

National Stigma and Discrimination Reduction Strategy Consultation 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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Recommendations

Recommendation 1: *The Strategy should propose immediate action to improve the reasonable adjustment provisions of the DDA.*

Recommendation 2: *Reconsider the proposal for a national independent function specific to mental ill-health for reviewing complaints. If proposed, recommend similar functions be conferred on the AHRC relating to disability more broadly.*

Recommendation 3: *Recommend a positive obligation to end discrimination to be incorporated into Federal anti-discrimination laws.*

Recommendation 4: *Recommend a review of insurance exceptions to anti-discrimination laws.*

Recommendation 5: *Consider linking enforcement of and accountability for compliance with anti-discrimination laws directly to actions for priority 2.4.*

Recommendation 6: *Recommend an action to encourage ASIC, AFCA and the AHRC to collaborate to address complaints complexity in financial services.*

Recommendation 7: *Recommend improvements to insurer transparency regarding the use of data. This should include recommending that an organisation with the appropriate skill monitor how insurers are using data, and what data they are using (for example, the AHRC, APRA or ASIC).*

Recommendation 8: *Recommend greater regulatory oversight of financial services industry codes of practice, including monitoring of compliance and enforcement.*

1. Introduction

PIAC welcomes the opportunity to provide feedback to the National Mental Health Commission (NMHC) on the Draft National Stigma and Discrimination Reduction Strategy (**'Draft Strategy'**).

As a leading social justice law and policy centre, PIAC works with people with lived experience of mental ill-health in many of our practice areas and programs. Many of the observations and recommendations made in the Draft Strategy are consistent with observations and recommendations PIAC has made in other forums and processes. For example, reforms to strengthen anti-discrimination and human rights laws in Australia are policy priorities for PIAC, and PIAC regularly contributes to public discussion of potential reforms. Recommendations in the Draft Strategy aimed at addressing stigma and discrimination in social services and housing are relevant to the work of PIAC's Homeless Persons' Legal Service (HPLS) and those in relation to legal systems are relevant to our work on police accountability and prisons and detention, including immigration detention.

While PIAC may therefore support many of the recommendations proposed in the Draft Strategy, this submission will focus on the Draft Strategy's approach to stigma and discrimination in financial services and insurance, having regard to the specific work PIAC has done in relation to mental health and insurance.

From 2012 to 2022, PIAC provided legal advice and representation to people who experienced discrimination, or were otherwise treated unfairly, by general and life insurance providers because of a mental health condition. PIAC acted for clients in several jurisdictions around Australia, including in making complaints of unlawful discrimination against insurers. In the course of its work, PIAC identified systemic problems with insurance industry practices that failed to protect vulnerable consumers from unlawful disability discrimination or other forms of unlawful or unfair behaviour.

In 2021, PIAC published a report (referred to in the Draft Strategy) 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. 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

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

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)

2. Priority 1: Foundational actions

PIAC supports the Draft Strategy's approach of starting with foundational actions which create frameworks for change, and then addressing structural discrimination and public and private stigma. PIAC also supports the clear objective of the Draft Strategy to respect and value people with personal lived experience to promote their autonomy and leadership.

2.1 Strengthen human rights and anti-discrimination legislation

PIAC agrees that anti-discrimination and human rights protection in Australia could be strengthened in a range of ways, and that this may benefit people with lived experience of mental ill-health. PIAC has previously actively contributed to the Australian Human Rights Commission (AHRC) Free & Equal project, and outlined priorities for reform arising from PIAC's work in a November 2019 submission.⁵ PIAC has also recommended comprehensive reform of NSW anti-discrimination legislation in its 2021 report 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act'.⁶

In particular, PIAC has advocated for some time for reform of the *Disability Discrimination Act 1992 (Cth) (DDA)* since the decision of the Full Federal Court in *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128. In PIAC's view, that decision seriously undermines the effectiveness of the DDA in respect of the requirement to provide reasonable adjustments.⁷ This is an issue noted in the Draft Strategy which requires swift, immediate attention, and could be simply remedied by legislative amendment. PIAC would be pleased to discuss our specific recommendation for legislative amendment for this reform with the National Mental Health Commission.

