

Advice on Application of the Disability Discrimination Act to Limitations on Coverage for Mental Health Conditions in Standard Form Insurance Contracts

8 June 2026

Matter: Advice - Life Insurance Code Review
Instructed by: Clyde & Co
Attention: Jessica Thurtell, Partner

A. Introduction

- 1 An independent reviewer has been appointed to review the Life Insurance Code of Practice.
- 2 I am asked to advise the Reviewer how the *Disability Discrimination Act 1992* (Cth) (**DDA**) would apply to general exclusions or limitations included in the terms and conditions of standard form life insurance contracts, for the purposes of his review of clause 2.1(b) of the Life Insurance Code of Practice.
- 3 The letter of instructions is included in **Annexure A**. I have been briefed with the documents listed in **Annexure B** to this advice. A short case summary of the four cases in which a court or tribunal has considered the actuarial or statistical data exemption in the DDA (*Xiros v Fortis*, *QBE v Bassanelli*, *Ingram v QBE*, *Applicant 202271 v AIA*) is included in **Annexure C**.
- 4 I am specifically asked to address:
 - (a) whether insurers are permitted to incorporate a total exclusion for mental health conditions, or particular categories or types of mental conditions;
 - (b) whether insurers may limit cover for mental health conditions (for example, lower payouts, instalment payments, higher premiums for cover that includes mental health conditions, or lower premiums for consumers that opt out of mental health cover) that are not imposed with respect to physical conditions;
 - (c) assuming insurers base their decisions on actuarial or statistical data, what other relevant factors the DDA requires insurers to take into account when assessing an application for insurance with no prior history of mental health issues; and
 - (d) any other relevant issues that may affect or limit an insurer's ability to exclude or limit cover for mental health.
- 5 I am further asked to advise as to general considerations which may need to be considered if the Life Code were to be amended to include a definition of “*blanket exclusion*” or “*blanket mental health exclusion*”.
- 6 I set out my responses to these specific questions at the end of this advice.

B. Assumptions and limitations

- 7 For the purposes of this advice, I have made the following assumptions.
- 8 **Mental health condition:** A mental health condition encompasses the range of conditions referred to in Section II of the current edition of DSM-5-TR.¹
- 9 **“Standard-form life insurance contract”:** A standard-form life insurance contract is a policy which is offered on the basis of standard terms which are not the subject of negotiation or underwriting assessment. A standard-form life insurance contract may be offered through either of the two kinds of product referred to in paragraph 8 of the letter of instruction, namely:
- (a) direct products, in which standard terms are offered which either do not take into account the applicant’s individual circumstances or terms may be automatically included by a rules engine; and
 - (b) advised products arranged by a financial advisor.
- 10 In an “advised” product, some information about the person applying for insurance is provided to the insurer prior to the policy being issued and individual underwriting may result in the product being underwritten on non-standard terms.
- 11 I note in passing that the Disability Discrimination Act also applies to group life insurance contracts and some of the issues canvassed in this advice may also arise in a group life insurance context. A discussion of group life insurance is beyond the scope of the matters I have been asked to address.
- 12 I have assumed that the insurance contracts under consideration are not prescribed sickness and accident policies for the purposes of Division 1 of Part 5 of the *Insurance Contracts Act 1984* (Cth) as defined by regulation 24 of the *Insurance Contracts Regulations 2017* (Cth) (broadly, continuous disability insurance of not more than three years duration or sickness and accident policies which are guaranteed renewable for a period of not more than one year).
- 13 **“Blanket exclusion”:** The term “*blanket exclusion specific to mental health*” is not defined in the Life Insurance Code. I take it to mean a term in a life insurance policy which excludes a specified condition or class of mental health conditions from cover. An exclusion from cover is not necessarily the same thing as a limitation on cover. I address this point further in the Section G below.
- 14 **Other anti-discrimination legislation:** I have limited my advice to a consideration of the DDA and have not separately considered State anti-discrimination legislation.

¹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fifth edition, Text Revision, 2022

C. Disability discrimination

Section 24 of the DDA

- 15 The *Disability Discrimination Act 1992* (Cth) (**DDA**) renders it unlawful to discriminate against a person on the ground of the person's "*disability*" in the provision of goods, services and facilities.² The operative provision is section 24, which provides:

*It is unlawful for a person who, whether for payment or not, provides goods or [1] **services**, or makes facilities available, to [2] **discriminate against another person [3] on the ground of the other person's [4] disability:***

- (a) *by refusing to provide the other person with those ... services ...; or*
- (b) *in the terms or conditions on which the first-mentioned person provides the other person with those ... services ...; or*
- (c) *in the manner in which the first-mentioned person provides the other person with those ... services ...*³

(Key elements highlighted in bold and numbered in square brackets for ease of identification.)

- 16 I address the key elements of the prohibition below, starting with the concepts of "*services*" (element [1]) and "*disability*" (element [4]), followed by "*discrimination*" (element [2]) and then the causal link required between the discrimination and the disability ("*on the ground of*", element [3]).

Element [1]: Meaning of "services"

- 17 "*Services*" are defined to include "*services relating to ... insurance*".⁴ The provision of insurance cover (issuing a policy) is a "*service*" for the purposes of the DDA.⁵ In *Ingram v QBE* the insurer initially denied, but ultimately conceded, that providing indemnity under the policy was a "*service*" for the purposes of the equivalent provisions in the Victorian anti-discrimination legislation.⁶
- 18 A question which arises is how specifically the "*service*" that is provided by the insurer in issuing cover is to be defined. In the case of trauma or critical illness cover, which is limited to specified conditions, such as cancer, heart attack and stroke, the relevant "*service*" is (arguably) not the provision of cover for any condition, but only the specified conditions. The insurer does not treat persons with mental health conditions less favourably in providing that service because cover for mental health conditions does not form part of the service. The DDA does not require a person to provide a new, varied or different service. I say "arguably", however, as the identification of the relevant "*service*" is a question of fact to be determined in the circumstances of each case and the tendency of the courts is to give it a broad interpretation in the context of anti-discrimination legislation.⁷

² DDA, s 24

³ DDA, s 24

⁴ DDA, s 3, definition of "services"

⁵ *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936 (***Ingram v QBE***) at [65]

⁶ *Ingram v QBE* at [290]

⁷ *Waters v Public Transport Corporation* (1991) 173 CLR 349; [1991] HCA 49 (service provided public tram operator defined broadly as the public "transport system" rather than by reference to discrete elements of the service (provision of conductors)); *King v Jetstar Airways Pty Ltd (No 2)* (2012) 286 ALR 149; [2012] FCA 8 (service provided by airline was the transportation of the passenger on the flight they had booked; wheelchair assistance to board and disembark from the aircraft is ancillary to the service provided and not a new or different service); point not argued on appeal (2012) 293 ALR 613; [2012] FCAFC 115

