

Chapter 1: Introduction

1.1 Travel insurance and discrimination

Many Victorians purchase travel insurance policies to ensure that they are covered if things unexpectedly go awry when travelling. Insurance cover is available for the potential expenses of lost bags or delays, medical assistance and hospital stays that might arise when travelling. However, in Victoria, many travel insurance policies contain 'blanket' exclusion terms that mean this cover is not available if you suffer any mental health conditions.

The Victorian Equal Opportunity and Human Rights Commission is concerned that these terms are unfair, and discriminate against people with a mental health condition. That's why we commenced this Investigation. The Commission has a mandate to ensure our anti-discrimination laws are respected and upheld, and that no person or groups of people are unfairly discriminated against. Specifically, we want to see people with a

mental health condition treated fairly and lawfully by travel insurers, and to see insurers actively fulfilling their duty to eliminate discrimination as far as possible.

The *Equal Opportunity Act 2010* (Vic) provides protection from discrimination, including provisions that prohibit discrimination by an insurer against a person on the basis of a protected attribute, such as a mental health condition.¹ This Investigation considered whether the conduct of insurers offering, selling and refusing cover under travel insurance policies that contained blanket exclusions directed towards people with a mental health condition was lawful.

In this chapter we set out the nature of the issue and the reasons why the Commission conducted this Investigation. We outline how an investigation works, and explain the methodology we used for this Investigation.

1.2 The problem

1.2.1 MENTAL HEALTH DISCRIMINATION IN THE TRAVEL INSURANCE INDUSTRY

Advocacy groups have repeatedly raised concerns about practices in the insurance industry that systemically disadvantage people with past or current mental health conditions.² These concerns include the issues that people with mental health conditions can face at three different touchpoints related to insurance products:

- product design and definitions (for example, a travel insurance policy may have a blanket exclusion for all claims due to mental health conditions)
- buying or entering the product (for example, people with past or current mental health conditions may be unable to access cover or may face higher premiums)

- making a claim and receiving benefits (for example, insurers may refuse indemnity for people with mental health conditions).³

Discriminatory practices in the insurance industry have the potential to affect a significant part of our community. One in five Australians were affected by a mental or behavioural condition in 2017–18, and 45 per cent of Australians will experience a mental health condition at some time in their life.⁴ Millions of Australians, including people with mental health conditions, also travel every year. Discrimination can result in financial hardship, can discourage people from seeking support, and embeds a stigma about mental health issues in the broader community.

Blanket mental health exclusions in travel insurance policies are discriminatory at face value because they treat people with a mental health condition differently to people without a mental health condition. However, the Equal Opportunity Act includes an exception from unlawful discrimination if an insurer can

provide relevant data to justify discrimination. The relevant law is discussed in Chapter 3 of this report. The application of the law to travel insurance industry practices is considered throughout this report.

CASE STUDY: BLANKET MENTAL HEALTH EXCLUSION DISCRIMINATORY⁵

Paul (not his real name) travelled to Vancouver for a holiday between January and April in 2015. While he was in Canada, and despite having no pre-existing mental health issues, he suffered an acute manic episode which resulted in him needing to be hospitalised for a week. In addition to medical expenses, Paul incurred financial loss for the subsequent cancellation of his trip. Once back in Australia, Paul sought to recover his expenses for this unforeseen event through his travel insurance policy. The insurer denied his claim based on its general exclusion relating to claims arising from depression, anxiety, stress, mental or nervous conditions.

Paul challenged the insurer's decision and made a complaint to the Financial Ombudsman Service (FOS).⁶ The FOS found that the exclusion in Paul's travel insurance policy amounted to unlawful discrimination under the *Disability Discrimination Act 1992* (Cth) because it sought to treat a person who developed a mental health condition differently to a person without a condition. The FOS also found that the insurer failed to establish that changing its policy would result in unjustifiable hardship and failed to provide actuarial or statistical data to otherwise justify the discrimination. In addition, the FOS found that the insurer had been aware for some time that the nature of the exclusions contained in the policy may fall short of the requirements of the Disability Discrimination Act. The FOS observed that the insurer's denial of Paul's claim, "despite the fact that it knew the applicant's mental illness was a first-presentation mental illness, was, in the circumstances, unreasonable and caused an unusual degree of inconvenience and pressure" on Paul.

