laws because it did not provide evidence it had considered statistics, actuarial data or expert medical information about the risks presented by different types of mental illnesses when it created the travel insurance policy.

The Commission has recognised this issue in its draft report and notes the Ingram decision in respect of blanket exclusions, commenting that there is "no evidence that these exclusions are becoming less common".

PIAC notes that, following the VCAT decision in *Ingram*, in October 2017, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) launched an investigation under the Equal Opportunity Act 2010 (Vic) into potentially unlawful discrimination against people with a

mental health condition in the travel insurance industry. VEOHRC published its report 'Fair-minded cover: Investigation into mental health discrimination in travel insurance' in June 2019 (**VEOHRC Report**).

VEOHRC assessed whether the data provided by insurers was sufficient to meet the exception to discrimination (and was therefore lawful discrimination under the Equal Opportunity Act), and whether the conduct of insurers and others in the industry was compliant with the positive duty to eliminate discrimination as far as possible. It found that all three of the travel insurers who were parties to the investigation had discriminated against people with a mental health condition by including a blanket mental health exclusion in their travel insurance policies and by failing to indemnify people under those policies. Notably, VEOHRC found that none of the three insurers produced actuarial or statistical data, or set out other relevant factors, to support the existence of blanket mental health exclusion clauses on their products.

During and after the investigation, a number of important and significant changes occurred, including:

- Travel insurers involved in the investigation took immediate steps to remove exclusion terms of the kind investigated;
- Those insurers agreed to take steps to address the Commission's recommendations, including in relation to the way they offer and indemnify pre-existing mental health conditions; and
- Leading industry groups acknowledged their role and agreed to provide improved education and enforceable provisions to ensure enduring change.

While a number of travel insurers have changed their policies as a result of the *Ingram* case and the VEOHRC investigation, practices in the life insurance industry remain largely unchanged. PIAC believes that a similar investigation conducted by an appropriate body with the power to compel data from insurers, such as ASIC or APRA, is required for the life insurance industry. Such an investigation would likely effect meaningful change to reduce the barriers to those with a past or current mental health condition accessing life insurance.

2.2 Broad mental health exclusion clauses

PIAC's particular concern is the application of excessively broad mental health exclusion clauses. PIAC has observed through its casework that, in applications for life insurance, it is common for applicants who disclose they have experienced depression or anxiety sometime in the past to have the following types of broad mental health exclusions placed on their policy, regardless of their individual circumstances:

Example 1

No claim shall be payable under this cover where that claim arises from or is contributed to by stress (including post traumatic stress), fatigue, physical symptoms of a psychiatric illness or condition, anxiety, depression, psychoneurotic, psychotic, personality, emotional or behavioural disorders, or disorders related to substance abuse or dependency (which includes alcohol, drug or chemical abuse or dependency).

Example 2

No payment will be made under this insurance for any disability contributed to or caused by any mental health disorder including, but not limited to, any anxiety state or disorder, adjustment disorder, acute stress disorder, depressive or mood disorder, personality or substance use disorder, eating disorder, suicide or self-harming behaviour or any complications arising from any of them.

Such broad exclusions are routinely placed on life, income, TPD and death insurance policies after an individual discloses any mental health condition including, for example, disclosing they are experiencing a mild adjustment disorder due to relationship issues, having experienced mild anxiety, or having a history of minor depression. The exclusions are also frequently placed on policies after a person has disclosed only symptoms of depression or anxiety (and not a diagnosed condition), for example, feeling 'low' after a relationship breakdown or feeling 'stressed' as a result of work.

Case study 1

The client experienced depression, anxiety and an eating disorder in their teenage years and experienced minor symptoms of anxiety around the time of their wedding (which was three years prior to their application for insurance). The client was provided with medication to assist them to sleep around this time.

The client later applied for life and TPD insurance through their superannuation provider and the application was denied on the basis of mental health history.

PIAC assisted the client to request the insurer review its decision to decline the client's application. The insurer then offered the client a life insurance policy with no exclusion and a TPD insurance policy with the following mental health exclusion:

No Total and Permanent Disability benefit shall be payable for any mental or nervous disease or disorder including but not limited to, anxiety, depression, stress, chronic fatigue syndrome, post-traumatic stress disorder, exhaustion or fibromyalgia, physical complications of psychiatric disorders, drug, alcohol or substance abuse, cognitive impairment, behavioural disorders or complications thereof.

The insurer did not provide any actuarial or statistical data to show that the client's previous conditions would result in them being more likely to develop the extensive number of conditions listed in the proposed exclusion, or all other mental health conditions in the future. Following further negotiation, the insurer eventually agreed to narrow the exclusion to apply to any claims:

directly arising from or directly related to any depressive disorder, anxiety disorder or eating disorder.

Case study 2

The client attended a counsellor on an ad hoc basis for symptoms of anxiety. The client was not provided with a diagnosis of any anxiety related disorder. The client did not take any medication and was not required to take any time off work due to their symptoms.