- 19 Speaking generally, TPD and IP insurance differs from critical illness in that many TPD and IP products do cover disability caused by mental health conditions. This is one factor which suggests that a term which excludes or limits cover in a standard form TPD or IP policy on the ground of a mental health condition treats a person with such a condition less favourably.
- 20 A related question is whether the marketing or terms of the policy itself indicate that the “service” provided by the product is limited to the provision of the cover that is provided. In other words, what is said to be an exclusion or limitation of cover could be regarded as really a term which defines the scope of the cover, and that the “service” is the provision of that cover. Whilst the point may be arguable in some cases, I doubt such a characterisation would be accepted by a court in most cases involving TPD and IP insurance. In my experience, the exclusion of, or limitation of cover in respect of, mental health conditions is usually achieved as a matter of form by incorporating a specific exclusion rather than by rewriting the scope of cover offered. That is, the structure of the policy is usually to state the cover provided by way of a broad insuring clause and then to provide for specific exclusions or limitations on the cover. These factors tend to suggest that the “service” provided by the insurer is the provision of broad-based TPD or IP cover which is either not provided, or provided on limited terms, to those insureds who fall within the exclusion or limitation. On this analysis, the policy is more readily seen as treating insureds with a mental health condition less favourably than insureds who do not suffer from a mental health condition.
- 21 That is not to say that there could not be a new TPD or IP product issued which does constitute a more limited “service” than the majority of TPD or IP policies issued. The issue is likely to be whether the new product is sufficiently different to other products offered by the insurer to constitute a different “service” for the purposes of the comparison required by section 5 of the DDA.

Element [4]: Meaning of “Disability”

- 22 “Disability” is defined by the DDA to include “a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour”⁸ and includes a disability that presently exists,⁹ “previously existed but no longer exists”¹⁰ and a disability which “may exist in the future (including because of a genetic predisposition to that disability)”.¹¹
- 23 The definition of “disability” is broad. Most, if not all, mental health conditions will come within the definition. The extension of the definition to a disability which previously existed would, for instance, catch a decision to exclude cover for depression on the grounds the applicant for insurance had previously suffered from a mental illness. The extension of the definition to a disability which may exist in the future is broader still and would catch a decision to exclude cover for a mental illness which the applicant does not suffer from at the time of the application for cover and has never suffered from in the past.
- 24 This was the position in *Ingram v QBE Insurance (Australia) Ltd.*¹² The applicant did not have depression at the time travel insurance was taken out and had no history of having suffered from depression in the past. The Victorian Civil and Administrative Tribunal held that the applicant nevertheless had a “disability” as defined under the equivalent definition in the Victorian anti-discrimination legislation at the time the policy was

⁸ DDA, s 4, definition of “disability”, subparagraph (g)

⁹ DDA, s 4, definition of “disability”, subparagraph (h)

¹⁰ DDA, s 4, definition of “disability”, subparagraph (i)

¹¹ DDA, s 4, definition of “disability”, subparagraph (j)

¹² [2015] VCAT 1936

issued.¹³ I address the decision in *Ingram v QBE* further below when dealing with Element [3].

Element [2]: meaning of “to discriminate”

- 25 The DDA draws a distinction between “direct” and “indirect” discrimination. Both are unlawful.
- 26 **Direct discrimination:** Direct disability discrimination occurs “*if, because of the disability, the discriminator treats or proposes to treat the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different*”: section 5(1) of the DDA.
- 27 This is obviously a broad definition of “discrimination”. The DDA uses the legislative drafting technique of imposing a broad and general prohibition and then providing for specified exceptions in which discrimination is permitted.
- 28 In the few decided cases on this topic, it has either been found (*Xiros v Fortis*¹⁴ and *Ingram v QBE*)¹⁵ or accepted and therefore not conclusively determined (*Bassanelli v QBE*¹⁶ and *Applicant 202271 v AIA*¹⁷) that a decision to refuse cover and the imposition of an exclusion in the policy on medical grounds is an instance of direct, rather than indirect, discrimination.
- 29 Where the insurer offers mental-health-inclusive cover only at a higher premium than it applies to cover for disability arising from physical conditions, or cover which is more limited if the disability arises from a mental health condition,¹⁸ the insurer is taking a decision at the design stage to treat mental health conditions differently in the terms on which it provides the service. The proper comparator is a person seeking cover for a physical condition in not materially different circumstances. If the person seeking mental health cover pays more or gets less, that is less favourable treatment in the terms of the service and engages s 24(b).
- 30 Refusing to provide insurance cover, excluding cover or limiting the cover on the ground of a disability or impairment therefore all amount to treating a person with the disability or impairment less favourably than a person who did not have the disability or impairment. They are instances of prima facie discrimination that would need to be justified by actuarial or statistical data and other relevant factors under section 46 of the DDA. The section 46 exemption is discussed in Section D below.
- 31 **Indirect discrimination:** An alternative argument that could be made by a person complaining of discrimination is that the exclusion or limitation in the policy amounts to a “*requirement or condition*” under section 6 of the DDA with which the person cannot comply. That is, the insurer will perform its obligations (pay claims for disability) only if those claims do not arise from a mental health condition. Because of the insured’s mental health disability, the insured person cannot comply with that condition – their claim necessarily arises from it. The requirement therefore has the effect of

¹³ *Equal Opportunity Act 2010* (Vic)

¹⁴ *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433; [2001] FMC 15 (***Xiros v Fortis***) at [15] (HIV/Aids exclusion)

¹⁵ *Ingram v QBE* at [57] (mental illness exclusion)

¹⁶ *Bassanelli v QBE Insurance (Australia) Ltd* [2003] FMCA 412 (***Bassanelli v QBE***) at [33]; *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88; [2004] FCA 396 (***QBE v Bassanelli***) (refusal to offer cover)

¹⁷ *Applicant 202271 v AIA Australia Limited* [2023] ACAT 59 (***Applicant 202271 v AIA***) at [6] (refusal of cover on the ground of bipolar disorder)

¹⁸ For example, under a tiered product structure of the kind contemplated in the Submission of the Actuaries Institute dated 12 May 2026, page 7, Question 3(b), third bullet point

disadvantaging persons with the disability. The argument was considered, however not determined, in *Xiros v Fortis*¹⁹ and *Ingram v QBE*.²⁰

- 32 In conclusion, on the current state of the authorities, an exclusion or limitation on cover on the grounds of mental health in a standard form policy is more likely to be characterised as direct rather than indirect discrimination, though the point has not been finally determined.