Ultimately, FOS found that the insurer was not legally entitled to rely on its exclusion relating to mental illness to refuse to pay Paul's claim. FOS determined that the insurer should pay Paul's estimated \$8877 loss, plus interest, as well as pay Paul \$1500 in non-financial loss for inconvenience and delay.

Concerns have also been raised by advocacy groups about the difficulties people with mental health conditions can experience in seeking review and redress of an insurer's decision related to obtaining or claiming insurance. This includes:

- difficulties obtaining clear written reasons for a decision
- the failure of insurers to provide consumers with access to the statistical and actuarial data relied on in making decisions
- the ineffectiveness of internal dispute resolution mechanisms, including long time frames, a lack of consultation, the cost and time required to obtain medical health records that often span most or all of the applicant's life, and unsatisfactory outcomes (particularly where the applicant is not legally represented)

- the lack of clarity about complaint processes following dispute resolution.⁷

The difficulties that people with mental health conditions face in accessing and claiming insurance can have significant impacts. Current industry practices risk further stigmatising mental illness and send the message that seeking treatment and support should be avoided because it may result in being denied services available to the rest of the community.⁸ An individual who is denied travel insurance must also personally accept the financial risk of a mental health condition impacting on their travel.

CASE STUDY: PREVIOUS UNRELATED MENTAL HEALTH CONDITION USED FOR REJECTION⁹

Eleni (not her real name) booked a trip to Thailand. During the trip, she experienced a panic attack and was admitted to hospital. Eleni's husband flew to Thailand to accompany her home. She was subsequently diagnosed with bipolar disorder.

Eleni made a claim on her travel insurance for medical expenses and unexpected travel costs. The insurer refused to pay on the basis of a blanket mental health exclusion in her policy. The insurer also implied that the condition that Eleni had experienced in Thailand was a pre-existing condition, on the basis that she had experienced post-natal depression more than 16 years earlier.

The Public Interest Advocacy Centre assisted Eleni to seek an internal review of the decision to refuse to pay her claim on the basis that the blanket mental health exclusion was likely to constitute discrimination and that Eleni's single episode of post-natal depression did not fall within the definition of a "pre-existing medical condition" in the product disclosure statement. The insurer eventually paid Eleni's claim.

1.2.2 RECENT DEVELOPMENTS

In recent years there has been greater community awareness and understanding of mental health, and the impact that discrimination and stigma can have on people who experience mental health conditions. However, advocates for consumers of mental health services believe that the insurance industry has not kept pace with changes in community attitudes by improving practices related to people with mental health conditions.¹⁰ Building on concerns expressed by advocacy groups, the spotlight has recently turned to the difficulties that people with mental health conditions can face in accessing and claiming insurance. This includes the following recent activities:

- The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry's examination of practices in the insurance industry that impact on people with a disability (including mental health conditions).
- The Actuaries Institute's 2017 Green Paper on Mental Health and Insurance, which explores the complex balance between insurers maintaining affordable and sustainable insurance products while meeting community expectations.
- The 2017 Review of the Insurance Council of Australia's General Insurance Code of Practice, which recommended introducing best practice guidance on mental health (including a statement that insurers must, as a minimum standard, comply with anti-discrimination laws).¹¹
- The federal Parliamentary Joint Committee on Corporations and Financial Services into the Life Insurance Industry, which made recommendations about mental health claims related to life and income protection insurance.¹²

CASE STUDY: INGRAM V QBE INSURANCE (AUSTRALIA) LTD

In *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 (*Ingram v QBE*), the Victorian Civil and Administrative Tribunal (VCAT) found that QBE unlawfully discriminated against Ella Ingram on the basis of a mental health condition.