PIAC supports consideration of a Federal Charter of Human Rights, and encourages the NMHC to build on the extensive work of the AHRC in the Free & Equal consultations and to work with them to further this and the discrimination law reforms proposed in the Draft Strategy.

Recommendation 1

The Strategy should propose immediate action to improve the reasonable adjustment provisions of the DDA.

2.2 Strengthen accountability mechanisms

PIAC agrees that effective accountability mechanisms are critical to holding institutions to account for engaging in discrimination, and that mechanisms currently available are not always well adapted to people with lived experience of mental ill-health. In relation to people with lived experience who have also experienced discrimination in the provision of insurance, PIAC outlines

<https://piac.asn.au/2017/01/18/submission-to-the-parliamentary-joint-committee-on-corporations-and-financial-services-inquiry-into-the-life-insurance-industry/>

⁵ Public Interest Advocacy Centre, *Submission to the Australian Human Rights Commission's (AHRC) Free & Equal Anti-Discrimination Law Reform Discussion Paper* (Submission, 8 November 2019)

<https://piac.asn.au/2019/11/08/australian-human-rights-commission-free-equal-anti-discrimination-law-reform-discussion-paper/>

⁶ Public Interest Advocacy Centre, *Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act* (Public Interest Advocacy Centre, 6 August 2021) <https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti-discrimination-act/>

⁷ See PIAC Submission to the AHRC, above n5, 4.

the shortcomings of existing complaints mechanisms in its report, *Mental Health Discrimination in Insurance*.⁸

PIAC agrees that anti-discrimination legislation should be enforceable through means other than complaints-based mechanisms. We have previously recommended the introduction of reporting frameworks for compliance by service providers (specifically insurers), and that the AHRC be empowered to investigate systemic breaches of the DDA.⁹ Changes to the *Australian Human Rights Commission Act 1986* passed in December 2022 have now conferred new functions on the AHRC to inquire into systemic unlawful discrimination.¹⁰ This may address some of the concerns relating to the absence of mechanisms to address systemic discrimination.

We note the Draft Strategy's recommendation for a national independent function to potentially perform a role in collating and monitoring discrimination complaints relating to mental ill-health and identifying and advising governments on emerging systemic discrimination issues. If such a body were to be created for those purposes, to the extent not already available, similar functions should also be provided to an appropriate body (such as the AHRC) in respect of national complaint monitoring and systemic discrimination concerning other disabilities.

A further reform that is not suggested in the Draft Strategy to provide a mechanism for investigation of systemic issues, is to incorporate a positive obligation to eliminate discrimination in the DDA, as recommended by the AHRC in the Free & Equal process.¹¹ Victorian legislation currently includes a positive duty, and the ACT has a bill before Parliament to introduce a positive duty. A positive duty may provide a further mechanism for effecting systemic change, where individual complaints are not effective (as PIAC has seen demonstrated in relation to mental health and insurance complaints in our *Mental Health Discrimination in Insurance* report).

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.¹² The report prompted significant changes in the travel insurance industry. A positive duty to eliminate discrimination is likely to encourage greater adherence to existing laws and drive cultural change.

⁸ PIAC, *Mental Health Discrimination in Insurance*, above n1, 41-44.

⁹ See, for example, Recommendations 2 and 3 in PIAC, Submission to AHRC, above n5, 8.

¹⁰ *Australian Human Rights Commission Act 1986*, Part II, Division 4B

¹¹ AHRC, *Free and equal: An Australian conversation on human rights Issues Paper 2021* (Australian Human Rights Commission, December 2021), 79.

¹² 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

Recommendation 2

Reconsider the proposal for a national independent function specific to mental ill-health for reviewing complaints. If proposed, recommend similar functions be conferred on the AHRC relating to disability more broadly.

Recommendation 3

Recommend a positive obligation to end discrimination to be incorporated into Federal anti-discrimination laws.