Element [3]: “on the ground of” (causation)

- 33 **General principle:** In order to be unlawful, the discrimination must be “on the ground of” the disability.²¹ That is, there must be a causal connection between the ground of discrimination alleged and the refusal to provide, or the imposition of the limitation on, cover.²² The central question is *why* the aggrieved person was treated less favourably.²³ The intention and motive of the alleged discriminator are relevant, although the test is not subjective but objective, in the sense that the question is to be determined by reference to objective facts. It requires an assessment of the “true basis” or “true reason or true ground” of the decision or conduct said to be discriminatory.²⁴
- 34 **Exclusion or limitation applied by rules engine:** In the case of a mental health exclusion or limitation triggered by the disclosure of a prior or existing mental health condition by a rules engine (such as the product considered in *Applicant 202271 v AIA*), the “true ground” of the decision is the disclosure of a mental health condition (or the potential for one) by the applicant. The effect of the rules engine is to impose a pre-programmed outcome (refusal of cover, imposition of an exclusion or imposition of a limitation of cover) determined during the design of the rules engine. That outcome treats the applicant less favourably than a person without the condition. The causal connection between the disability and the less favourable treatment will generally be made out in such a case, as it is the disclosure of the condition which triggers the imposition of the exclusion or limitation.
- 35 **Exclusion or limitation in standard form contract:** In cases where the mental health exclusion or limitation has been included as part of a standard form contract, the causal connection is less obvious.
- 36 The decision to exclude or limit cover is taken at the design stage. Discrimination occurs at a later point in time – when the policy is issued (or cover is refused) or when a claim under the policy is declined. The information that is available to the insurer will differ depending on the point in time at which the discrimination is alleged. At the time the product is designed, the insurer has no knowledge about the individual applicant. At the time of issuing the policy, the insurer will have some information about the applicant. Whether the insurer would be aware of the applicant’s medical history at that point would depend on what information is provided during the application process. When an insurer declines a claim, the insurer will have greater knowledge of the applicant’s

¹⁹ *Xiros v Fortis* at [15]

²⁰ *Ingram v QBE* at [58]

²¹ Section 5 of the DDA

²² *Waters v Public Transport Corporation* (1991) 173 CLR 349; [1991] HCA 49 at 401 per McHugh J; *Laurent v Commissioner of Police* (2009) 68 SR (WA) 165; [2009] WASAT 254 at [32]

²³ *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92; [2003] HCA 62 at [236]

²⁴ *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; [1989] HCA 56 at 177 per Deane & Gaudron JJ and [184] per Dawson J (retrenchment on a “last on, first off” basis not “on the ground of” gender for the purposes of s 24(1) of the *Anti-Discrimination Act 1977* (NSW)); *Toben v Jones* (2003) 129 FCR 515; [2003] FCAFC 137 at [63] (publication of material denying the holocaust “because of” race or ethnic origin for the purposes of s 18C of the *Racial Discrimination Act 1975* (Cth)). See also *Western Sydney University v Thiab* (2023) 111 NSWLR 241; [2023] NSWCA 57 (suspension of student not “because of” her political beliefs).

circumstances. By that time, the insured has the disability (the mental health condition that caused the claim) and medical evidence about the disability will be available.

- 37 The reasoning in *Ingram v QBE* was that, at the time the policy was issued, the applicant (who did not have, and had never in the past had, a mental health condition) had the "disability" of a potential future mental health condition, solely because that disability may exist in the future. The Tribunal rejected QBE's argument that future disability should be interpreted as meaning a disability which exists but has not been diagnosed or become manifest at the time the policy is issued.²⁵ The finding was that the insurer, by issuing the policy with the blanket mental health exclusion, proposed to treat the insured less favourably in the terms of the coverage (by excluding future mental health claims) than it treats a person who will never develop such a condition (whose policy provides comprehensive coverage).
- 38 There is a degree of artificiality in this analysis in the case of a standard-form policy. On the VCAT's reasoning in *Ingram*, effectively every applicant has a "future disability" because everyone has some potential to develop mental illness. That is a broad and potentially far-reaching conclusion. I am not convinced it is correct. Section 5 of the DDA requires a comparison of the treatment of the person with the disability and a person without the disability. The exclusion applies equally to all applicants. The insurer is not treating either class of applicant less favourably on the ground of future disability. It is treating all applicants on the same terms, because all applicants have the potential to develop depression at some point in the future.
- 39 Until the decision in *Ingram v QBE* is considered by a superior court, however, insurers cannot assume that the reasoning in *Ingram v QBE* will not be followed. The practical effect is that an exclusion or limitation in a standard form policy will be treated as discriminatory conduct even where the applicant has no present or past mental health condition, and the question will be whether the conduct is justified under the applicable exemptions.
- 40 **Offer of cover on non-standard terms:** In the case of an advised product, the fact that an insurer may depart from the standard terms in individual cases indicates that the insurer treats some applicants more (or less) favourably on the basis of underwriter's assessment of the risk. There are two situations which might give rise to an allegation of discrimination on the ground of disability. The first situation is where the underwriter imposes a mental health exclusion or limitation on cover that does not appear in the standard terms. That would amount to treating the applicant less favourably on the ground of the condition. Whether it constitutes unlawful discrimination will depend on whether either of the actuarial or statistical data or unjustifiable hardship exemptions apply. The second situation is where the standard terms contain a mental health exclusion or limitation on cover and the underwriter does not consider the applicant's circumstances but merely proceeds to offer the cover on the standard terms. If an underwriter processes an advised product application by simply carrying across the standard terms without any assessment of the individual's mental health circumstances, that conduct may constitute discrimination even in an "underwritten" product, particularly if the insurer has departed from the standard terms for other applicants.

²⁵ *Ingram v QBE* at [37]

D. Exemptions

Actuarial or statistical data exception

41 **Section 46 of the DDA:** Subsection 46(1) applies to discrimination in refusing to offer an insurance policy. Subsection 46(2) applies to discrimination in the terms and conditions on which an insurance policy is issued. The test is the same under both subsections and the distinction is therefore not material for current purposes.

42 The DDA permits discrimination on the ground of disability in each of these cases if the discrimination:

(f)(i) *is based upon actuarial or statistical data on which it is reasonable for the [discriminator] to rely; and*

(f)(ii) *is reasonable having regard to the matter of the data and other relevant factors; or*

(g) *in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors.*²⁶

43 Subsection (f) has been referred to in submissions to the Reviewer as the “*data limb*”. Subsection (g) has been referred to as the “*no data limb*”.²⁷ I adopt these labels for convenience.

44 **Onus:** In a litigated claim, the insurer bears the burden of proving the elements of the data and no data limbs.²⁸

Data limb (1): actuarial or statistical data

45 **Reliance:** For the data limb to apply, the discrimination must be “*based upon*” actuarial or statistical data. The phrase “*based on*” connotes the act complained of involving less favourable treatment being done by “*reference to*”²⁹ actuarial or statistical data. In combination with the reference to reliance in the section, subsections 46(1)(f) and (2)(f) have been interpreted as requiring actual reliance by the insurer on the data.³⁰

46 The requirement of actual reliance could be interpreted as requiring an insurer to refer to the actuarial or statistical data every time it makes a decision to refuse, exclude, or limit cover. However, I think such an interpretation goes too far. The Tribunal accepted in *Applicant 202271 v AIA* that the data exception does not require an insurer to consult the data every time an application is declined.³¹ It may in some cases be necessary for the insurer to adduce evidence that the actuarial or statistical data was nevertheless relied on – for example, through evidence of a standard practice or procedure which was itself based on the data.

