

5 June 2024

Code Review Panel
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By email: secretariat@codeofpracticereview.com.au

Dear Review Panel

Independent Review of the 2020 General Insurance Code of Practice

The Public Interest Advocacy Centre ('PIAC') is a leading social justice law and policy centre.

Since 2012, PIAC has provided 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 also been involved in public policy development and advocacy, including through submissions to the Insurance Council of Australia ('ICA') on previous reviews of the General Insurance Code of Practice ('Code') and in the development of the ICA's 'Guide on Mental Health' ('Guide').

PIAC welcomes the opportunity to comment on the *Initial Consultation Paper for the independent review of the 2020 General Insurance Code of Practice*. As noted in the Consultation Paper, PIAC has called for the Code to contain commitments to support customers with mental health conditions and improve compliance with anti-discrimination laws.¹ We make the following recommendations to improve the Code in this regard. We confine our comments on the consultation to the provisions addressing mental health. In relation to addressing consumer vulnerability generally and in other specific circumstances, we commend to the Review Panel the joint consumer submission from Financial Rights Legal Centre and others.

¹ Insurance Council of Australia, *Initial Consultation Paper for the independent review of the 2020 General Insurance Code of Practice* (April 2024) [2.2.3].

Recommendations:

1. The practices outlined in the Guide should become clear commitments in the Code and should be binding and enforceable. The ICA should consult with consumer and mental health stakeholders to incorporate the Guide in the Code.
2. The Code should require insurers to provide a clear explanation of the grounds for their decision to decline cover or offer non-standard terms, and to provide directly to an applicant or insured on request, the actuarial and statistical data and relevant factors relied on to make a decision to decline cover or offer cover on non-standard terms.
3. The Code should include a commitment by insurers to regularly report to the ICA on the processes, procedures and policies they have implemented to ensure compliance with anti-discrimination laws and to meet their Code obligations. The ICA should provide those reports to the Australian Human Rights Commission ('AHRC').

Discrimination by insurers in relation to mental health

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 difficult to access many forms of insurance.

In 2021, PIAC published a report examining systemic problems in the way insurers design, price and offer policies and assess claims for people with past or current mental health conditions.² People have been denied cover unfairly, had their cover subject to broad exclusions for mental health or an unreasonably high premium, encountered difficulties when trying to question or challenge decisions, and have not received clear evidence from insurers to justify discriminatory practices.

While there have been some changes to laws and insurance industry practices over the past decade that have attempted to address concerns, many of these systemic issues remain. The Code has an important role to play in setting expectations of insurers and improving consumer experiences.

General Insurance Code of Practice

In January 2021, Part 9 of the Code came into effect to provide increased protection for vulnerable consumers who access retail insurance products or services.

Part 9 of the Code contains the following commitments in relation to mental health:

- At a minimum, insurers will design and sell their products and apply their terms in compliance with the requirements of the *Disability Discrimination Act 1992* (Cth) (DDA) and/or any relevant State or Territory anti-discrimination requirements;

² Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (Report, October 2021).

- Insurers will treat people with any past or current mental health condition fairly;
- Insurers will only ask relevant questions when deciding whether to provide cover for a pre-existing mental health condition; and
- If cover for that condition can not be provided, insurers will tell the person about their right to ask for the information relied on when assessing the application. If a person asks for that information, then insurers will provide it as set out in part 12 of the Code.

In July 2021, the supplementary Guide was published to ‘highlight best practices insurers should consider in meeting these Code requirements’ including:

- Where possible, managing 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.
- Exclusions for pre-existing mental health conditions should only apply where there is evidence that an applicant has an existing mental health condition, or is at risk of a recurrence of a past mental health condition, and the covered event relates to the pre-existing mental illness.
- Insurers must keep records of data relied on, and continuously seek to obtain better data to enable any exclusions to be narrowly designed.³

This Guide does not bind insurers, has no legal force and compliance is voluntary.

Consultation Questions

Question 2.4: Is the Code in line with community expectations regarding customer vulnerability? If not, how can it be improved?

PIAC recognises the introduction of Part 9 into the Code and the creation of the Guide as important steps towards improving the Code’s responsiveness to consumer vulnerability in relation to mental health. However, in our view, the Code could better meet community expectations by incorporating the Guide into the Code as clear commitments by insurers to adopt the practices outlined in the Guide.

While the Code obliges insurers to comply with the requirements of the DDA and/or relevant State or Territory anti-discrimination requirements (as they are legally obliged to do), there are still concerns that insurers are not adequately complying with those laws or following the relevant guidance on mental health, in their decisions to decline cover for pre-existing mental health conditions.

In December 2023, CHOICE conducted research posing as a customer with a pre-existing condition of depression with anxiety. It reported travel insurance being ‘flatly denied or

³ Insurance Council of Australia, *Guide on Mental Health* (1 July 2021).

approved with a massive premium increase' by 15 insurance providers.⁴ This suggests potentially discriminatory practices continue to be widespread within the travel insurance industry despite the introduction of Part 9 of the Code and the publication of the Guide.