2.3 Reducing structural discrimination

PIAC agrees that mental health related stigma and discrimination cannot be adequately addressed by changing attitudes and individual behaviours alone and that systemic change is required. Many areas covered by the Draft Strategy impact PIAC's clients and their communities, and addressing stigma and discrimination in the ways suggested in the Draft Strategy could make significant positive impacts in their lives.

Ensuring social services are accessible, equitable and non-discriminatory is a key action to realise the vision of the Strategy. PIAC's Homeless Persons' Legal Service (HPLS) advocates for a flexible social security system that ensures parity of psychosocial disability with other forms of disability, and recognises the sometimes episodic nature of mental ill health impacting on people's capacity to work. To achieve this, we recommend amending eligibility and other rules for people currently on the Disability Support Pension. We also support reform of other social security policies such as mutual obligation requirements.¹³ We therefore strongly support the priority actions 2.3g and 2.3k of the Draft Strategy.

Reform of tenancy law to reduce stigma and discrimination would have a strong positive impact on the lives of many of our clients. HPLS advocates for tenancy legislation reform to replace no cause evictions, as recommended at action 2.3i, with a set of prescribed, reasonable grounds. Other reforms to advance the objective of action 2.3i include stronger regulation of application processes for rental properties, potentially through a standardised application process. We note, however, the significant challenges in achieving these changes across all jurisdictions, where the barriers in each jurisdiction may vary.

PIAC also advocates for the rights of people in detention, including equal access to healthcare in immigration detention. We note that the Draft Strategy does not consider stigma and discrimination in immigration detention. The types of discrimination identified by the Draft Strategy in relation to correctional and forensic systems also often apply in immigration detention. In addition, the 'equivalence of care' principle which afford rights to reasonable healthcare to prisoners in correctional settings does not apply to people in immigration detention.¹⁴ Mental ill-health is a challenge facing many of PIAC's clients in immigration detention, often compounded by the experience of detention itself. Recognition of this in the Draft Strategy could assist to

¹³ Public Interest Advocacy Centre, *Submission No 88 to Senate Standing Committee on Community Affairs, Parliament of Australia, Inquiry into the purpose, intent and adequacy of the Disability Support Pension* (30 July 2021). See also Evidence to Senate Standing Committee on Community Affairs, Parliament of Australia, Canberra/online, 16 November 2021, p9-13 (Thomas Chailloux)

¹⁴ Public Interest Advocacy Centre, *In Poor Health: Health care in Australian immigration detention* (June 2018), 5, <https://piac.asn.au/2018/06/13/in-poor-health-health-care-in-australian-immigration-detention/>

uphold the human rights of those currently in detention and those with experience of immigration detention who enter the Australian community. Some of the issues facing people with disability in immigration detention are described in our recent submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.¹⁵

Although PIAC's work touches on many other areas covered in the Draft Strategy, our further comments are focused specifically on the sections dealing with financial services and insurance, as this is where we have direct experience advocating for change, based on our work with people with lived experience of mental ill-health.

3. Priority 2: Structural Discrimination, Financial Services and Insurance

As a general comment, we note the Commission's observations about the role of insurance and its interaction/intersection with other systems that seek to support people's financial security and economic dignity. We agree that this is a complex system that warrants more fundamental and systemic review to determine whether it is serving the interests of people with lived experience and/or society as a whole. There may be alternative models which better cater for all people. However, accepting that currently the system operates with this complexity, PIAC considers that reforms to the provision of insurance can improve the experiences of people with lived experience.

3.1 Anti-discrimination legislation

In the discussion of Priority 1, the Draft Strategy identifies the need to strengthen foundations for addressing discrimination, including strengthening anti-discrimination laws. In PIAC's view, addressing the foundations of the legal framework will be critical for addressing discrimination in financial services and insurance, as in other areas. Priority 1.1 suggests, among other things, that the insurance exceptions in anti-discrimination laws, exemplified by section 46 of the *Disability Discrimination Act* (Cth), may warrant review. We note the suggestion to review insurance exceptions is not directly incorporated into the recommended actions for Priority 1, or mentioned in relation to Priority 2. PIAC considers that there is a case for reviewing those exceptions both in the DDA and at the State & Territory level.