47 **Adequacy of the data:** It must be reasonable to rely on the actuarial or statistical data. It is not reasonable to rely on actuarial or statistical data which is objectively inadequate,

²⁶ DDA, s 46(1)&(2)

²⁷ Financial Rights Legal Centre, *Supplementary Submission to the Life Code Review* dated 13 May 2026

²⁸ *Bassanelli* at [39]

²⁹ *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8 at [26]; *Hamzy v Commissioner of Corrective Services NSW* (2022) 107 NSWLR 544; [2022] NSWCA 16 at [67]

³⁰ *QBE v Bassanelli* at [30]

³¹ *Applicant 202271 v AIA* at [51]

for example because it is qualified, incomplete, based on an insufficient sample or is not directly applicable to the particular decision to refuse, exclude or limit cover.³²

- 48 Although the data exception contemplates reliance on either actuarial or statistical data, statistical data on its own may be insufficient. Whether that is so will depend on the nature of the statistical data involved and what is reasonable in the particular circumstances. Medical studies on their own may not be sufficient. It is one thing to say, for example, that depression is associated with an increase in periods of unemployment. It is another to quantify the risk for the purposes of determining whether it is reasonable, having regard to the statistical data, to impose the exclusion or limitation. It is necessary to look at the extent of the increased risk and to apply it to the target market. It is relevant to know what the expected increase in claims payouts would be if the condition were not excluded. It may also be relevant to compare the risk that has been excluded with other risks the insurer chose not to exclude when drafting the terms of the policy.
- 49 A related issue is the interpretation of the data. An underwriter is not necessarily qualified to interpret medical studies on the risks associated with particular disabilities. As the AHRC Guidelines note, actuarial advice may be required to interpret the data and quantify the risk.³³ I agree. I note that, in the two litigated cases in which insurers have succeeded on the data limb, insurers adduced evidence from employed actuaries explaining the data and the impact on pricing and claims cost if the insurer were required to cover the condition in question.³⁴ In the two cases in which insurers failed to satisfy the data limb, in one (*QBE v Bassanelli*), no actuarial or statistical data was produced to the court.³⁵ In the other (*Ingram v QBE*), the actuarial evidence interpreting the medical and claims statistics was produced for the purposes of the litigation and could not be relied on because it was not in existence and could not have been relied on by the insurer at the time of the decision to include the mental illness exclusion in the policy.³⁶
- 50 The AHRC Guidelines also suggest advice from a researcher with academic medical qualifications who has training, study or experience in the interpretation and application of statistics might be appropriate.³⁷ Again, I agree. That is not to say advice of a medical researcher would be required in every case. If there are authoritative medical studies which clearly quantify the risk, are reliable and are not contradicted by, or inconsistent with, other studies, it would be reasonable to rely on them. The point for present purposes is that an underwriter or actuary may not be qualified to assess the reliability of a medical study or which of two conflicting medical studies should be preferred.
- 51 **Secondary data:** Whether reliance on secondary data, such as underwriting guidelines, that are based on actuarial or statistical data satisfies the requirements of the data exception is something of an open question. My view is that the word “*directly*” is not to be read into the phrase “*based on*” in section 46 of the DDA. The breadth of the construction given to the phrase “*based on*” in similar contexts suggests that a decision which is only indirectly based on the data will suffice. In other words, a decision which is made on the basis of underwriting guidelines, which are themselves based on actuarial or statistical data which is reliable, up to date and applicable to the risk would satisfy the data exception.
- 52 An insurer would, however, need to be satisfied about the adequacy of the actuarial or statistical data underpinning underwriting guidelines before it relied on them. One of the

³² *QBE v Bassanelli* at [30]

³³ Australian Human Rights Commission, *DDA Guidelines on Insurance and Superannuation*, November 2016 (**AHRC Guidelines**), page 13 [4.2(d)]

³⁴ *Xiros v Fortis & Applicant 202271 v AIA*

³⁵ *Bassanelli v QBE* at [5]

³⁶ *Ingram v QBE* at [90]

³⁷ AHRC Guidelines, page 12 [4.2(a)]

reasons the data exception was found to be satisfied in *Applicant 202271 v AIA* was that there was evidence of the meta-analysis of the statistical data underpinning the reinsurer's underwriting guidelines.³⁸ Primary insurers have not always been able to produce evidence of the actuarial or statistical data on which underwriting guidelines are based, particularly where the underwriting guidelines date back many years. If the insurer is unable to do so, it will likely be unable to make out the actuarial or statistical data exception.

- 53 **Time at which reasonableness is assessed:** The reasonableness of the insurer's reliance on the actuarial or statistical data is to be assessed at the time of the discriminatory conduct complained of. Data on which it is reasonable to rely at the time of product design may no longer be reasonable when the policy is issued. The data may be out-of-date or discredited.³⁹
- 54 A question that arose in *Ingram v QBE* was whether the insurer made the decision to impose the mental health exclusion when it issued the version of the policy terms in force when the applicant applied for cover or whether that decision was made when a previous iteration of the policy terms was issued.⁴⁰ The Tribunal did not determine the issue in that case. However, it may not satisfy the requirements of reliance and reasonableness if an insurer were to incorporate an exclusion or limitation in a product simply on the basis it appeared in an earlier product.
- 55 I understand that life insurers are required under Prudential Standard CPS 320 to obtain the written advice of their Appointed Actuary when issuing or modifying a policy. I do not know to what extent the Appointed Actuary addresses the impact of mental health exclusions or limitations and the relevant actuarial or statistical data.
- 56 **Standard of reasonableness:** It has been said of the test of reasonableness in the context of other discrimination legislation that the "*test of reasonableness is less demanding than one of necessity but more demanding than one of convenience*" and is to be determined objectively having regard to "*all the circumstances*".⁴¹
- 57 **Proportionality:** What constitutes reasonable discrimination is likely to involve questions of proportionality. For example, one of the reasons the discrimination was unreasonable in *QBE v Bassanelli* was that the insurer had the capacity to issue a policy which excluded pre-existing conditions or on the basis of an additional premium, yet it did not consider these options and simply refused to offer any cover.⁴²
- 58 By way of another example, it would not be reasonable to impose an exclusion which went beyond the actuarial or statistical data. For instance, it may not be reasonable to rely on actuarial or statistical data directed to the risks associated with depressive and anxiety disorders in imposing an exclusion which extends to other mental health conditions, such as neurocognitive disorders.

³⁸ [2023] ACAT 59 at [33]

³⁹ *QBE v Bassanelli* at [30]

⁴⁰ [2015] VCAT 1936 at [107]

⁴¹ *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 263, applied by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 395-396 and by the Federal Magistrates Court in the context of s 46(2) of the DDA in *Xiros v Fortis* at [16]

⁴² *QBE v Bassanelli* at [57]

Data limb (2): reasonableness having regard to the data and other relevant factors

- 59 In addition to it being reasonable to rely on the actuarial or statistical data on which the discrimination was based, it is necessary that the discrimination also be reasonable “*having regard to the matter of the data and other relevant factors*”.⁴³
- 60 This limb involves an assessment of the other factors that are relevant and of the reasonableness of the discrimination having regard to those factors. I discuss the “other relevant factors” below.
- 61 In summary, an insurer seeking to rely on the data limb will need to demonstrate: (a) that it actually relied on actuarial or statistical data; (b) that the data was adequate and current at the time of the relevant decision; and (c) that the extent of the exclusion or limitation was reasonable, in the sense of being reasonably proportionate to the risk identified by the data. Of the four cases in which the data limb has been considered, insurers have succeeded in two and failed in two, and the quality and currency of the actuarial evidence was a decisive factor in each.

