



# MENTAL HEALTH AND INSURANCE

Submission to the Australian Law  
Reform Commission issues paper on  
*Equality, Capacity and Disability in  
Commonwealth Laws*

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*Mentally healthy people, mentally healthy communities*

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## BACKGROUND

This submission has been prepared by the Mental Health Council of Australia (MHCA) in response to Questions 6, 29, 30 and 31 of the Australian Law Reform Commission's (ALRC) issues paper on *Equality, Capacity and Disability in Commonwealth Laws*.

The MHCA is the peak, national non-government organisation representing and promoting the interests of the Australian mental health sector and committed to achieving better mental health for all Australians. More information about the MHCA is provided at the end of this document.

Current laws and industry practice continue to result in unequal treatment of, and unfair outcomes for, people with experience of mental illness who seek to access certain kinds of insurance products.

The MHCA has a long-standing interest in this issue, and this submission should be read in conjunction with previous representations, including:

- a submission to the *Productivity Commission Inquiry into the Disability Discrimination Act* (2004);
- submissions to two separate Treasury consultations on *Unfair contract terms for contracts of general insurance* (May 2010 and May 2013);
- the *Mental Health, Discrimination & Insurance: A Survey of Consumer Experiences* report, published jointly by the MHCA and *beyondblue* (2011);
- a submission to the Senate Inquiry into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (January 2013), which recommended specific amendments to proposed anti-discrimination legislation (see attached); and
- the *Speak up and take action to reduce discrimination in insurance* fact sheet (released August 2013)

The MHCA also draws the ALRC's attention to a submission to this inquiry by the Public Interest Advocacy Centre (PIAC), which is providing legal advice to consumers who feel they may have been discriminated against on the basis of mental illness.

## MENTAL HEALTH CONSUMERS' EXPERIENCES WITH INSURANCE

The MHCA has heard many stories from mental health consumers about negative experiences and outcomes in insurance. A prior history of mental illness can mean that someone is denied insurance cover, asked to pay a higher premium, or has their claim rejected. This is particularly the case in relation to travel insurance, life insurance, total and permanent disability insurance and income protection.

These stories suggest that insurers often treat people with mental illness in ways that would be clearly unacceptable for people with physical ailments. For example:

- A history of one mental illness can mean someone is refused insurance for another, unrelated mental illness.
- The cost of returning early from an overseas holiday might be covered by travel insurance for parents of a child in a car accident, but not for those returning to care for a child who has just had her first ever experience of psychosis.
- Insurers have been known to impute mental illness on questionable grounds in the absence of a diagnosis. For example, seeing a counsellor or psychologist in the past, or reporting normal human experiences like stress and insomnia, have been used to conclude that someone has a mental illness despite there being no further evidence.

Consumers have reported feeling that their dealings with insurers have violated their sense of fairness, dignity and autonomy. Other clear themes that have emerged from consumers' stories include the following:

- Relatively minor past experiences with mental illness – including action to prevent or intervene early when someone experiences the signs and symptoms of a mental illness – often lead to insurance outcomes that seem disproportionately conservative.
- Highly relevant individual circumstances are often not sufficiently taken into account by insurers.
- In considering the risks associated with mental illness, everyday human experiences, such as stress and fatigue, are often conflated with more serious and/or diagnosable conditions.
- Very broad exclusion clauses for mental illness are frequently used, and appear to be applied as standard practice, without modifications that would take into account the risk associated with a person's particular diagnosis and other individual circumstances.

As well as differences in outcomes, mental health consumers face difficulties with the process of applying for insurance and making claims. These difficulties can inhibit consumers' capacity to convey the full range of information relevant to the application or claim. For example:

- Consumers have reported insurance applications and claims assessments that are inappropriately handled by insurance company staff, and sometimes distressing.
- The composition and content of forms used to disclose a prior mental illness can prevent an accurate and comprehensive representation of a consumer's situation – for example, by using forced choice options, a limited number of questions and seemingly arbitrary cut-off points (for example, a question that asks about hospitalisation in the last 10 years, or medication use in the last 5 years).
- There can be challenges providing proof associated with some mental illnesses, particularly where symptoms and needs fluctuate in severity over time or where there is disagreement among medical practitioners regarding diagnosis.
- Insurers' decisions are often difficult to challenge where the reasons for the decision are not clearly and fully communicated to consumers.

