Life Insurance Code of Practice Version 2.0

Submission to the Financial Services Council

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- 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 First Nations people
- Access to sustainable and 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)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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Recommendations

1. Policy design – blanket mental health exclusions

The Code should include a commitment not to design and sell products which incorporate a blanket mental health exclusion in the general terms of the policy.

2. Mental health discrimination and buying a policy

The Code should include additional commitments to comply with anti-discrimination laws including:

a. *at a minimum, to make decisions on applications for insurance in compliance with the requirements of the Disability Discrimination Act 1992* (Cth) *and/or any relevant State or Territory anti-discrimination laws;*
b. *to ensure decisions are evidence- based, involving relevant sources of actuarial and statistical data where this is available, and having regard to any other relevant factors including the individual circumstances of the applicant;*
c. *to regularly review and update underwriting processes and the information relied upon to make decisions to ensure these are not relying on out-of-date or irrelevant sources of information;*
d. *not to automatically decline an application where the application reveals a past or current mental health condition or symptoms of a mental health condition;*
e. *to, wherever possible, provide cover to persons with a past or current mental health condition and manage risk through pricing, exclusions, limits and caps based on actuarial and statistical data and other relevant factors, rather than not provide cover at all;*
f. *to allow applicants the opportunity to withdraw their application before declining to offer insurance or offering insurance on non-standard terms;*
g. *to tell consumers, where insurance is offered on non-standard terms (for example, with a mental health exclusion or a higher premium than a standard premium):*
    - *how long it is intended that the exclusion/higher premium will apply to the policy*
    - *how and when the insured can ask for the exclusion to be removed or premium reduced, and the criteria they would need to satisfy;*
h. *to develop, implement and maintain policies that reflect the above.*

3. Buying a policy – data transparency

Draft clause 4.29 should:

a. *commit specifically to explaining the 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 that was relied on to make the decision.*
b. *commit to providing directly to an applicant or insured on request, the actuarial and statistical data relied on to make a decision to decline cover or offer cover on alternative terms.*

4. Pre-existing conditions and claims

The Code should include commitments as recommended by the PJC to:

a. *where a pre-existing condition is to be used by an insurer as the basis for denying a claim or avoiding a contract, a direct medical connection between the prognosis of a pre-existing diagnosed condition and the claim must be established; and*
b. *the statistical and actuarial evidence and any other material used to establish a pre-existing condition, as well as a written summary of the evidence in simple and plain language, be provided by the life insurer to the consumer/policyholder on request.*

5. Appendix B – supporting customers experiencing a mental health condition

Appendix B should form an enforceable part of the Code and include additional commitments outlined in this submission.

6. Enforceability

Provisions of the Code which make commitments regarding decisions to offer or decline insurance, or to offer insurance on non-standard terms, should be made enforceable code provisions.

1. Introduction

PIAC welcomes the opportunity to comment on the FSC Life Insurance Code of Practice Consultation Draft Version 2.0 (**draft Code**). This submission focuses on issues relating to consumers who have experienced mental health conditions and reiterates the comments provided by PIAC directly to the FSC during consumer consultative group meetings over the past four years. This submission also builds on PIAC's comments in relation to the first iteration of the Life Insurance Code of Practice in 2016, and our comments on an earlier draft of the revised Life Insurance Code of Practice in 2019.[1]

Overall comment on the draft Code

PIAC acknowledges the efforts that have been made to redraft the Code in plain English, and to expand the extent to which the Code specifically addresses the experience of people with mental health conditions, particularly in relation to claims handling provisions. The inclusion of specific provisions addressing the manner in which insurers offer policies and assess claims for people with past or current mental health conditions are welcome.

However, the draft Code remains too general with respect to the obligations of insurers in relation to people with mental health symptoms or diagnosed conditions. It fails to refer to the *Disability Discrimination Act 1992* (Cth) (**DDA**). It does not provide guidance to insurers on the specific processes and practices they need to adopt to enhance compliance with the DDA. In PIAC's view, this is a significant oversight, and a missed opportunity to reduce systemic discrimination by life insurers in the area of mental health.

PIAC is particularly concerned that the previous key commitment to comply with disability discrimination law has been removed from the draft Code and has not been replaced with any equivalent.

Further, the draft Code fails to address all the recommendations made by the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Life Insurance Industry (**PJC**),[2] and it is not clear why these recommendations have not been fully adopted.

PIAC's submission focuses on the mental health related provisions of the draft Code, but PIAC also endorses the joint consumer submission from Financial Rights Legal Centre, Consumer Action Law Centre and Redfern Legal Centre which addresses other aspects of the draft Code.