No data limb

- 62 A point that is (correctly) made in a number of the submissions is that the no data limb only applies if actuarial or statistical data on which it would be reasonable to rely is unavailable and cannot reasonably be obtained.⁴⁴
- 63 As with the “*other relevant factors*” under the data limb, satisfaction of the no data limb turns on the reasonableness of the discrimination having regard to those factors.
- 64 The range of other factors that are to be considered under the no data limb may be broader than those to be considered under the data limb. The data limb is directed to “*the matter of the data and other relevant factors*”, whereas the no data limb adds the word “*any*”, directing attention to “*any other relevant factors*”.⁴⁵ My view is that the range of factors are likely to be substantially the same under both limbs. Ultimately, what is reasonable requires a judgment to be made which balances competing factors. The practical difference between the two limbs is that the other relevant factors would need to be of more weight under the no data limb in the absence of actuarial or statistical data justifying the discrimination.

Other relevant factors

- 65 The DDA does not seek to define or limit what might qualify as another relevant factor. The factors to be taken into account are not limited to the matters known to the insurer⁴⁶ and include factors which the insurer ought to have been aware of.⁴⁷ How far an insurer is required to go in undertaking enquiries to obtain information will be a matter of fact and degree.
- 66 In circumstances where there is actuarial or statistical data on which it is reasonable to rely (that is, the data limb applies) the reasonableness of the discrimination is to be assessed having regard to both the actuarial or statistical data and the other relevant factors. The existence of the actuarial or statistical data is to be treated as a given. The other factors that are to be considered in addition to the actuarial or statistical data will be dictated by the particular circumstances of the case. Where no actuarial or statistical

⁴³ Subsections 46(1)(f)(ii) and 46(1)(f)(ii) of the DDA

⁴⁴ *QBE v Bassanelli* at [32]-[33]

⁴⁵ Compare *QBE v Bassanelli* at [31] (the data limb) with [53]-[54] (the no data limb)

⁴⁶ *QBE v Bassanelli* at [54]

⁴⁷ *QBE v Bassanelli* at [37]

data is available (that is, the no data limb applies), the reasonableness of the discrimination has to be made solely on the basis of other relevant factors. Again, the factors to be considered will depend on the particular circumstances of the case. The relevant factors to be considered will not necessarily all point one way (that is, for or against the reasonableness of the discrimination). What is required is a balancing exercise having regard to potentially competing factors.

Factors considered relevant in reported cases

- 67 I set out below a list of other factors which have been considered in the reported cases.
- 68 **Nature of the product:** It will generally be more reasonable to refuse, exclude or limit cover in a low-cost product which is not underwritten than in an underwritten product.⁴⁸
- 69 **Increased cost to other policyholders:** The increased premium cost to other insured persons if the insurer were required to cover the condition.⁴⁹
- 70 As I understand the process, the actuarial process when pricing a product assumes that the cover will contain the proposed exclusions or limitations on cover. Further, the assumption is that the pool of lives insured is relatively homogeneous. When pricing the product, the actuary considers the expected rates of claim, size of claims and the size of the pool of customers to arrive at a cost for the product. The cost varies by factors such as age and gender. If the product were changed to cover conditions which were excluded or in respect of which cover is to be limited, the cost assumptions will no longer be valid and it would increase the price.
- 71 **Risk of anti-selection:** The risk of anti-selection (the risk that persons will intentionally select a policy of insurance offered by a particular insurer to provide cover against risks to which those persons are peculiarly susceptible) may be relevant.⁵⁰
- 72 Where the product is different to existing products available on the market (for example, the product offers cover not currently available on the market or offers cover that is available but at a lesser cost), anti-selection is a particular risk and one which would be difficult to price for, in part because policyholder behaviour can change in response to the new product. Underestimating the number of individuals who anti-select will have material consequences on the financial viability of the product.⁵¹
- 73 **Financial impact on the insurer:** The financial impact on the insurer's business if it were required to cover the condition is a relevant factor if it is unable to pass the increased cost on to other policyholders.⁵²
- 74 **APRA Prudential Standards:** A related consideration is the need to maintain capital adequacy to comply with APRA Prudential Standards.⁵³
- 75 **Applicant's circumstances:** At the stage of designing the policy, the insurer does not know anything about the individual applicants who will be applying for cover. The insurer's ability to rely on the exemption will turn almost entirely on the quality of its population-level actuarial data and the reasonableness, in terms of proportionality, of

⁴⁸ *Applicant 202271 v AIA* at [53(a)]-[54] (online direct life (death and trauma) policy). See also *King v Jetstar Airways Pty Ltd* (2012) 293 ALR 613; [2012] FCAFC 115 (low-cost airline offering limited wheelchair capacity; unjustifiable hardship exemption made out)

⁴⁹ *Applicant 202271 v AIA* at [36]

⁵⁰ *Xiros v Fortis* at [14] & [16]; *Applicant 202271 v AIA* at [55]

⁵¹ *Applicant 202271 v AIA* at [37]

⁵² *Waters v Public Transport Corporation* (1991) 173 CLR 349; [1991] HCA 49 at 384 per Deane J & 384 per Dawson & Toohey JJ; *Ingram v QBE* at [212]

⁵³ *Ingram v QBE* at [214]

the exclusion or limitation on cover and any information it has about the target market for the product. It is difficult to see how the particular circumstances of a future applicant could be a relevant factor in this situation.

- 76 In an advised product, on the other hand, the insurer will have some information about the individual applicant, such as their age and gender. The insurer may have information about their occupation, lifestyle and past and current mental health history. That information may indicate that the assumptions which led to the inclusion of a mental health exclusion or limitation in the standard terms at the design stage are inapplicable to the applicant. For instance, actuarial or statistical data of the rate or incidence of mental health conditions in the general population which includes persons with a history of mental health conditions may overstate the risk presented by an applicant who discloses never having had a mental health disorder. Whether that is so will depend on the quality of the actuarial or statistical data and its applicability to the particular applicant. In short, an applicant's individual circumstances will potentially be a relevant factor in cases involving advised products. The weight to be given to the actuarial or statistical data will need to be balanced against the weight to be given to the applicant's particular circumstances.
- 77 **Less discriminatory alternatives:** Whether other, less discriminatory, alternatives were available (for example, offering a premium loading in place of an exclusion) is another relevant factor considered in *QBE v Bassanelli*.⁵⁴
- 78 **Other available insurance:** Whether the insurer offered another product which may provide cover for the condition (for example, an underwritten product) was considered to be relevant by the Tribunal in *Applicant 202271 v AIA*.⁵⁵ It is more likely to be reasonable to exclude or limit cover for a mental health condition in a low-cost product if there are other products offered by the insurer (albeit at a higher cost) which provide cover for the condition. A tiered product structure of the kind contemplated in the submission of the Actuaries Institute submission would be an example.⁵⁶
- 79 **Cover offered by other insurers:** The fact that another insurer offers the same or similar cover without an exclusion or limitation was considered to be a relevant factor by the court in *QBE v Bassanelli*.⁵⁷ For a valid comparison to be drawn, the terms on which the other insurer or insurers offered such cover would need to be substantially similar. Differences in the cost would also need to be taken into account.