While an insurance exception is a feature of anti-discrimination legislation in all Australian jurisdictions, the terms of the exceptions are not consistent across them. This inconsistency may create confusion for both consumers and insurers but also may provide an opportunity to examine whether some jurisdictions have achieved a more useful formulation. For example, the ACT has recently examined its anti-discrimination legislation and an amended bill is currently before Parliament which rewrites the insurance exception to introduce a requirement for any discrimination to be 'reasonable, proportionate and justifiable in the circumstances',¹⁶ which appears to be a more onerous test than other equivalent provisions. The ongoing concerns about the use of 'actuarial and statistical data' may also be considered in a review of the exception, and

¹⁵ Public Interest Advocacy Centre, *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability – Experiences of people with disability in immigration detention* (22 December 2022) <https://piac.asn.au/2023/01/09/submission-to-the-royal-commission-into-violence-abuse-neglect-and-exploitation-of-people-with-disability-experiences-of-people-with-disability-in-immigration-detention/>

¹⁶ *Discrimination Amendment Bill 2022* (ACT), s 8,

changes to increase the transparency (for example, through mandatory provision of the data to consumers) and accountability of insurers in respect of that data could be considered.

Recommendation 4

Recommend a review of insurance exceptions to anti-discrimination laws.

3.2 Enforcement and accountability

In terms of the recommendations for Priority 2 relating specifically to financial services and insurance, we note that effective implementation of these overarching legal frameworks is consistently identified in many past inquiries (referred to in the Draft Strategy) as necessary to address the poor experiences of people with lived experience of mental ill-health. The Draft Strategy recognises this in the discussion section for Priority 2, but the recommended actions are focused on supporting industry codes of practice, standards and guidelines rather than enforcement of the laws themselves.

While industry codes of practice have substantially improved over time, their effective recognition and implementation of anti-discrimination laws remains imperfect – for example, the 2023 Life Insurance Code of Practice no longer refers to compliance with anti-discrimination legislation directly (where its predecessor did),¹⁷ which potentially limits consideration of compliance with those laws from code compliance and enforcement bodies. We recognise that the legal framework regarding discrimination is addressed in Priority 1, but we suggest considering how the recommended actions for Priority 2.4 could more clearly link enforcement of and accountability for anti-discrimination laws by providers of financial services and insurance.

Linked to this are the adequacy of complaints and dispute resolution mechanisms specifically concerning financial services and insurance. The discussion in Priority 1.2 notes problems that can arise from overly complex or inaccessible complaints mechanisms, as well as the need for more independent scrutiny at a systemic level, but does not specifically address this issue in respect of financial services and insurance.

PIAC has previously raised concerns about the division of complaint handling in financial services between the Australian Financial Complaints Authority (AFCA) and the AHRC and State/Territory-based anti-discrimination bodies. This can be a significant issue for consumers, particularly given that insurers almost always refer consumers to AFCA for complaints but do not indicate that complaints may also be made to other bodies, like the AHRC. This can become a problem when consumers make a complaint to AFCA and then discover that AFCA is unable to make a determination because of the limitations in AFCA's Rules, for example, in respect of decisions to refuse insurance cover (Rule C.1.4(d)) and decisions to offer life insurance on non-standard terms (Rule C.1.4(b)). It can lead to consumers abandoning complaints despite having legitimate grievances. This highlights the need for: consumer guidance regarding discrimination and financial services; the resourcing of legal assistance services to assist people to navigate these complex systems; and consideration of reforms to rules and regulations to clarify the roles of each body.

¹⁷ Life Insurance Code of Practice 2019, clause 5.17 <https://fsc.org.au/resources/1695-life-insurance-code-of-practice-with-appendix>

Recommendation 5

Consider linking enforcement of and accountability for compliance with anti-discrimination laws directly to actions for priority 2.4.

Recommendation 6

Recommend an action to encourage ASIC, AFCA and the AHRC to collaborate to address complaints complexity in financial services.