In late 2011, Ella decided to join a school trip to New York and paid costs including a travel insurance policy issued by QBE. In January 2012, Ella experienced symptoms of depression for the first time, which resulted in the decision not to go on the trip. Ella's mother lodged a claim for the cost of the trip, which was rejected by QBE.

QBE relied on a general exclusion in the policy for claims arising from a mental health condition. QBE said that its decision was based on statistical modelling and analysis of claims arising from a range of causes, which demonstrated that there is a high risk of cancellation of travel policies due to mental health conditions.

VCAT found that QBE directly discriminated against Ella when it issued a policy that included a blanket mental health exclusion and when it refused indemnity based on the exclusion. VCAT found that QBE did not provide sufficient evidence to rely on exceptions to discrimination, including proving that the discrimination was based on actuarial or statistical data or that QBE would have suffered unjustifiable hardship if it had not included the exclusion in the policy. Ella was awarded more than \$4000 for the value of the cancelled trip and \$15,000 for hurt and humiliation.

A detailed analysis of the *Ingram v QBE* case is included in Chapter 3.

The insurance industry is regulated by consumer, financial and prudential laws and regulations that are designed to set standards of compliance for insurers, and protect consumers from unscrupulous corporate conduct. Importantly, the regulatory framework also includes state and federal anti-discrimination laws, which prohibit unlawful discrimination by insurers. These laws regulate discrimination through a mix of education, dispute resolution, research and enforcement. The Australian Human Rights Commission has also issued specific guidelines for providers of insurance.¹³

Without proper attention to anti-discrimination laws and rigorous processes to prevent discrimination, insurers can risk discriminating against the most vulnerable people in our community, including people with mental health conditions. Failure to comply with anti-discrimination laws is not only unlawful but does not meet community standards for how a person with a mental health condition should be treated.

1.2.3 THE NEED FOR AN INVESTIGATION

The Commission's role to enforce the law

As Victoria's equal opportunity regulator, the Commission is tasked with enforcing the Equal Opportunity Act by exercising our statutory functions. This includes investigating systemic discrimination that has the potential to harm particular groups of people and can have flow-on effects for the broader community.

The Commission's investigation power helps to shift the burden of enforcing the law from individual complainants to the regulator. This power is critical to relieve the burden from consumers and allow the Commission to use its enforcement powers to eliminate discrimination to the greatest extent possible. The burden of enforcement can be compounded when a complainant has a mental health condition. The perceived complexity, time, costs and stigma associated with bringing a complaint can also make individuals with mental health conditions reluctant to use dispute resolution processes.

Limitations of individual complaints and advocacy

The Commission is aware that individual complaints are not always sufficient to lead to a broader change in policy or practice. For example, in the case of *Ingram v QBE*, despite VCAT's finding that QBE had unlawfully discriminated against Ms Ingram, QBE initially refused to change its policies and practices, asserting that its mental health exclusions were necessary to keep travel insurance affordable and that the Tribunal's findings related "only to a specific set of circumstances".¹⁴

QBE changed its travel insurance policies in 2016. QBE's participation in the Investigation is discussed further in Chapter 2.

The Commission is also aware that consumer advocates have worked for more than a decade to influence positive change to industry practice related to people with mental health conditions. For example, Beyond Blue states that considerable effort, time and resources have been invested by consumer advocates over the years to address this issue. However, "while undoubtedly mental health is firmly on the agenda for the industry, and there are signals of change, this has not yet resulted in any large-scale, systemic improvements".¹⁵

The ability to access relevant data

The Commission's investigation powers enabled us to request and assess whether insurer parties had sufficient actuarial or statistical data to satisfy the exception to discrimination under the Equal Opportunity Act. There is currently no transparency in the travel insurance industry about whether relevant data exists to justify the exception to discrimination and consumers can face difficulties obtaining relevant data (which is rarely provided outside formal complaint or court processes).

The *Ingram v QBE* case highlighted the complexity of whether and how insurers can validly claim an exception, presenting an opportunity for the Commission to clarify the application of the exception and provide guidance on best practice to insurers.