Additional factors considered relevant in the AHRC Guidelines

- 80 The AHRC Guidelines consider a number of additional factors and provide examples of factors which they consider may be relevant. A number of these are directed to underwritten policies and medical opinions on the assumptions made about the nature of the products involved.
- 81 **Medical opinions and work records:** It would presumably not be practicable for the insurer to obtain a medical opinion in a direct product because there is no human involved in the decision as to the terms on which cover is provided, nor in the case of an advised product, because any exclusion is not the subject of an underwriting assessment.
- 82 **Accepted practice:** The AHRC considers it would be permissible when determining whether the discrimination is reasonable to have regard to the terms on which other

⁵⁴ *Bassanelli v QBE* at [54]

⁵⁵ *Applicant 202271 v AIA* at [53(b)]

⁵⁶ Actuaries Institute submission dated 12 May 2026, page 7, Question 3(b)

⁵⁷ *Bassanelli v QBE* at [43]

insurers would be prepared to issue a policy.⁵⁸ This is a factor which it would be reasonable to take into account at the product design stage. The AHRC takes the view that it would not be reasonable, however, to refuse to insure a person with a disability simply because of historical practice.⁵⁹ I agree.

Other relevant factors – categories not closed

83 The data limb does not limit the range of other relevant factors that may be taken into account. The above list should not be regarded as a complete list of all the factors that may arise in a particular case.

84 In conclusion, the actuarial or statistical data exception is the primary exemption available to insurers. The unjustifiable hardship exception, addressed in Section E, is a secondary and largely overlapping ground.

E. Unjustifiable hardship exception

85 The DDA contains a general exception to the prohibition where avoiding the discrimination would impose an “*unjustifiable hardship*” on the discriminator.⁶⁰ “*Unjustifiable hardship*” is to be assessed according to the relevant circumstances of the particular case, including: (a) “*the nature of the benefit or detriment likely to accrue to, or be suffered by any person concerned*”; (b) “*the effect of the disability of any person concerned*”; and (c) “*the financial circumstances, and the estimated amount of expenditure required to be made, by*” the discriminator.⁶¹

86 Additional cost and the impracticality of making provision for disability can constitute unjustifiable hardship. Courts have held that a bus company's cost of installing wheelchair access facilities on buses constitutes unjustifiable hardship,⁶² as does the requirement to accept more than two wheelchairs on a low-cost airline.⁶³ Increased claims costs and exposure to anti-selection and other risks would similarly constitute unjustifiable hardship in particular cases.

87 It would therefore be open to a life insurer to show that it would cause it unjustifiable financial hardship if it were not permitted to exclude or limit cover for certain conditions. In practice, there is likely to be a substantial overlap with the actuarial or statistical data exception and the factors considered under that heading. In cases where actuarial or statistical data is available, the data will often be the best evidence of the additional risk the insurer would be undertaking were it not permitted to exclude or limit the cover.

88 I therefore do not think there will be many cases in practice in which an insurer fails to satisfy the actuarial or statistical data exception but succeeds in establishing unjustifiable hardship.

F. Answers to specific questions

89 **Question 1:** *Whether insurers are permitted to incorporate a total exclusion for mental health conditions, or particular categories or types of mental health conditions.*

90 Yes, provided they can meet the actuarial or statistical data or unjustifiable hardship exemptions in the DDA. In practice, a total exclusion of all mental health conditions will

⁵⁸ AHRC Guidelines, page 13 [4.2(e)]

⁵⁹ AHRC Guidelines, page 13 [4.2(e)]

⁶⁰ DDA, s 29A;

⁶¹ DDA, s 11

⁶² *Moxon v Westbus Pty Ltd* (2002) EOC ¶193-180; *Moxon v Westbus Pty Ltd (No 2)* (2002) EOC ¶193-248

⁶³ *King v Jetstar Airways Pty Ltd* {2012} 293 ALR 613

be more difficult to justify than an exclusion which is targeted to a particular category or type of mental health conditions.

- 91 **Question 2:** *Whether insurers may limit cover for mental health conditions (for example, lower payouts, instalment payments, higher premiums for cover that includes mental health conditions, or lower premiums for consumers that opt out of mental health cover) that are not imposed with respect to physical conditions.*
- 92 Again, yes, provided they can meet the actuarial or statistical data or unjustifiable hardship exemptions in the DDA. In practice, it would be necessary for the insurer to be able to justify the limitation by reference to actuarial or statistical data relevant to the mental health conditions in question and/or other relevant factors. The insurer would also need to be able to justify the differential treatment of mental health conditions and physical conditions by reference to actuarial or statistical data and/or other relevant factors.
- 93 **Question 3:** *Assuming insurers base their decisions on actuarial or statistical data, what other relevant factors the DDA requires insurers to take into account when assessing an application for insurance with no prior history of mental health issues?*
- 94 The ultimate question is whether the discrimination is reasonable having regard to all of the circumstances. Below is a list of factors which may be relevant to that question. The factors that will apply will vary from case to case, depending on the circumstances.
- (a) The nature and cost of the product.
 - (b) The increased cost to other policyholders if the insurer were required to cover the condition.
 - (c) The financial impact on the insurer if it were required to cover the condition.
 - (d) The requirement on the insurer to comply with APRA Prudential Standards.
 - (e) (In the case of an advised product) the applicant's circumstances.
 - (f) Whether there were less discriminatory alternatives the insurer could have employed.
 - (g) Whether the insurer provided other insurance products that would have provided cover for the condition.
 - (h) The cover offered by other insurers.
 - (i) Whether the insurer complied with accepted insurance practice.
- 95 The categories of factors which may be relevant are not closed and there may be other factors that would be considered relevant in particular cases.
- 96 The factors are discussed in paragraphs 67 to 83 above.
- 97 **Question 4:** *Any other relevant issues that may affect or limit an insurer's ability to exclude or limit cover for mental health.*
- 98 There are other statutory provisions which may affect or limit an insurer's ability to exclude or limit cover in certain circumstances. These include:

- (a) the general duties of utmost good faith imposed by sections 13 and 14 of the *Insurance Contracts Act 1984 (ICA)* and the equivalent duty of good faith and fair dealing imposed by the common law.
- (b) the duty to clearly inform a prospective insured of the effect of unusual terms imposed by section 37 of the ICA.
- (c) the duty to provide financial services “*efficiently, honestly and fairly*” imposed on financial services licensees by section 912A of the *Corporations Act 2001 (Cth)*.

99 A discussion of these provisions is beyond the scope of this advice.

100 I am not aware of any other relevant issues having regard to the questions I have been asked to address.

G. Definition of blanket mental health exclusion

101 I set out below some matters to be considered should a decision be taken to include a definition of “*blanket mental health exclusion*” in the Life Insurance Code.

102 “**Exclusion**” vs “**limitation**”: Firstly, the term “exclusion” does not have a settled meaning. Most policies contain a set of provisions which are labelled as exclusions.⁶⁴ Generally speaking, exclusions operate to carve out from the general words of the insuring clause specific risks or circumstances from the otherwise available cover.⁶⁵ An example would be an exclusion which provides: “*No cover will be provided for disability arising from any mental health condition*” (**Example 1**). That is an obvious exclusion which is “*specific to mental health*” within the meaning of the current clause 2.1(b) of the Life Insurance Code.

