ATTN: The Honourable Kenneth Madison Hayne AC QC

Commissioner

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

By email: *FSRCenquiries@royalcommission.gov.au*

14 June 2018

Dear Commissioner

MENTAL HEALTH AND INSURANCE

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA has considered the submission from the Public Interest Advocacy Centre (PIAC) dated 26 April 2018 urging the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Commission) asking the Commission to inquire into the practices of insurers in relation to people with past or current mental health conditions. The ALA agrees with the submission and also urges the Commission to undertake such an inquiry.

The ALA agrees with PIAC that there are systemic problems and discriminatory practices in the way insurers design, price and offer policies and assess claims for people with past or current mental health conditions. In particular, the ALA submits that there are discriminatory practices within the insurance sector in terms of:

- Determining terms during underwriting; and
- The writing of policies to include blanket exclusion clauses.

[1] www.lawyersalliance.com.au.

Under the *Disability Discrimination Act* 1992 (*'DD Act'*) insurers are allowed to discriminate where the discrimination is based on actuarial or statistical data on which it is reasonable for the insurer to rely.[2] In 2006, a Memorandum of Understanding (MoU) was entered into between stakeholders from the mental health sector and insurance sector. This MoU helped develop the detailed guide 'Mental Illness and Life Insurance — What you need to know'.

Despite these efforts, a 2011 report from Mental Health Council of Australia (MHCA) and Beyond Blue demonstrates that many individuals who have suffered mental illness continue to experience discrimination from the insurance industry.[3] Significantly:

- 45 per cent of respondents said that their application for income protection insurance was declined due to mental illness;
- 67 per cent said it was difficult to obtain life and income protection insurance; and
- 50 per cent had insurance cover but paid more or had exclusions for mental illness/health claims. [4]

There are three recurring issues within the insurance sector when assessing individuals with mental illness that indicate the systemic and discriminatory practices to which we refer:

1. In cases where an applicant discloses their mental health condition during the application process and the insurer refuses to make an insurance offer;
2. In cases where an applicant discloses their mental health condition during the application process and the insurer offers limited protection — specifically excluding claims arising from any mental health condition (not just the diagnosed condition);

[2] *Disability Discrimination Act* 1992 s.46(1)(f)
[3] Mental Health Council of Australia and BeyondBlue, *Mental Health, Discrimination & Insurance: A Survey of Consumer Experiences 2011*
[4]*Ibid*

3. In cases where the insurer finds the applicant has failed to disclose a mental health condition and cancels the policy (even when the non-disclosure is minor and insurers could vary the terms of the existing policy).[5]

Despite the provision in the *DD Act* that allows insurers to discriminate where the discrimination is based on actuarial or statistical data on which it is reasonable for the Insurer to rely, there is no positive obligation for Insurers to provide copies of the actuarial and statistical data upon which they relied when making decisions on insurance applications and claims. It may be that such information can be compelled from an insurer through discovery in a legal action but it is submitted that a disabled consumer ought not to have to take on the stress, inconvenience, cost and risk associated with such an action in order to understand the basis for an insurer's underwriting decision.

In the case of *Ingram v QBE Insurance (Australia) Ltd*[6] the insurer did not produce evidence to prove its acts of discrimination were based on actuarial or statistical data within the statutory exceptions or that It would have suffered unjustifiable hardship if it had not included the mental illness exclusion in the policy issued. No doubt the insurer would have produced such information if it existed. This exemplifies the industry's misuse of blanket exclusion clauses without any proper documented basis.

The ALA submits that the Royal Commission provides an opportunity to compel insurers to provide information regarding their internal practices and systems, and particularly what actuarial data is utilised in assessing risk and making decisions on insurance applications and claims. It also provides an opportunity to hear directly from consumers who have experienced mental illness who have been adversely affected by insurer practices. Moreover the ALA submits that this inquiry comes within the Commission's Terms of Reference, namely to inquire into:

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[5] Public Interest Advocacy Centre *Mental Illness and Insurance* http://www.piac.asn.au/news/2015/06/mental-illness-and-insurance

[6] *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936

'(f) the adequacy of:

> i. *existing laws and policies of the Commonwealth relating to the provision of… financial services;*
>
> ii. *the internal systems of financial services entities; and*
>
> iii. *forms of industry self-regulation, including industry codes of conduct;*

to identify, regulate and address misconduct in the relevant industry, to meet community standards and expectations and to provide appropriate redress to consumers.'

Given that approximately 45 per cent of Australians have reported that they have experienced some sort of mental health condition[7] and the important role of the insurance sector in providing financial security for Australians, the ALA agrees with PIAC that this is a critical issue that should be the subject of a dedicated area of investigation by the Commission.

Should you wish to discuss this further please do not hesitate to contact Dr Louis Schetzer, Policy and Advocacy Manager with the ALA (louis@lawyersalliance.com.au) or ALA Spokesperson Josh Mennen (JMennen@mauriceblackburn.com.au).

Yours sincerely,

Laura Neil
National President
Australian Lawyers Alliance

[7] Slade, T., Johnston, A., Teesson, M., Whiteford, H., Burgess, P., Pirkis, J., and Saw, S. (2009), *The Mental Health of Australians 2, Report on the 2007 National Survey of Mental Health and Wellbeing*, Canberra, Commonwealth Department of Health and Aged Care.