The client applied for life and TPD insurance. The insurer offered life insurance with no exclusions and offered TPD insurance with an exclusion which excluded claims arising from:

Any disability that is a result of any mental disorder including, but not limited to, anxiety, depression, stress, fatigue, post traumatic stress disorder, insomnia, exhaustion or fibromyalgia, physical complication of psychiatric disorders, drug or alcohol abuse, cognitive impairment, behavioural disorders or complications thereof.

The client requested the insurer to change its decision to offer TPD insurance with this mental health exclusion. The insurer declined this request. PIAC assisted the client to again request the insurer change its decision on the basis that the insurer had failed to make inquiries into all relevant factors relating to the client's application for insurance.

After reviewing the client's medical records, the insurer reversed its decision and offered the client a TPD policy without a mental health exclusion.

The limiting of cover in this way is discriminatory and does not meet the criteria for the exception in section 46 of the DDA because the insurer:

- cannot show that the discrimination is based on actuarial or statistical data that is reasonable for the insurer to rely; and
- has not properly considered the particular circumstances of the individual in deciding to apply the exclusion.

PIAC has acted for many clients who have made complaints of discrimination to the Australian Human Rights Commission or State-based anti-discrimination bodies. Most of those complaints have been resolved with the relevant insurer on favourable, but confidential, terms for our clients. Outcomes have included the removal or more appropriate limiting of exclusion clauses, the payment of damages, and agreements to review the insurer's policies or procedures. While these outcomes have been favourable for our clients, the individual resolution of claims is not able to achieve the systemic change which is necessary to see all life insurers more fairly and lawfully offer cover to those who have experienced a mental health condition. This is because:

1. It is difficult for individuals who have had cover denied or limited in relation to mental health to seek review and redress of the insurer's decision without legal assistance because:
 - a. insurers' internal review processes are not always clear, and generally result in the insurer affirming its original decision. There is then no choice but to pursue a formal complaint or claim to an external body;
 - b. the individual is often denied access to some or all of the material relied on by the insurer, making it extremely difficult for the individual to address the insurer's concerns; and
 - c. some of the material relied on by insurers to demonstrate that applicant for insurance poses too high a risk, for example, medical journal articles, require expert analysis by lawyers, actuaries and medical experts in the field of psychiatry.
2. It is difficult for consumers to gain access to the material and data relied upon by insurers in decisions that affect them. Insurers rarely provide such data outside formal court processes. This means individuals are often unable to test whether an insurer has satisfied the insurance exemption in the DDA without commencing a claim in a court or

tribunal. This places an unrealistic and unfair burden on vulnerable individuals who suspect an insurer has unlawfully discriminated against them.

3. Pursuing a legal complaint is arduous, time consuming and expensive. For many of PIAC's clients, the risk of an adverse costs order dissuades them from pursuing a discrimination complaint in the federal courts even when they have a strong claim. As a result, many strong claims settle on terms that may be favourable to the claimant but are far less than they ought to be under the law. While the costs risks to an individual are high, to insurers the cost of settling is low relative to the risk of having to implement more systemic changes. Most often respondent insurers insist that any such settlement be confidential. The result is that the impetus for making any long-lasting change to current practice is lost and no legal precedent is made.
4. The individual nature of claims means that the issue can only be raised with specific insurers as individuals come forward with complaints. A broader approach is needed to ensure all insurers are accountable for these issues.

Given the above, PIAC is pleased that the Commission has recognised issues of discrimination in the insurance sector in its draft report and has made recommendations that could go some way to reducing, in the insurance context, the stigma and discrimination felt by those who have experienced a mental health condition. PIAC provides the following comments on those recommendations.

3. Draft recommendation 20.2

3.1 FSC to update mental health training requirements

PIAC supports the Commission's recommendation that the Financial Services Council (FSC) update mental health training requirements for insurers in Life Insurance Industry Standard 21, in consultation with consumer and carer organisations to reflect contemporary thinking about mental illness. PIAC also supports the recommendation to:

- expand coverage of the Standard to all employees;
- publish data on industry compliance; and
- rollout the Standard to superannuation funds and financial advisory group members.

In addition, PIAC notes that the Insurance Council of Australia has recently reviewed and updated the General Insurance Code of Conduct so that it includes specific obligations in respect of treating those with mental health conditions fairly, and includes a guidance document for members regarding best practice in respect of mental health. In practice, general (travel) insurers will not be able to apply blanket mental health exclusion clauses on products without being inconsistent with the Code.