Discrimination by insurers in relation to mental health

Unfortunately, people living with mental health conditions, or who have experienced a mental health condition or symptoms of a mental health condition in the past, continue to find it more difficult than others to access many forms of insurance. Since Beyond Blue and Mental Health Australia published research in 2011 which revealed that people living with mental health

[1] Public Interest Advocacy Centre, *Feedback on the draft Life Insurance Code of Practice* (8 September 2016) available https://fsc.org.au/web-page-resources/life-insurance/1594-cop-resource-ps-public-interest-advocacy-centre; Public Interest Advocacy Centre, *Consultation Draft – Life Insurance Code of Practice: Submission to the Financial Services Council* (28 February 2019) available https://fsc.org.au/web-page-resources/fsc-life-insurance-draft-code-of-practice-2-0-1/1663-public-interest-advocacy-centre-fsc-life-insurance-code-of-practice-2-0-submission

[2] Parliamentary Joint Committee on Corporations and Financial Services, *Life Insurance Industry,* March 2018 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/LifeInsurance/Report

conditions experience significant difficulty and discrimination when applying for insurance products and making claims against their policies,[3] PIAC has assisted and represented many clients whose experience bears out those observations. PIAC has documented systemic problems in the way insurers design, price and offer policies and assess claims for people with past or current mental health conditions in several past submissions, including to the Royal Commission into Misconduct in Banking and Financial Services (**Royal Commission**), and has continued to raise these concerns directly with the FSC over many years.

The Productivity Commission, in its recent landmark report into mental health in Australia, has recognised the important role insurance plays in supporting people with mental health conditions and in experiences of stigma and discrimination. Stigma and discrimination continues to prevent people from accessing the support and treatment they need, and the Commission recommended further changes to the insurance sector to 'better support people to live fulfilling lives'.[4]

PIAC remains particularly concerned about the routine denial of cover or use of extremely broad mental health exclusions in income protection and TPD insurance. This occurs for individuals who disclose a history of a diagnosed mental health condition, as well as individuals who disclose symptoms of a mental health condition but have never been diagnosed. PIAC continues to hear from clients who have had these experiences, and considers the practice of insurers applying overly broad mental health exclusion clauses to be ongoing. We are concerned these practices are not only in breach of anti-discrimination law, but take an approach that penalises and discourages people from seeking preventative, early medical assistance to proactively manage their mental health. The significance of this penalty is only increasing as more people find themselves needing mental health support as a consequence of the global COVID-19 pandemic.

As the FSC and its members are well aware, insurers are required to comply with the DDA and equivalent State and Territory anti-discrimination legislation which makes discrimination on the basis of disability, including mental illness, unlawful. Insurers are permitted to discriminate by that legislation in limited circumstances, where the discrimination is:[5]

a. based upon actuarial or statistical data on which it is reasonable for the insurer to rely; and
b. reasonable having regard to the matter of the data and other relevant factors; or
c. in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.

The Australian Human Rights Commission (**AHRC**) 'Guidelines for Providers of Insurance and Superannuation under the Disability Discrimination Act 1992 (Cth)' and the case law which has considered these provisions make it clear that the DDA requires insurers:[6]

- to actively consider the evidence available to them to determine whether discrimination is reasonable;

[3] Mental Health Council of Australia and beyondblue, *Mental Health Discrimination and Insurance: A Survey of Consumer Experiences 2011*, 4.
[4] Productivity Commission, *Inquiry Report: Mental Health*, (Report No 95, 30 June 2020) Vol 2, 371-372, available https://www.pc.gov.au/inquiries/completed/mental-health/report/mental-health-volume2.pdf
[5] *Disability Discrimination Act 1992* (Cth) s 46
[6] See *QBE Travel Insurance v Bassanelli* [2004] FCA 396 and *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 193

- to not apply broad formulaic approaches to determining whether discrimination is reasonable – individual circumstances must be considered;
- to be able to identify the data they rely on to support their assessment of risk and, when relying on data, the data must be in existence at the time, be up to date and relevant to the circumstances of the individual.

PIAC remains concerned that current practices of FSC members, particularly in relation to underwriting, do not adequately meet these requirements, and that the Code could be improved to ensure that they do.

2. Policy design

Blanket mental health exclusions

Insurance products that apply blanket mental health exclusion clauses are very likely to be in breach of anti-discrimination laws and should not be sold. Accordingly a provision should be added to the draft Code explicitly stating that life insurance policies should not be designed to include blanket mental health insurance clauses as standard terms.