Investigation as catalyst for change

The use of the Commission's investigation power also ensured that we could hold insurers to account with a broad range of investigation outcomes. The Equal Opportunity Act allows the Commission to "take any action it thinks fit" after conducting an investigation, such as entering into an agreement about actions required to comply with the Act.¹⁶ Investigation outcomes have the potential to create lasting systemic change, can have a positive impact on a significant number of Victorians, and can help to maintain industry and community engagement on important issues.

The Commission commends insurers who have removed blanket mental health exclusions from their travel insurance policies prior to the Investigation. It also acknowledges the cooperation of the party and non-party insurers who participated in the investigation, including sharing data and other information with the Commission.

The timeline over provides a snapshot of the many changes that have occurred in the discrimination and travel insurance space, particularly since the Commission commenced its Investigation.

1.2.4 TIMELINE OF CHANGE

Date	Event
December 2015	<i>Ingram v QBE Insurance (Australia) Ltd (Human Rights)</i> [2015] VCAT 1936 judgment
March 2017	Financial Ombudsman Service Determination 428120
July 2017	QBE removes exclusion terms
October 2017	Actuaries Institute publishes Green Paper into mental health conditions and insurance
	Victorian Equal Opportunity and Human Rights Commission publicly announces Investigation
November 2017	Allianz considers it no longer relies on the exclusion terms but does not remove from all platforms
May 2018	Suncorp removes exclusion terms in May 2018
June 2018	Allianz completes removal of exclusion terms from all policies and platforms, begins offering limited cover for some pre-existing mental health conditions
	World Nomads Group (WNG) notes it is planning to remove exclusion terms and will do so by end of 2019
January 2019	The Commission informs insurers of proposed findings
	The Commission informs the Insurance Council of Australia of recommendation to make enforceable mental health minimum requirements in Code of Practice
	The Commission recommends all insurers consider removing of blanket pre-existing condition clauses for mental health
February 2019	WNG agrees to expedited removal of exclusion terms
	Allianz, WNG, and Suncorp acknowledge recommendations regarding future practice including changing pre-existing condition terms

1.3 The investigation

1.3.1 ABOUT THE COMMISSION

The Commission is an independent statutory body with responsibilities under the *Equal Opportunity Act 2010*, the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), and the *Racial and Religious Tolerance Act 2001*.

The Commission's role is to protect and promote human rights and eliminate discrimination, sexual harassment and victimisation to the greatest extent possible. We do this through a range of functions.

Resolve complaints	We resolve complaints of discrimination, sexual harassment, racial and religious vilification and victimisation by providing a free, confidential dispute resolution service.
Research	We undertake research to understand and find solutions to systemic causes of discrimination and human rights breaches.
Educate	<p>We:</p> <ul style="list-style-type: none"> • provide information to help people understand and assert their rights • conduct voluntary reviews of programs and practices to help organisations comply with their human rights obligations • provide education and consultancy services to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.
Advocate	We raise awareness across the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views and behaviour.
Monitor	We monitor the operation of the Charter to track Victoria's progress in protecting fundamental rights.
Enforce	We intervene in court proceedings to bring an expert independent perspective to cases raising equal opportunity, discrimination and human rights issues. We also conduct investigations to identify and eliminate systemic discrimination.

1.3.2 PURPOSE AND SCOPE OF THE INVESTIGATION

Purpose

The Investigation's purpose was to determine whether systemic discrimination was occurring in the travel insurance industry against people with a mental health condition. And, if so, to promote equality and best practice in the industry by attempting to eliminate discrimination to the greatest extent possible. Equality is about ensuring that everyone has the same life opportunities, including the ability to access and claim travel insurance to make travel affordable and safe for everyone.