The FSC Life Insurance Code, which came into operation in October 2016, already includes a commitment to comply with anti-discrimination law but does not address or establish a process for life insurers to adhere to when assessing applications or claims that reveal a mental health condition. The Life Insurance Code of Conduct is due to be reviewed in 2020. PIAC recommends that, as well as incorporating amendments responding to the recommendations in the Final Report of the Royal Commission, the Life Insurance Code explicitly recognise life insurers' obligations to those with a past or current mental health condition by requiring insurers to:

- ensure that when designing policies the terms are based on up to date, relevant and reasonable actuarial or statistical data, and where such data is not available that the terms of policies are based on other relevant factors;
- ensure that applications for insurance that reveal a mental health condition or symptoms of a mental health condition are not automatically declined;
- establish a process for considering life insurance applications that reveal a mental health condition, including:
 - refer applications for insurance that reveal a mental health condition or symptoms of a mental health condition to an appropriately qualified underwriter and obtain further information from the applicant to assist in the proper risk assessment of their application;
 - wherever possible, provide cover to persons with a past or current mental health condition and manage risk through policy pricing, exclusions, limits and caps based on actuarial and statistical data and other relevant factors, rather than not provide cover at all;
 - ensure that where a policy is offered with a mental health exclusion or a premium loading, specify:
 - how long it is intended that the exclusion or higher premium will apply to the policy;
 - the criteria the insured would be required to satisfy to have the exclusion removed or premium reduced; and
 - the process for removing or amending the exclusion/premium;
- automatically provide applicants with detailed written reasons when they refuse to provide insurance or offer cover on non-standard terms (e.g. with an exclusion or a premium loading), which at a minimum refers to the specific grounds on which the decision was made having regard to the disclosures made during the application process and the risk according to actuarial and statistical data.

3.2 ASIC evaluation of Codes of Practice and industry standards

In relation to the Commission's recommendation that ASIC undertake an evaluation of the effectiveness of industry Codes of Practice and industry standards that relate to the provision of services to people with mental illness, PIAC agrees that an independent assessment of current industry practices is needed. However, having regard to the context given above, PIAC suggests it would be appropriate to focus as a priority on investigation of the underwriting practices of life insurers. Reasons for this include:

- a) The potential scope of the evaluation proposed in recommendation 20.2 is very broad given the different types of insurance and number of insurers that would potentially be considered;
- b) The Banking & Financial Services Royal Commission made several recommendations which may improve practices in the claims handling context but did not address the issues that arise in underwriting;
- c) Following *Ingram* and the VEOHRC Report, many general insurers offering travel insurance have removed blanket mental health exclusions from policies but little change has occurred in respect of the use of exclusions in the life insurance industry.

PIAC recommends that an investigation into discrimination in relation to mental health in the underwriting of life insurance policies be undertaken at the earliest opportunity, with a focus on

the application of broad mental health exclusions. In this regard, PIAC supports the Commission's proposal for an evaluation to occur within two years. PIAC suggests that such an investigation could adopt a model similar to that used by VEOHRC in its investigation into travel insurance.

Key features of the VEOHRC investigation included:

- being limited but clear in respect of the features of the insurance products it was examining, which were:
 - the terms on which travel insurers offered insurance that excluded or limited cover to people who have, or have had, a mental health condition; and
 - the terms on which travel insurers denied insurance cover, or offered insurance policies on unfavourable terms (such as extra costs being required through higher premiums or excesses), to people who disclose pre-existing mental health conditions, without adequate risks assessments being undertaken for the individuals concerned.
- selecting which together represented approximately 70 per cent of the travel insurance market to participate in the investigation and made three insurers which maintained mental health exclusions in their policies parties to the investigation.
- having the power to compel the insurer parties to provide VEOHRC with the actuarial, statistical and other data they relied on to discriminate;
- obtaining expert reports from an independent actuary to assess any data provided by an insurer;
- drawing on the lived experiences of people with mental health conditions, through case studies provided through various public inquiries, as well as VEOHRC's complaint and enquiry data;
- consulting with consumer advocates and industry bodies; and
- during the process it provided participants with the opportunity to comment and provide feedback on preliminary views and findings, and recommendations.

Having regard to the considered methodology, consultative approach, and successful outcomes, PIAC considers that the VEOHRC investigation provides an excellent model for a further investigation of the similar issue of the routine application of broad mental health exclusion clauses in the life insurance industry. As yet, little public scrutiny has been applied to this issue and an investigation like the one conducted by VEOHRC could prompt significant improvements in the practices of life insurers, and vastly improve the experiences of those with some history of a mental health condition who seek life insurance.

PIAC submits that further evaluation by ASIC of industry codes of practice and industry standards could also occur separately from an investigation into underwriting in life insurance, and as recommended by the Commission in draft recommendation 20.2, particularly to:

- Increase transparency and accountability by considering obligations and practices in respect of communicating decisions and reasons to consumers;
- Increase transparency and accountability by considering mechanisms for reporting instances of declining or limiting cover to an independent body such as the Australian Human Rights Commission; and
- Consider whether claims are resolved consistently and within adequate timeframes.

3.3 OAIC review of protocols for insurer access to clinical records

PIAC agrees with the Commission's observations regarding the likely effect of the proposed standardised consent form FSC Standard No. 26 for access to clinical records. It is not clear at this point how effective the new standard will be and PIAC supports the Commission's recommendation that it be reviewed by the Office of the Australian Information Commissioner after two years.