3.3 Definitions and data

Action 2.4b

PIAC agrees with the objective in 2.4b of exploring opportunities to embed common definitions and contemporary understandings of mental ill-health in insurance products and services. As canvassed in PIAC's report and in previous submissions, poor understanding of the range of conditions covered by mental health or mental illness and a lack of differentiation between conditions is a major issue in insurance products and often the cause of frustration from consumers where their lived experience does not match the definitions used by insurers. We note this objective is framed as the responsibility of the NMHC. We consider it should also be a responsibility of industry peaks and financial service providers working in collaboration with the mental health sector.

Action 2.4d

In relation to recommendation 2.4d, PIAC considers that, notwithstanding some progress in industry codes of practice, there is still much work to be done by insurers to ensure a person's individual experience is appropriately considered, particularly in relation to the underwriting of individual insurance policies. In relation to insurance specifically, anti-discrimination laws require insurers to consider individual circumstances in order to ensure the relevant discrimination is reasonable. However, PIAC has advised many clients (some relatively recently) where policies were automatically declined or made subject to broad mental health exclusions without them being given an opportunity to provide any information about their individual experience of mental ill-health.¹⁸ The 2023 Life Insurance Code of Practice specifically commits life insurers to taking into account individual circumstances, such as history, severity and type of condition, in underwriting decisions.¹⁹ However, implementation of this commitment will require monitoring and enforcement. Similarly, the new commitment from life insurers not to use blanket mental health exclusions will require monitoring for implementation.

Action 2.4g

PIAC supports the recommendations in 2.4g for improving data collection and reporting by financial service providers regarding their compliance with industry standards and codes of practice. We note this does not extend to reporting on compliance with anti-discrimination laws themselves. As PIAC has consistently raised in its advocacy, insurer transparency and accountability for compliance with discrimination laws is an ongoing issue and mandatory reporting that is tied directly to anti-discrimination laws themselves may assist to remedy this.

¹⁸ See PIAC, Mental Health Discrimination in Insurance, above n1, 53-55.

¹⁹ Financial Services Council, Life Insurance Code of Practice 2023 (commencing 1 July 2023), clause 4.12 <https://fsc.org.au/resources/2488-fsc-code-of-practice-2022-final/file>

In relation to any efforts to improve data collection by insurers, PIAC considers that data collected and relied upon by insurers to justify discrimination should be transparent and made available to people who are affected by its use – ie. insurers should be required to disclose the data used to rely on the insurance exception in anti-discrimination legislation to consumers and to anti-discrimination enforcement bodies. This may be a matter for legislative amendment to enable the AHRC or other discrimination enforcement bodies to compel production of data, or for industry participants to commit to do so in their respective codes of practice.

Recommendation 7

Recommend improvements to insurer transparency regarding the use of data. This should include recommending that an organisation with the appropriate skill monitor how insurers are using data, and what data they are using (for example, the AHRC, APRA or ASIC).

Action 2.4h

PIAC considers recommendation 2.4h in respect of further improvements to industry standards and codes of practice to be important. PIAC has raised enforceability of codes of practice as a concern for some time, and monitoring and oversight is critical. This is particularly so where industry peak bodies with responsibility for codes may change over time – for example, PIAC understands that some life insurers have moved away from the Financial Services Council to set up a separate industry body, the Council of Australian Life Insurers.²⁰ The FSC currently has ownership of the Life Insurance Code of Practice, and it will be critical to the consumer protections provided by the Code that it remains operational and enforceable despite and throughout such organisational changes. This highlights the importance of making consumer protections in the Code binding through an external oversight body such as ASIC. It is therefore important to continue pursuing the implementation of enforceable code provisions, and not allow industry bodies to delay this.

Recommendation 8

Recommend greater regulatory oversight of financial services industry codes of practice, including monitoring of compliance and enforcement.

²⁰ 'Australia's life insurance industry announces formation of new dedicated peak body, the Council of Australian Life Insurers (CALI)' (Media Release, 22 June 2022) https://cali.org.au/wp-content/uploads/2022/08/Australias-life-insurers-announce-formation-of-new-peak-body_22062022-1.pdf