The investigation sought to examine whether travel insurers were lawfully relying on an exception under the Equal Opportunity Act to justify discrimination.¹⁷ The exception allows an insurer to discriminate by refusing to provide an insurance policy to a person, or in the terms on which a policy is provided, if the discrimination is based on reasonable actuarial or statistical data and any other relevant factors. The purpose of the investigation was to use the Commission's investigation function to:

- require the insurer parties to the Investigation to provide the Commission with the actuarial, statistical and other data they relied on to discriminate
- assess whether the data was sufficient to meet the exception to discrimination (and was therefore lawful discrimination under the Equal Opportunity Act)
- assess whether the conduct of insurers and others in the industry was compliant with the positive duty to eliminate discrimination as far as possible.

Scope

The investigation examined the terms on which travel insurers:

- offered insurance on terms that exclude or limit cover to people who have, or have had, a mental health condition
- denied insurance cover, or the offering of insurance policies on unfavourable terms (such as extra costs being required through higher premiums or excesses), to people who disclose pre-existing mental health conditions, without adequate risks assessments being undertaken for the individuals concerns, and/or are not reasonable.

TERMS OF REFERENCE

The terms of reference for the Investigation set out that the Commission:

- is aware that some providers of travel insurance products have provided contracts of insurance on terms that exclude cover to people on the basis of a mental illness, or have refused indemnity under such contracts of insurance to people on the basis of their mental illness
- is aware of recent cases, determinations and industry commentary regarding the availability and provision of travel insurance for those who have or have had a mental illness
- considers that without lawful justification, such practices may be in contravention of the Equal Opportunity Act, including its objectives
- on this basis considers that the availability of travel insurance to people who have or have had a mental illness raises a serious issue, having regard to the requirement that any limits on the availability of travel insurance to people with a disability be reasonable, by reference to actuarial or statistical data or other relevant factors
- considers that an investigation pursuant to section 127 of the Equal Opportunity Act would assist in understanding the extent to which such practices are occurring and provide an opportunity to offer to the Australian insurance industry guidance about best practice.

The Commission has determined to conduct an investigation, which will consider:

- practices involving the offer of travel insurance on terms which substantially limit or exclude cover for people with a mental illness, or where indemnity under contracts of travel insurance has been refused to people who have or have had mental illnesses
- whether such conduct is unlawful discrimination under the Equal Opportunity Act
- what steps, if any, have been taken by insurers to eliminate such discrimination pursuant to their positive duty under Part 3 of the Equal Opportunity Act
- what options there are to eliminate any unlawful discrimination, to the greatest extent possible
- any other matters that are incidental to the above.

Limitations of the Investigation

The Investigation was limited to potential unlawful discrimination in the travel insurance industry only. The Commission is aware of concerns raised by consumer advocates about unfair and potentially unlawful practices in the provision of other forms of insurance, such as life insurance and income protection insurance. Other forms of insurance are regulated in the same way as travel insurance under the Equal Opportunity Act, including the application of legal exceptions. Therefore, the conclusions in this report may be applicable to the insurance industry more broadly in promoting best practice.

The Investigation focused on 'blanket' mental health exclusions in travel insurance policies.

In this way, the Commission could consider as its primary focus what data or information was held by insurers as the basis for offering the exclusion terms. The data or information is critical to be able to rely on an exception in the Equal Opportunity Act. The Commission considered the impact of the policies on people who have, or have had, a mental health condition. As part of this, it considered how travel insurers provide (or do not provide) insurance to people with a pre-existing medical condition.

Finally, the Investigation was limited to the application of the Equal Opportunity Act to travel insurance policy terms, conditions and practices. Although the Investigation did not directly invite submissions from people with mental health conditions who purchase

and claim travel insurance, the Commission did draw on the lived experiences of people with mental health conditions. We did this through case studies that have been provided through various public inquiries, as well as the Commission's complaint and enquiry data.¹⁸ These case studies are an important reminder of the personal stories that underpin the formal Investigation.

1.3.3 POWER TO INVESTIGATE

The Commission's investigation power was introduced in 2010 to provide a framework for dealing more effectively with systemic discrimination and to "encourage more proactive compliance and alleviate the burden on individuals to address discrimination through complaints".¹⁹ The investigation power enables the Commission to enforce the law in a proactive and strategic way.

