

Discrimination Amendment Bill 2022 (ACT) Exposure Draft

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

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1. PIAC's mental health and insurance work

Since 2012 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 because of a mental health condition. PIAC has acted for clients in several jurisdictions around Australia, including in making complaints of unlawful discrimination against insurers. In the course of its work, PIAC has identified systemic problems with insurance industry practices that have failed to protect vulnerable consumers from unlawful disability discrimination or other forms of unlawful or unfair behaviour.

PIAC welcomes this opportunity to comment on the Exposure Draft Discrimination Amendment Bill 2022 (ACT) ('Draft Bill'), in relation to the proposed changes to the *Discrimination Act 1991* (ACT) ('Act'), to the extent those changes concern insurance.

In 2021, PIAC published a report outlining the systemic issues identified through its work, and changes to laws and insurance industry practices over the past decade that have attempted to address some of those concerns.¹ Despite some progress, significant concerns remain for people accessing insurance with a past or current experience of mental ill-health. Among other things, the report recommended that insurers:

- be required to provide, 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 non-standard terms on the basis of disability;
- regularly review and update the data they rely on to make decisions to discrimination; and
- be required to report to the Australian Human Rights Commission or other relevant body on disability discrimination.

PIAC has also made several previous submissions to inquiries related to this issue, including to the Productivity Commission Inquiry into Mental Health in 2020,² to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry³ and in November 2016 to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Life Insurance.⁴ This submission draws from that previous work and responds to the proposed amendments to the Act relating to insurance.

¹ Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (October 2021) https://piac.asn.au/wp-content/uploads/2021/11/21.11.04-PIAC-Report_Mental-Health-Discrimination-Insurance.pdf (PIAC Report)

² Public Interest Advocacy Centre, *Mental Health and Insurance - Submission to the Productivity Commission Inquiry into Mental Health* (23 January 2020) <https://piac.asn.au/wp-content/uploads/2020/01/20.01.23-PIAC-Submission-to-Productivity-Commission.pdf>

³ Public Interest Advocacy Centre, *Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (26 April 2018) <https://piac.asn.au/2018/04/26/submission-to-the-royal-commission-into-misconduct-in-the-banking-superannuation-and-financial-services-industry/>

⁴ Public Interest Advocacy Centre, *Submission to the Parliamentary Joint Committee on Corporations and Financial Services: Inquiry into the Life Insurance Industry* (18 November 2016) <https://piac.asn.au/2017/01/18/submission-to-the-parliamentary-joint-committee-on-corporations-and-financial-services-inquiry-into-the-life-insurance-industry/>

2. Proposed Amendments

2.1 Section 28 Insurance

This submission addresses the proposed amendments to section 28 of the Act, which the Draft Bill proposes as follows:

(1) It is not unlawful for a person providing insurance services (the insurance service provider) to discriminate against another person (the consumer) in relation to the terms on which an annuity or insurance policy is offered to, or may be obtained by, the consumer if—

(a) the discrimination is based on actuarial or statistical data on which it is reasonable for the insurance service provider to rely; and

(b) the discrimination is reasonable, proportionate and justifiable in the circumstances.

(2) If the consumer requests access to the data, the insurance service provider must—

(a) give the consumer a document containing the data or a meaningful explanation of the data;

or

(b) make a document containing the data available for inspection at a reasonable time and place.

Reasonableness

PIAC supports the proposal to amend the test of reasonableness for discrimination by insurers in section 28 to require that any discrimination be (a) ‘based on actuarial or statistical data’ and (b) ‘reasonable, proportionate and justifiable in the circumstances’. This is a more stringent test than the current section, which requires only that the discrimination be considered ‘reasonable in the circumstances, having regard to any actuarial or statistical data on which it is reasonable for the first person to rely’. The existing formulation of the exception in section 28 is arguably less stringent than other jurisdictions which require consideration of the reasonableness of reliance on any data, as well as consideration of ‘other relevant factors’ in the assessment of reasonableness.⁵ Those ‘other relevant factors’ have been understood to include the particular circumstances of the individual seeking insurance, among other things, which has provided a basis for challenging insurers on their decisions to discriminate.⁶ However, the ability of insurers to rely on ‘other relevant factors’ in the absence of relevant data also enables insurers to continue discriminatory practices that may not be supported by evidence – for example, as was found by the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) to have occurred in relation to the use of blanket mental health exclusions in travel insurance.⁷

The proposed amendments would require insurers to have relevant data in order to discriminate. This goes further than most other jurisdictions (except for Tasmania) in that it provides no fall-back ability to discriminate on the basis of other considerations if there is no data. PIAC considers this is a positive change that will encourage insurers to carefully consider their underwriting approach to ensure it is supported by current and relevant evidence of risk, rather than

⁵ For example, *Disability Discrimination Act 1992* (Cth), s46.

⁶ See Australian Human Rights Commission, *Guidelines for Providers of Insurance and Superannuation under the Disability Discrimination Act 1992* (Cth), <https://humanrights.gov.au/our-work/disability-rights/guidelines-providers-insurance-and-superannuation-under-disability>.