3. Buying a life insurance policy

Clause 4.2

Draft clause 4.2 states: 'We will ensure that you are not required to have specialist knowledge to answer our questions, but we do expect you to have a good understanding of your health, lifestyle and financial situation.'

PIAC submits the words 'but we do expect you to have a good understanding of your health, lifestyle and financial situation' should be removed. It is not clear what this statement means or how it interacts with the duty not to make a misrepresentation. The purpose of the Code is to set out the obligations and requirements of insurers, not consumers, and these words are unnecessary, vague and confusing. The words also do not accurately reflect the wording of ss 20(b) and 21 of the *Insurance Contracts Act 1984* (Cth) in relation to the insurers duty to take reasonable care not to make a misrepresentation, and the duty of disclosure.

Mental health, family medical history and genetics

The current Life Insurance Code of Practice contains the following provision:

> 5.17 Our decisions on applications for insurance will comply with the requirements of anti-discrimination law. Our decisions will be evidence- based, involving relevant sources of information where this is available, and having regard to any other relevant factors where no data is available and cannot reasonably be obtained. We will regularly review our underwriting decision-making processes to ensure we are not relying on out-of-date or irrelevant sources of information.

This commitment reflects the requirements of anti-discrimination law outlined above, insofar as it refers to basing decisions on relevant sources of information and having regard to other relevant factors, as well as committing to regularly review processes and information. The inclusion of this

commitment reminds insurers, and indicates to consumers, that insurers have specific obligations under anti-discrimination laws with which they should actively comply. PIAC understands the FSC is concerned about repeating obligations insurers have already under the law, however, including this commitment in the Code:

a. assists consumers to understand that insurers are required to comply with anti-discrimination laws;
b. reminds insurers what those laws require of them in terms of their decision-making and internal processes, in circumstances where insurers have demonstrated poor compliance in the past;[7] and
c. provides an additional mechanism for accountability where compliance with the Code is monitored and Code breaches can be reported.

Current clause 5.17 provides an explanation of how insurers commit to meeting those obligations under the law, and this is now absent from the draft Code. PIAC strongly opposes the omission of this clause.

Rather than removing this provision, PIAC submits it should be expanded upon to provide a framework for insurer compliance with the law, which includes commitments to explain to consumers the actuarial and statistical basis of their decisions and to develop policies for compliance with discrimination law. PIAC also considers insurers should commit to, wherever possible, provide cover to people with a past or current mental health condition and manage risk through other mechanisms rather than not provide cover at all.

PIAC recommends the following commitments be included in the Code:

a. at a minimum, to make decisions on applications for insurance in in compliance with the requirements of the DDA and/or any relevant State or Territory anti-discrimination laws;
b. to ensure decisions are evidence- based, involving relevant sources of actuarial and statistical data where this is available, and having regard to any other relevant factors including the individual circumstances of the applicant;
c. to regularly review and update underwriting processes and the information relied upon to make decisions to ensure these are not relying on out-of-date or irrelevant sources of information;
d. to, wherever possible, provide cover to persons with a past or current mental health condition and manage risk through pricing, exclusions, limits and caps based on actuarial and statistical data and other relevant factors, rather than not provide cover at all.

Clause 4.18

PIAC acknowledges that the draft Code includes a new paragraph 4.18 specifically referring to applications for insurance which disclose a mental health condition as follows:

[7] See documented compliance problems in travel insurance in Victorian Equal Opportunity & Human Rights Commission, *Fair Minded Cover: Mental health discrimination in the travel industry*, 2019, https://www.humanrights.vic.gov.au/legal-and-policy/research-reviews-and-investigations/mental-health-discrimination-in-the-travel-industry/report/

4.18 If you tell us about a diagnosed mental health condition or symptoms of a mental health condition you have or have had, we will:

a) allow you the opportunity to provide information about the history, severity or type of condition before making our decision about whether to insure you and, if so, the terms we offer you, and

b) take into account your circumstances such as the history, severity or type of condition, when deciding whether we can offer you cover. If we do not offer you cover, or we offer you alternative terms, we will explain to you why in line with clause 4.26.

The commitment to take into account a person's circumstances when deciding applications for insurance is welcome and partially responds to the recommendations of the PJC, however, it does not articulate how insurers will ensure they comply with the DDA, nor does it sufficiently address the concerns identified by the PJC.

Draft paragraph 4.18 does not explicitly commit, as recommended by the PJC, not to automatically decline an application – although this may be implied, explicitly stating this would make this clear to consumers. It also does not commit to giving an applicant an opportunity to withdraw an application or, where an insurer offers insurance on non-standard terms, specify:

- how long it is intended that the exclusion/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 of the exclusion/premium.[8]

Draft clause 4.26 states that if an insurer offers 'alternative terms,' they 'will explain in plain language the alternative terms.' This does not commit to providing the information recommended by the PJC above. There is also no commitment in the Code to maintain policies that reflect the above practices, as recommended by the PJC.