THE COMMISSION'S POWER TO INVESTIGATE

The Commission has the power to conduct investigations under section 127 of the Equal Opportunity Act. The Commission's Board must decide whether the Commission should commence an investigation.

Section 127 sets out the threshold criteria that must be met before the Commission can commence an investigation including if:

- the matter:
 - raises an issue that is serious in nature
 - relates to a class or group of persons
 - cannot reasonably be expected to be resolved by dispute resolution or by making an application to VCAT
- there are reasonable grounds to suspect that one or more contraventions of this Act have occurred
- the investigation would advance the objectives of the Act.

In making a decision, the Commission's investigations policy requires the Commission's Board to consider other practical factors including:

- what is the nature and seriousness of the alleged breach of the Equal Opportunity Act?
- would the Commission within its functions be likely to obtain sufficient evidence to support a finding of a breach of the Act?
- what are the resource requirements in conducting the investigation, including how much is the investigation likely to cost, does the Commission have the required staff to undertake the investigation and can the workload involved in the investigation be managed?
- what is the likelihood of obtaining a satisfactory outcome?
- will action taken by the Commission set an example to other individuals and organisations about conduct that is not acceptable under the Equal Opportunity Act, that is, will the outcome of the investigation have a broader impact?
- are there other ways of addressing the issue raised?

Section 130 empowers the Commission to ask any party to provide information if it is reasonably necessary for the purpose of conducting an investigation.

Advancing the objectives of the Equal Opportunity Act

The investigation function supports the objectives of the Equal Opportunity Act to:

- eliminate discrimination, sexual harassment and victimisation to the greatest extent possible
- further promote and protect the right to equality set out in the Charter
- encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation
- promote and enable the progressive realisation of equality by recognising that discrimination can cause social and economic disadvantage, and that access to opportunities is not equitably distributed throughout society
- enable the Commission to encourage best practice and facilitate compliance (including by using its enforcement functions).

In particular, the investigation can consider whether there has been a contravention of the positive duty to eliminate discrimination, as far as possible.

IMPACT OF INVESTIGATION

Over the course of the Investigation, a number of important and significant changes occurred, most notably that:

- all travel insurers party to the Investigation have either already or have now taken immediate steps to remove exclusion terms of the kind investigated by the Commission
- all travel insurers party to the Investigation agreed to take steps to address the Commission's recommendations, including in relation to the way they offer and indemnify pre-existing mental health conditions
- leading industry groups have acknowledged their role and have agreed to support the Investigation by providing improved education and enforceable provisions to ensure enduring change.

1.4 Methodology

1.4.1 SELECTING THE INSURERS

The Commission selected the insurers based on:

- the significance of their market share in the Australian travel insurance industry
- an assessment of the travel insurance products each insurer provided (determined by reference to public Product Disclosure Statements)

- the identification of travel insurance policies with general mental health exclusions that deny coverage to, and preclude any payment to, a person who makes a claim because they have experienced a mental health condition. These clauses may include words such as:

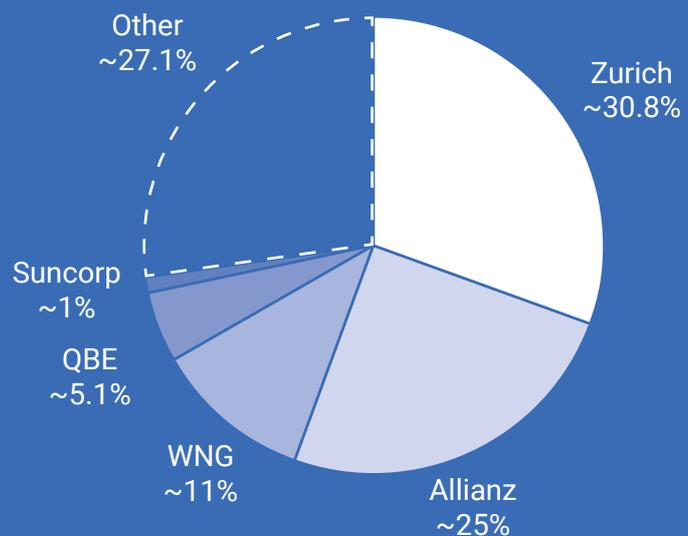
We will not pay claims arising from psychiatric, mental, nervous, emotional, personality and behavioural disorders, including but not limited to phobias, stress, anxiety and depression.