103 Secondly, policies also contain other terms which limit the scope of the cover, for example, by reference to certain characteristics of the person insured, the sum insured, the period of cover and so on. The insuring clause will also contain limitations on the cover provided, expressly or by implication. Such limitations would not be caught by the current clause 2.1(b) unless they are “*specific to mental health*”.

104 Where the limitation is “*specific to mental health*”, it may be difficult to determine whether the limitation operates as an exclusion or as merely a term limiting the scope of the cover provided by the product. By way of example, the insuring clause may provide, “*In the event the insured person suffers total disability as a result of injury*”, and “*injury*” may be defined to mean “*bodily injury*” (**Example 2**). It would be difficult to characterise such a provision as an “*exclusion specific to mental health*” under the current clause 2.1(b). However, the limitation of cover to physical injury will have the same effect in many cases as the exclusion in a policy with a more broadly worded insuring clause which provides that no cover will be provided for disability arising from any mental health condition. Example 2 could be characterised as either a term having the effect of a mental health exclusion (which may be discriminatory) or as a term defining the scope of cover provided by the product, that is, a product which is only designed to cover disability for physical conditions (which would not ordinarily be discriminatory).

105 Thirdly, a limitation on cover may be inherent in the scope of the cover provided. For instance, trauma and critical illness policies generally provide for payment of a lump sum in the event the person insured suffers a specified condition such as a heart attack, stroke, cancer etc, and the cover is limited to those specified conditions (**Example 3**). The footnote to clause 2.1(b) appears to recognise the potential for clause 2.1(b) to

⁶⁴ Merkin & Enright, *Sutton on Insurance Law*, Thomson Reuters 2025 (**Sutton**) [9.60]

⁶⁵ Derrington & Ashton, *The Law of Liability Insurance*, 4e LexisNexis 2025, [10.1]

extend to trauma and critical illness policies by creating an exception to the prohibition of blanket exclusions. The second sentence of the footnote provides:

We will continue to offer products designed to cover specific conditions or circumstances which by their nature do not include cover for mental health conditions such as trauma and critical illness products.

- 106 A more general issue for consideration in any definition of “*blanket mental health exclusion*” is the extent to which the concept of a blanket exclusion extends to limiting provisions which are not exclusions in the traditional sense. A broad definition which extends the definition to any limitation of cover by reference to mental health conditions could prevent insurers from designing new products of the kind contemplated in Example 3 above unless they cover mental health conditions. A narrow definition which restricts the definition to terms traditionally regarded as exclusions would catch only terms of the kind exemplified by Example 1 above and could result in terms which have effectively the same discriminatory effect (Example 2) not being caught by clause 2.1(b).
- 107 “**Blanket exclusion**”: As a matter of ordinary language, the term “*blanket*” suggests an exclusion which is broad, rather than targeted. An exclusion may be either broad (for example, one which excludes any mental health condition) or targeted (for example, one which excludes only one condition). A targeted exclusion could be automatically generated by a rules engine in a direct product. For example, an applicant may disclose that they had depression in the past, which triggers a rule which incorporates an exclusion with respect to depression in the policy that is offered.
- 108 The report of the Life Code Compliance Committee issued in September 2025 took the view that a “blanket exclusion” was one which was “*broad, automatic and applies to all policyholders regardless of their individual circumstances*”.⁶⁶ In addition to the requirement that the exclusion be broad, this definition introduces two further elements. It would not catch a targeted exclusion generated by a rules engine – while such an exclusion is applied automatically, it only applies to those insureds who disclose a past or current mental health condition. It would also not catch an exclusion imposed by an underwriter following assessment of an application for an advised product.
- 109 **Conclusion**: Any definition of “*blanket mental health exclusion*” should address the scope of the prohibition by reference to: the nature of the cover; the manner in which the cover is issued or the exclusion imposed; and the terms it captures.
- 110 As to the first (nature of the cover), if the intention is that certain classes of cover (such as trauma or critical illness cover) are not to be included in the prohibition, it would be clearer to expressly carve them out from the scope of the prohibition, either in the definition or the text of clause 2.1(b).
- 111 As to the second (the manner in which the exclusion is imposed), a definition directed to the absence of individual assessment (“blanket” in the sense of automatic) would capture a rules-engine exclusion, but raises the further question of how an automated assessment triggered by an applicant’s disclosure is to be distinguished from underwriting of the kind preserved by the footnote. Any definition would need to accommodate both circumstances. Alternatively, if the choice is made to define a “*blanket mental health exclusion*” by reference to its discriminatory effect (see below), it would not be necessary to address the process by which the exclusion came to be imposed.

⁶⁶ LCCC Inquiry Report, *Keeping the Promise: Mental Health and Life Insurance Commitments*, September 2025, page 8

112 As to the third (the terms which are caught), a choice must be made as to how far the definition reaches beyond terms traditionally labelled as exclusions (Example 1) to terms which are not expressed as exclusions but produce a comparable effect (Example 2), and to terms which merely define the inherent scope of a specialised product (Example 3). That choice may involve consideration as to whether it is preferable for the definition to be directed to the exclusion's form or breadth or its discriminatory effect. Focusing on discriminatory effect would sit more naturally with the reference in clause 2.1(b) to the *Disability Discrimination Act 1992*.

113 Each of these choices involves a value judgment as to how far the prohibition should intrude upon product design, and how terms which are discriminatory in effect but not in form ought to be treated. Those judgments are, in my view, properly for the reviewer and stakeholders to determine.



Stephen Walsh

Annexure A

Instructions

Life Insurance – Limitations on Coverage for Mental Health Conditions in Standard Form Contracts

1. The 2025-2026 independent review of the Life Insurance Code of Practice is currently underway, with a final report due on 30 June.
2. The Independent Reviewer of the Life Code is considering what standards the Code should set in relation to 'blanket exclusions' for mental health coverage in standard form life insurance contracts. The Code currently states (2.1(b)) that when designing new products (excluding group policies), insurers:
 - b) do not incorporate a blanket exclusion specific to mental health in the general terms and conditions of the standard form contract, consistent with our obligations under the Disability Discrimination Act 1992 and equivalent State and/or Territory Law.
3. This is particularly relevant for TPD and Income Protection policies. Stakeholders have provided different views on how the Disability Discrimination Act would apply to such limitations or exclusions or limitations (noting that there is no definition of 'blanket exclusion' in the DDA or the Life Code). Relevant to this consideration is the Australian Human Rights Commission's Guidelines for providers of insurance and superannuation under the DDA (2016) which can be found [here](#).
4. The life insurance industry, through the Council of Australian Life Insurers (CALI) has recommended in a submission (see [here](#)) that the Life Code should:
 - a. Contain an explicit commitment for life insurers to comply with the Disability Discrimination Act (DDA);
 - b. permit product design features that limit cover for mental health conditions in standard form contracts without individual underwriting (consistent with the DDA); and
 - c. recognise that standard form contracts can offer different cover between mental health conditions and other causes of claim without individual underwriting (consistent with the DDA).
5. Such design features would apply for all people insured under that policy.
6. Insurers may still undertake individual underwriting of the policy. Where individual underwriting is undertaken, an individual with a prior history of mental health issues may still be offered the policy on non-standard terms (i.e. an exclusion for mental health conditions, loading, etc) consistent with the DDA.

