



Treasury consultation: Unfair contract terms for contracts of general insurance – Joint submission from the Mental Health Council of Australia and *beyondblue* – May 2013

*The **Mental Health Council of Australia** (MHCA) is the peak, national non-government organisation representing and promoting the interests of the Australian mental health sector. The membership of the MHCA includes national organisations representing mental health services, consumers, carers, special needs groups, clinical service providers, and community and private mental health service providers, as well as national research institutions and state/territory peak bodies.*

***beyondblue: the national depression and anxiety initiative** is a national, independent, not-for-profit organisation working to address issues associated with depression, anxiety and related disorders in Australia. *beyondblue* is a bipartisan initiative of the Australian, State and Territory governments with the key goals of raising community awareness about depression and anxiety and reducing associated stigma. *beyondblue* works in partnership with health services, schools, workplaces, universities, media and community organisations, as well as people living with depression/anxiety and their carers, to bring together their expertise.*

In addition to the below, we refer you to our joint submission to the Senate Inquiry into the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* (January 2013) (see attached). Although targeted towards draft legislation with a focus on anti-discrimination, rather than contractual issues, that submission provides context and background equally relevant to the issues raised in this submission.

The ability to access insurance to protect against the financial risk of adverse unforeseen events is seen as the norm in Australia, providing social and financial benefits and security. However, **many Australians with experience of mental illness find it difficult or impossible to access insurance** of various kinds, including life insurance, total and permanent disability insurance, income protection and travel insurance.

People with a history of mental illness (and in some cases people with no diagnosis but whom insurance companies suspect could have a mental illness) are often forced to pay increased premiums, are excluded cover for events that might be associated with their mental illness, or have applications and claims rejected outright on the grounds of mental illness. This occurs even where people with a history of mental illness present a modest or lower risk of making a claim compared with other insurance customers.

The MHCA and *beyondblue* have been working in partnership for over a decade to bring greater fairness to the insurance market and improve access to insurance for people with experience of mental illness. Despite our lengthy engagement with government and representatives of the insurance sector, **there has been limited progress** to date.

The amendments proposed in the *Insurance Contracts Amendment (Unfair Terms) Bill 2013* represent a positive development for mental health consumers. However, **a concerted effort may be required to communicate the proposed changes** to the public, including people with experience of mental illness, given the current complexity and lack of transparency in the insurance marketplace.

We support the **burden of proof being placed on insurers** to show that the disputed contract term is proportionate to the underwritten risk and not unfair. This is an appropriate

arrangement, reflecting the superior power held by insurers in terms of information, expertise, and financial and time resources. If insurers behave in ways that have detrimental impacts on the community, or a particular section of the community, then insurers should be required to justify their conduct.

We also support **expanding the Australian Securities and Investments Commission's investigative powers**. This will be of particular benefit to people with experience of mental illness, who often face many barriers to individually pursuing remedial action under current arrangements, and who can struggle to enforce their rights under law.

Currently, insurance decisions as they relate to people with mental illness are not sufficiently transparent and we regularly hear stories from individuals who have been refused cover or have had claims denied for reasons that are not clear.

The proposed amendments **may deliver more transparency in how insurance decisions are made where mental illness is a consideration**. Under the proposed arrangements, insurers may be compelled to produce documentary evidence to show that a contract term reflects the underwriting risk. These documents could in turn shed light on what information is being used to arrive at underwriting conclusions, and how such information is interpreted by insurers.

Nevertheless, we remain cautious about the extent to which the proposed amendments will address the unfair treatment that people with experience of mental illness currently face in insurance markets more broadly.

The amendments will extend unfair contract terms provisions to general insurance, but not to other insurance products such as income protection and life insurance, domains in which unfair treatment of people with experience of mental illness is common. Limiting the amendments in this way is a missed opportunity.

The MHCA and *beyondblue* therefore **urge the Government, as a matter of priority, to act upon the Assistant Treasurer's promise that "further consideration will be given to the application of unfair contract terms laws to life insurance contracts"**. Excluding life insurance from the unfair contract terms protections will maintain the current unsatisfactory arrangements, which are neither simple nor fair for people with experience of mental illness.

We note that under the proposed amendments a contract term will not be deemed unfair if it is "reasonably necessary to protect the legitimate interests of an insurer" on the basis that it "reflects the underwriting risk accepted by the insurer". Nevertheless, we understand that **the proposed amendments will provide a useful remedy where an underwriter arbitrarily imposes a term without any significant increase in the insurer's risk profile based on the information disclosed, and then tries to rely on that term to deny coverage**.

Much like the Commonwealth and State Discrimination Acts, this legislation has the potential to shine a light on the currently opaque processes that insurers go through when deciding what coverage to provide to people with experience of mental illness. However, we have some reservations regarding whether this potential will be realised in practise.

For example, under section 46 of the *Disability Discrimination Act 1992* (DDA), insurance companies are legally able to discriminate against people with experience of mental illness on the basis of disability, so long as that discrimination is based on actuarial or statistical data on which it is reasonable to rely. **The stories we hear regularly suggest that decisions of insurance companies often contravene the DDA**, both in the way that the underwritten risks are interpreted in contracts and in the underwriting process itself.

The issue of data sufficiency and reliability in insurance and mental health is **an issue of long-standing concern to the MHCA and *beyondblue* that we will be pursuing through alternative avenues in the near future.**

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