Insurers have now had several years to become familiar with the Guide. It would not be onerous to make practices outlined in the Guide firm commitments as part of the Code. The Victorian Equal Opportunity and Human Rights Commission, in its comprehensive review of travel insurer compliance with discrimination laws, recommended guidance be mandatory and enforceable.⁵ We note the current Life Insurance Code of Practice incorporates several similar obligations and outlines these obligations in a separate appendix so consumers can clearly understand the obligations insurers have to people with mental health conditions.⁶

To improve the effectiveness of the Code at preventing discriminatory practices, we consider the practices expressed in the Guide should be mandated in the Code itself to clarify insurer obligations, compel insurers to abide by best practice and strengthen protections for consumers. The ICA should consult with consumer and mental health stakeholders to expand the Code by reference to the practices described in the Guide and the *Australian Human Rights Commission's Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)*.

Further, while the Code requires insurers to provide reasons for decisions to decline cover, this is often not sufficient to enable a person to understand whether the decision was reasonable. Where insurers rely on the exemption in the DDA to decline cover or offer cover on non-standard terms, insurers should clearly explain 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.

PIAC considers these improvements would better align the Code with community expectations and promote the objectives of the Code, including 'better, more informed relations' between insurers and consumers and 'continuous improvement of the general insurance industry through education and training.'⁷

⁴ CHOICE, *Why are travel insurers still denying mental health cover?* (Web Page, 19 December 2023) <https://www.choice.com.au/travel/money/travel-insurance/articles/mental-health-cover-and-travel-insurance>.

⁵ VEOHRC, *Fair-minded cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, June 2019), 12. https://www.humanrights.vic.gov.au/static/ae2f408a6338e52807f9aa499f359eb1/Resource-Fair_minded_cover-Full_report.pdf.

⁶ Council of Australian Life Insurers, *Life Insurance Code of Practice* (December 2023) app B.

⁷ Insurance Council of Australia, *General Insurance Code of Practice* (1 October 2023) pts 1(b), 1(e).

Recommendation 1: The Guide on Mental Health should form part of the Code and should be binding and enforceable

The practices outlined in the Guide on Mental Health should become clear commitments in the Code and should be binding and enforceable. The Insurance Council of Australia should consult with consumer and mental health stakeholders to incorporate the Guide in the Code.

Recommendation 2: Transparency regarding actuarial and statistical data

The Code should require insurers to provide a clear explanation of the grounds for their decision to decline cover or offer non-standard terms, and to provide directly to an applicant or insured on request, the actuarial and statistical data and relevant factors relied on to make a decision to decline cover or offer cover on non-standard terms.

Question 2.5: How can the Code and/or its administration encourage greater compliance with vulnerability obligations?

In the Final Report of the Financial Services Royal Commission, Commissioner Hayne noted:

Industry codes are expressed as promises made by industry participants. If industry codes are to be more than public relations puffs, the promises made must be made seriously. If they are made seriously (and those bound by the codes say that they are), the promises that are set out in the code, and are intended to govern the particular relations between the provider and the acquirer of a financial product or financial service, must be kept. This must entail that the promises can be enforced by those to whom the promises are made...⁸

While the Code has been updated to enhance its enforcement and sanction provisions, as the Guide is not a binding part of the Code, neither consumers nor Code compliance bodies are able to compel insurers to adopt this guidance.

We urge the ICA to take this opportunity to incorporate the Guide in the Code. This will enable consumers to access the enforcement and sanctions provisions of the Code, including compensation for significant breaches of the Code and greater oversight, and mandate insurer compliance with vulnerability obligations in respect of consumers with mental health conditions.

Question 2.6: Are other mechanisms more appropriate than the Code to address issues related to the assistance insurers provide vulnerable customers and if so, what and why?

In PIAC's view, it is important for the Code to contain insurer commitments to address the needs of vulnerable customers, and in particular customers with mental health conditions.

⁸ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 2019) vol 1, 12.

It is difficult for customers to enforce rights retrospectively through internal dispute resolution or external complaints or litigation. Individual complaints also rarely address the systemic causes of discrimination and consumer dissatisfaction.

The Code provides a clear statement of insurer commitments and accountability mechanisms which can drive proactive compliance from insurers. In addition to converting the Guide into clear Code commitments, the Code should enhance accountability and oversight mechanisms by requiring insurers to report annually to the ICA on the processes, procedures and policies they have implemented to ensure compliance with anti-discrimination laws and to meet their Code obligations. The ICA should provide those reports to the AHRC.

Recommendation 3: Monitoring of General Insurance Practices

The Code should include a commitment by insurers to regularly report to the Insurance Council of Australia on the processes, procedures and policies they have implemented to ensure compliance with anti-discrimination laws and to meet their Code obligations. The Insurance Council of Australia should provide those reports to the Australian Human Rights Commission.

Yours sincerely



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