7. The Reviewer is seeking advice on how the DDA would apply to general exclusions or limitations included in the terms and conditions of standard form life insurance contracts. This includes:
 - a. Whether insurers could include a total exclusion for mental health conditions or for particular categories/types of mental health conditions;
 - b. Whether insurers could include design features that limit cover for mental health conditions when compared with physical conditions (for example, lower payouts for mental health conditions, instalment payments for mental health conditions, higher premiums for cover that included mental health conditions or lower premiums for consumers that opted out of mental health cover);
 - c. Assuming insurers have actuarial or statistical data to support any general limitations or exclusions for mental health to standard form life insurance contracts, what "other relevant factors" would an insurer need to take into account when assessing an application for insurance from a person with no prior history of mental health issues to ensure that it is not in breach of the DDA; and
 - d. Any other relevant issues that may affect or limit an insurer's ability to include general exclusions or limitations for mental health.
- 7A. The Reviewer is also seeking advice on what may need to be considered if the Life Code were to be amended to include a definition of "blanket exclusion" or "blanket mental health exclusion" (assuming clause 2.1(b) of the Life Code was amended to include that phrase). That is, are there any general considerations that arise in the formulation and drafting of such a definition?
8. The advice should consider the questions in relation to individual life insurance products including:
 - a. Non-advised products which are purchased directly from life insurers. These products are generally simpler and do not require individual underwriting but are instead automatically underwritten by a rules engine. Where a person discloses a pre-existing condition, they may be declined cover; and
 - b. Advised products which are arranged by a financial adviser. These products have standard terms and conditions but individual underwriting may result in the product being offered on non-standard terms.

A range of submissions to the review that provide views on this issue will be provided.

Annexure B
Documents Provided

- 1 Life Code Independent Review Interim Report dated 10 April 2026
- 2 Life Code Review Interim Report – Submission by the Life Code Compliance Committee, undated
- 3 Submission of the Actuaries Institute dated 12 May 2026
- 4 Submission of the Council of Australian Life Insurers dated 24 March 2026
- 5 Submission of the Financial Rights Legal Centre dated 13 May 2026
- 6 Submission of Maurice Blackburn Lawyers dated 8 May 2026

Annexure C

Case Summaries

A. **Xiros v Fortis Life Assurance Ltd**⁶⁷

- 1 **Court/ tribunal:** Federal Magistrates Court.
- 2 **Product type:** Death and permanent and temporary disablement cover in mortgage protection insurance policy.
- 3 **Anti-discrimination legislation:** *Disability Discrimination Act 1992* (Cth).
- 4 **Discrimination alleged:** Policy excluded claims made on the basis of HIV/AIDS.
- 5 **Actuarial or statistical data:** Evidence provided from the reinsurer based on European data about the three-year survival rate following an AIDS diagnosis and from the Life Insurance Federation of Australia of a continuing high level of claims for death and disablement as a result of HIV infection and AIDS was held to satisfy the data exception.⁶⁸
- 6 **Outcome:** Insurer succeeded on the data limb of the actuarial or statistical data exemption.

B. **QBE Travel Insurance v Bassanelli**⁶⁹

- 7 **Court/tribunal:** Federal Court.
- 8 **Product type:** Travel insurance.
- 9 **Anti-discrimination legislation:** *Disability Discrimination Act 1992* (Cth).
- 10 **Discrimination alleged:** Refusal to issue a travel insurance policy to the applicant on account of her pre-existing medical condition (breast cancer).
- 11 **Actuarial or statistical data:** The respondent relied on the "reasonableness" limb of the s 46 DDA exemption. There was some anecdotal evidence that statistical evidence in the form of the proportion of claims made on travel insurance policies issued by the insurer⁷⁰ and to medical studies on the outcomes of treatment for women with metastatic breast cancer⁷¹ was available, however it was not necessary for the court to determine its adequacy because the insurer conceded it did not rely on actuarial or statistical data when it decided not to issue the policy.⁷² The decision had been made by the underwriter, an experienced nurse, based on her knowledge and experience of metastatic cancer.⁷³
- 12 **Outcome:** Applicant succeeded. The court declared the respondent had unlawfully discriminated against the applicant and ordered payment of compensation.

⁶⁷ (2001) 162 FLR 433; [2001] FMC 15

⁶⁸ at [15]

⁶⁹ *Bassanelli v QBE Insurance (Australia) Ltd* [2003] FMCA 412 (first instance) & *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88 (appeal)

⁷⁰ *QBE v Bassanelli* at [61]

⁷¹ *QBE v Bassanelli* at [35]

⁷² *Bassanelli v QBE* at [5]

⁷³ *QBE v Bassanelli* at [62]-[63]

C. Ingram v QBE Insurance (Australia) Ltd⁷⁴

13 **Court/ tribunal:** Victorian Civil and Administrative Tribunal.

14 **Product type:** Travel insurance containing a mental illness exclusion clause.

15 **Anti-discrimination legislation:** *Equal Opportunity Act 2010* (Vic)

16 **Discrimination alleged:** Direct discrimination: (1) by including a mental illness exclusion in a standard travel insurance policy; and (2) by denying indemnity to the applicant when a claim was made in reliance on that exclusion.

17 **Actuarial or statistical data:** The insurer accepted that it had no actuarial data at the time of its imposition of a mental illness exclusion.⁷⁵ The insurer produced statistics and reports in evidence which were available and asked the Tribunal to infer that it had taken this information into account.⁷⁶ The Tribunal was not prepared to do so in the absence of evidence that the insurer had turned its mind to the statistical data at the time it declined indemnity under the policy.⁷⁷

18 **Outcome:** Applicant succeeded on both claims of discrimination. The actuarial or statistical data exception and the unjustifiable hardship defence were not made out. Orders for compensation were made.

D. Applicant 202271 v AIA Australia Limited⁷⁸

19 **Court/ tribunal:** ACT Civil and Administrative Tribunal.

20 **Product type:** Direct life and trauma policy.

21 **Anti-discrimination legislation:** *Discrimination Act 1991* (ACT)

22 **Discrimination alleged:** Refusal to provide life and trauma insurance through the automated online direct product following disclosure of bipolar disorder.

23 **Actuarial or statistical data:** AIA relied on actuarial and statistical data underlying its underwriting guidelines, which were embedded in the automated ruleset for the direct product. The tribunal accepted that the respondent's Underwriting Guidelines were based on actuarial and statistical data and that it was reasonable to rely on that data. The tribunal also noted the particular challenges posed by direct products — given their automated, online nature, manual underwriting is not possible and the risk of anti-selection is heightened — and accepted that managing those risks by limiting eligibility to lower-risk applicants was a sound and reasonable approach supported by the data.

24 **Outcome:** Insurer succeeded. The tribunal found no unlawful discrimination, holding that the s 28 exemption under the *Discrimination Act 1991* (ACT) applied. The tribunal also noted that the applicant could have applied for a retail product involving manual underwriting, which would have allowed the specific circumstances of the applicant's condition to be assessed.

⁷⁴ [2015] VCAT 1936

⁷⁵ at [90]

⁷⁶ at [100]

⁷⁷ at [109]

⁷⁸ [2023] ACAT 59