⁷ Victorian Equal Opportunity & Human Rights Commission, *Fair-minded cover: Investigation into Discrimination in the Travel Insurance Industry* (Report, June 2019), 10-11, https://www.humanrights.vic.gov.au/static/ae2f408a6338e52807f9aa499f359eb1/Resource-Fair_minded_cover-Full_report.pdf (**VEOHRC Report**).

assumptions or beliefs about certain individual conditions or characteristics. This is particularly welcome in relation to insurance for people experiencing mental health conditions, who are frequently denied cover or subject to broad exclusions because of long standing underwriting policies which may not be supported by relevant and up to date data.

PIAC also supports the proposed requirement that any discrimination be reasonable as well as 'proportionate and justifiable' in the circumstances. This will enable the particular circumstances of the individual insured to be considered in assessing whether the discrimination meets the test and, more so than other provisions requiring consideration of 'other relevant factors' in assessing reasonableness, puts the onus on the insurer to demonstrate the necessity of the discrimination. The additional elements of proportionality and justifiability may also provide greater incentive to insurers to ensure their underwriting guidelines are appropriate and that they have adequate processes in place to assess the need for any discrimination, to ensure it reflects the risk posed by the applicant for insurance.

Provision of data

PIAC also supports the introduction of requirements for insurers to provide the data relied upon to a person on request. PIAC has long advocated for greater transparency in the use of data by insurers, given that data is at the centre of the insurance exception.⁸ In PIAC's experience, consumers cannot easily access the data relied upon by insurers in decisions that affect them because insurers rarely provide such data outside court or tribunal processes, and so are unable to assess whether the data justifies the insurer's decision. We note that the General Insurance Code of Practice (updated in 2020) and the new Life Insurance Code of Practice (to come into effect in July 2023) provide commitments to provide reasons for decisions to decline cover or offer cover on alternative terms, but do not go so far as to commit to providing the supporting data.⁹ PIAC is therefore supportive of the proposed amendment to require insurers to provide data on request.

However, PIAC is concerned that allowing insurers to provide a 'meaningful explanation' rather than the data itself risks the problem continuing because it gives insurers the ability to offer their interpretation of the data without providing any means for interrogation. PIAC has observed insurers, when questioned about data, to point consumers to underwriting guidelines as justification for their decisions but refuse to provide any of the data supporting those guidelines. PIAC is concerned insurers will continue to do this and claim underwriting guidelines, or some summary thereof, offer the requisite 'meaningful explanation' of the data. PIAC therefore recommends the option to provide a 'meaningful explanation' be removed or reformulated, or be required in addition to the data itself, to ensure the data relied upon can be properly assessed by consumers.

2.2 Section 75 Positive duty

PIAC welcomes the introduction of a positive duty to eliminate discrimination, particularly in the context of insurance. PIAC's work in the area of mental health discrimination in insurance has shown systemic issues in the way insurers design, underwrite and provide insurance to people with experience of mental ill-health, and has also exposed the limitations of existing negative anti-

⁸ PIAC Report, 68.

⁹ Insurance Council of Australia, General Insurance Code of Practice 2020, clause 47; Financial Services Council, Life Insurance Code of Practice 2022, clause 4.23.

discrimination systems which rely on individual complaints for enforcement. PIAC's report outlines the barriers to accessing complaints mechanisms, including the split dispute resolution system for insurance complaints where people are often directed only to the Australian Financial Complaints Authority (AFCA) and are unaware of their rights under anti-discrimination legislation.¹⁰ While PIAC has been able to assist many individuals to obtain favourable outcomes through the discrimination complaint process, those outcomes rarely translate to any systemic change, and the barriers to taking action in a Tribunal or Court are even higher for an individual when faced with a powerful and well-resourced respondent insurer.

The 2019 investigation and report of VEOHRC, 'Fair-minded cover: Investigation into mental health discrimination in travel insurance,' provides a good example of how systemic change can be realised by combining negative anti-discrimination duties with positive duties to eliminate discrimination. That report found that travel insurers had been unlawfully discriminating through their use of blanket mental health exclusions, as well as failing to comply with their positive duty to eliminate discrimination because they did not have adequate compliance systems in place or processes to ensure the discrimination allowed by the insurance exception was limited as much as possible.¹¹ Significant changes have been made in the travel insurance industry since that report, including the removal of blanket exclusions and revisions to the ICA General Insurance Code of Practice which provide greater commitments by insurers to treat people with experience of mental ill-health consistently and fairly.

PIAC considers that, particularly for insurers, a positive duty to eliminate discrimination is an important step forward which will encourage insurers to take their anti-discrimination obligations seriously and provide some accountability for doing so. In relation to the proposed 3-year phase in for this duty for non-public authorities, we query whether this is required for bodies like insurers, many of which are already subject to such a duty under the *Equal Opportunity Act 2010* (Vic).

3. Summary

PIAC is pleased to see the Draft Bill consider and update the insurance exception in the ACT's discrimination laws. In relation to proposed section 28:

- PIAC supports the proposed section 28(1); and
- PIAC supports the requirement for insurers to provide data in proposed section 28(2), except for the ability to substitute the actual data with a 'meaningful explanation of the data'. PIAC suggests those words should be removed.

PIAC supports the introduction of a positive duty to eliminate discrimination which should apply to insurers and suggests it could be introduced sooner than the 3 years proposed in the Draft Bill.

¹⁰ See PIAC Report, 73-74.

¹¹ VEOHRC Report, 10.