In addition to reinstating the commitments previously made in the current clause 5.17 as recommended above, PIAC submits that the Code should include the following commitments:

a. not to automatically decline an application where the application reveals a past or current mental health condition or symptoms of a mental health condition;
b. to allow applicants the opportunity to withdraw their application before declining to offer insurance or offering insurance on non-standard terms;
c. to tell consumers, where insurance is offered on non-standard terms (for example, with a mental health exclusion or a higher premium than a standard premium):
    - how long it is intended that the exclusion/higher premium will apply to the policy; and
    - how and when the insured can ask for the exclusion to be removed or premium reduced, and the criteria they would need to satisfy.

Clause 4.26 and 4.29 – transparency regarding data

Data is at the centre of the insurance exceptions under the DDA. However, it is extremely difficult for consumers or observers to know whether insurers have relevant data and, if they do, whether it justifies their discriminatory decisions. Consumers cannot easily access the data relied upon by

[8] See PJC Recommendation 10.7

insurers in decisions that affect them because insurers rarely, in PIAC's experience, provide such data outside court processes.

Insurers should be more transparent about the data they use to make discriminatory decisions, ideally by providing that data to the extent possible in plain language to people, and making the data itself available on request.

Draft clause 4.29, in committing to provide an applicant with reasons for a decision to decline cover or offer 'alternative' terms, should commit specifically to explaining the 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 that was relied on to make the decision. The Code should also commit to providing directly to an applicant or insured on request, the actuarial and statistical data relied on to make a decision to decline cover or offer cover on alternative terms.

4. Medical definitions, examinations and pre-existing conditions

PIAC endorses the joint consumer submission from Financial Rights Legal Centre, Consumer Action Law Centre and Redfern Legal Centre regarding medical definitions and medical examinations.

Paragraphs 5.14 and 5.49

PIAC is particularly concerned that Recommendation 10.6 of the PJC has not been implemented, which suggested the following:

- where a pre-existing condition is to be used by an insurer as the basis for denying a claim or avoiding a contract, a direct medical connection between the prognosis of a pre-existing diagnosed condition and the claim must be established; and
- the statistical and actuarial evidence and any other material used to establish a pre-existing condition, as well as a written summary of the evidence in simple and plain language, be provided by the life insurer to the consumer/policyholder on request.

Draft paragraph 5.14 commits to only verifying 'information you gave us when you applied for cover about conditions that are not related to your claim if we have reasonable grounds', and draft paragraph 5.49 commits to giving reasons and a summary of information about the insured that the insurer has relied on to deny a claim. Draft paragraph 4.7 also commits to providing reasons for avoiding a policy, and access to information relied upon.

However, none of these provisions require that insurers make a link between the claim and the pre-existing diagnosed condition, nor do they commit to providing the statistical and actuarial evidence (or an explanation thereof) the insurer has used to decide what effect the pre-existing condition would have on the cover. Those commitments should be included in the Code as recommended by the PJC.

5. Mental Health Appendix

The proposed Code includes 'Appendix B - supporting customers experiencing a mental health condition'. PIAC understands this intended to address the PJC Recommendation 10.7 that part of the Code be dedicated to addressing mental health life insurance claims and related issues. While it may be helpful to consumers to collect the most significant provisions in the Code which may impact on a person experiencing a mental health condition, PIAC has some concerns about the approach taken to Appendix B.

The Appendix states that it is not part of the Code. This is both confusing for consumers, given that it replicates various provisions in the Code which clearly are part of the Code, and not in keeping with the purpose of the PJC recommendation. The Appendix does purport to make additional commitments to treat consumers experiencing vulnerability due to a mental health condition with empathy, compassion and respect – to achieve this Appendix B should be an enforceable part of the Code.

The Appendix should also include the additional commitments recommended above.

6. Enforceability and breaches

The draft Code is not proposed to be enforceable by consumers through the insurance contract, nor has the FSC identified the clauses that are proposed to be enforceable under the new enforceable code regime recommended by the Royal Commission.

PIAC reiterates its previous concerns for ensuring the Code is enforceable. The nomination of enforceable provisions should happen as soon as possible, and should involve a process for input from stakeholders.

PIAC considers that the Code commitments regarding decision-making in relation to offering insurance, or the terms of insurance offered, are provisions that govern the terms of the contract and should be made enforceable so that consumers have the ability to directly enforce those terms.