- People with mental illness also can face distinctive barriers in engaging with a complaints process, which can be complicated, drawn-out, often adversarial in nature, and daunting for consumers who may be worried about the symptoms of their illness worsening.

The insurance industry has identified a recent growth in insurance claims related to mental illness and other disabilities. Unfortunately, consumers who take preventative or early action to manage the symptoms of mental illness – thereby reducing their insurance risk compared with someone whose mental illness is undiagnosed and untreated – can be excluded from insurance cover or forced to pay more than their actual risk warrants. For example, insurers commonly stipulate that someone must be treatment-free for a certain period before they can take out cover.

Such approaches discourage people from seeking seek treatment for fear of jeopardising their insurance cover, and undermine the many government-funded campaigns and programs to encourage help-seeking. That an industry which is based on managing long-term risk takes such a short-sighted approach reinforces the case for government intervention to ensure that people with mental illness have access to the insurance market on fair terms.

## THE DISABILITY DISCRIMINATION ACT

Section 46 of the Disability Discrimination Act (Cth) 1992 (the DDA) provides that discrimination by insurance or superannuation providers on the basis of disability (including mental illness) is not unlawful in certain circumstances, namely where there exist actuarial or statistical data on which it is reasonable to rely. Where no actuarial or statistical data exists, insurance companies may rely on 'other relevant factors' to support their decision to discriminate.

In principle, the exemption in s46 is a practical acknowledgement of the insurance business model, which relies on the ability to distinguish between levels of risk. In practice, however, exempting insurers from anti-discrimination law in this way has led to unfair and unreasonable outcomes for people with mental illness, both when compared with people with other kinds of disability and when compared with the broader Australian population. Indeed, the MHCA believes that despite – and in some cases, because of – the provisions of s46, many people with experience of mental illness face unequal treatment and recognition before the law in the context of insurance.

To the extent that the protection offered by s46 of the DDA relates to available statistical or actuarial data, this data must also be reasonable to rely on. Unfortunately, the body of evidence in the public domain is far from robust and the MHCA believes that it is not well understood or consistently applied by insurers. Further, because actuarial processes are commercial-in-confidence, it is difficult (if not impossible) to determine whether insurers possess proprietary data that would enable a reasonable assessment of risk to be made. Despite many requests, the MHCA is yet to see evidence that such data exist, and have seen notable evidence to the contrary.

For example, the MHCA is aware of insurers providing general information brochures on mental illness or academic papers describing single clinical studies as grounds for a decision to reject an application for insurance. Such responses indicate a profound misunderstanding within the insurance industry of mental health issues generally, as well as an inability to use data to make reasonable decisions reflecting the actual risk of someone making a claim.

There is little to no independent oversight of how data is used by insurers, and consumers have very limited power to access information that would reveal how insurance decisions are made. As a result insurers are able to apply what the MHCA believes to be an overly conservative approach that is not consistent with the evidence base, ultimately to the detriment of mental health consumers.



There is also a lack of clarity around what is meant by ‘other relevant factors’ in s46 of the DDA. While the MHCA understands that ‘other relevant factors’ has a relatively wide interpretation in case law<sup>1</sup>, many consumers’ stories suggest that a broad understanding of what might be relevant is not being applied in practice. Arguably, one of the most relevant factors in assessing insurance risk – especially where robust data are not available – is someone’s individual circumstances, including circumstances that lower risk (such as having an effective treatment plan or a strong record of employment). However, consumer stories suggest that this type of information is often disregarded or not even sought by insurers.

Experience to date suggests that current legal and regulatory arrangements negatively affect mental health consumers’ ability to exercise informed choice in insurance, impose barriers to adequate enforcement of existing consumer and anti-discrimination protections, and may also restrict innovation in the insurance market. Freedom of choice in the marketplace is also limited by what the MHCA believes to be arbitrary and ill-informed requirements by insurers that are not founded on robust evidence or a contemporary understanding of mental illness.

## SOME SOLUTIONS

A solution must be found that balances, on the one hand, the need to provide fair market access to the very large number of people in Australia with experience of mental illness, with, on the other hand, the reasonable expectation that insurance risk should be assessed and priced appropriately. For such a solution to be credible, it must have the endorsement of mental health stakeholders, in consultation with consumers and carers, rather than being solely industry-driven. Importantly, it must depart from the ineffective approaches taken in the past, which – despite the advocacy of organisations like the MHCA and beyondblue over the past ten years – have resulted in unacceptably slow progress in providing fair access to the insurance market for people with mental illness.

Many of the issues around mental illness and insurance in this submission reflect those considered in the ALRC’s June 2013 report *Access All Ages—Older Workers and Commonwealth Laws*. The MHCA proposes that relevant recommendations from that report be applied to people with disability, including (but not limited to) people with mental illness. These recommendations should, at a minimum, include review and amendment of the insurance exemptions under Commonwealth (and state and territory) anti-discrimination legislation.

The MHCA also draws the ALRC’s attention to specific suggestions for amendments to the DDA in its joint submission (with beyondblue) to the 2013 Senate Inquiry into amendments to anti-discrimination legislation (see attached).

A further critical step is to shed more light on the legal and actuarial aspects of mental health and insurance. As a priority, the Australian Government should commission an independent actuarial study to evaluate the relevance, applicability and quality of data on which the insurance industry relies to assess the risks associated with mental illness, with terms of reference to be developed in consultation with mental health stakeholders.

In addition, the MHCA seeks the following specific actions:

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<sup>1</sup> *QBE Travel Insurance v Bassanelli* [2004] FCA 396 (7 April 2004)

1. The development and testing of new insurance products and/or changes to existing products to enable people with experience of mental illness to take out cover on reasonable terms<sup>2</sup>, which would in turn generate data for future use in actuarial decision-making;
2. Tailored mental health training for both frontline and underwriting staff in all areas of the insurance industry<sup>3</sup>;
3. Updated and detailed guidelines for industry in applying exemptions for providers of insurance and superannuation under the DDA;
4. Voluntary changes to company and/or industry guidelines for assessing applications and claims, and underwriting processes;
5. Improvements to forms and processes for insurance applications, claims and complaints; and
6. Publication of (and continual updates to) a guide to mental health-friendly insurance policies and practices.

The MHCA recognises that several of the actions proposed above can only be undertaken by insurers and are not the direct responsibility of government. However, to date the insurance industry has failed to demonstrate its commitment to finding a satisfactory solution to these problems. For this reason, the MHCA believes that the case for regulatory intervention is strong, and hopes to work with government and industry in developing the right solutions.

## ABOUT THE MHCA

The MHCA is the peak, national non-government organisation representing and promoting the interests of the Australian mental health sector and committed to achieving better mental health for all Australians. It was established in 1997 as the first independent peak body in Australia to truly represent the full spectrum of mental health stakeholders and issues. MHCA members include national organisations representing consumers, carers, special needs groups, clinical service providers, public and private mental health service providers, researchers and state/territory community mental health peak bodies.

The MHCA aims to promote mentally healthy communities, educate Australians on mental health issues, influence mental health reform so that government policies address all contemporary mental health issues, conduct research on mental health issues, and carry out regular consultation to represent the best interests of our members, partners and the community. These endeavours in education and policy reform are matched by our commitment to researching more innovative approaches to the provision of mental health care. In addition, the MHCA continues to focus on the human rights of people with a mental illness.

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<sup>2</sup> The MHCA believes that there is a particularly high level of demand for travel insurance that can be taken out on reasonable terms by people who have, or care for people who have, a diagnosed mental illness.

<sup>3</sup> It is noted that this recommendation would go beyond the Financial Service Council's recently released Mental Health Education Policy (Standard No. 21), which requires mental health awareness training for providers of life insurance products and associated information.

Mental Health  
Council of Australia



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