The Commission selected the following insurers which, at the time of the investigation, represented approximately 70 per cent of the travel insurance market, and included:

- three insurers that maintained general mental health exclusions at the time of the investigation and were asked to provide data under section 130 of the Equal Opportunity Act: World Nomads Group (WNG), Suncorp and Allianz (party insurers)
- two insurers that had removed existing mental health exclusions by the time of the investigation and were asked to voluntarily provide information to assist the investigation: Zurich and QBE (the non-party insurers).²⁰

QBE declined to participate in the investigation.

Market share of travel insurers in Australia



1.4.2 INFORMATION SOURCES

The Commission has the power to collect information for the purposes of an investigation by using a broad range of methods, including asking a party to provide information on a voluntary basis, seeking stakeholder input, or any other means it considers appropriate in the circumstances and within its powers.²¹

The Commission used the following information sources to inform the investigation:

- information provided voluntarily by non-party insurers on request
- data provided by parties under section 130 of the Equal Opportunity Act
- research on potential discrimination in the insurance industry²²
- consultation with consumer advocates and industry bodies²³
- expert reports from an independent actuary
- relevant case law²⁴
- the Australian Human Rights Commission's 2016 *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)*.

1.4.3 OUR PROCESS

The Commission has the power to conduct an investigation “in the manner it thinks fit” but is bound by the principles of natural justice.²⁵ In practice, this means that the Commission will act fairly and ensure that it will:

- give a person whose interests may be adversely affected by an investigation an opportunity to present their view
- act without bias
- base any conclusions arising from the investigation on logically probative evidence.²⁶

The Commission understands the importance of natural justice and therefore determined that the Investigation would be consultative. Organisations that participated in the Investigation had an opportunity to comment on the Commission's findings and recommendations prior to the Investigation being finalised.

The Commission used the following process to conduct the Investigation:

Research	The Commission undertook preliminary research on potential unlawful discrimination in the travel insurance industry to inform its decision to commence an Investigation.
Consultation	<p>The Commission consulted with bodies including:</p> <ul style="list-style-type: none"> • consumer advocates such as Mental Health Australia, Beyond Blue, Victoria Legal Aid, the Public Interest Advocacy Centre and SANE Australia • industry bodies such as the Insurance Council of Australia and the Actuaries Institute • the Australian Human Rights Commission.
Notification	The Commission notified party insurers and non-party insurers about the commencement of the Investigation and requested their participation.
Request for data and information	<p>The Commission requested:</p> <ul style="list-style-type: none"> • information from the party insurers to the Investigation under section 130 of the Equal Opportunity Act including, for example: <ul style="list-style-type: none"> – data considered or relied on to include relevant policy terms – an explanation for how that data is used to decline insurance or to offer alternate terms and conditions of insurance for people with a mental health condition – data regarding the number of times the insurer declined to enter into a contract of insurance on the basis of the applicant having a mental health condition – data regarding the number of times the insurer declined to indemnify an insured on the basis of a relevant policy term or the person’s past or present mental health condition • information from the non-party insurers including, for example: <ul style="list-style-type: none"> – the reasons and evidentiary basis for removing blanket mental health exclusions from their policies – any subsequent claims related to mental health conditions • information from industry bodies, for example the Insurance Council of Australia and the Actuaries Institute about best practice and conduct across the industry, including new initiatives and challenges. <p>The Commission also asked all five insurers to provide information on the steps they have taken to implement the positive duty to eliminate discrimination against people with a mental health condition in the provision of travel insurance.²⁷</p>
Data analysis	The Commission engaged an independent actuary to analyse the data provided by the party insurers to support our determination of whether the party insurers had sufficient actuarial or statistical data to rely on the exception to discrimination under section 47 of the Equal Opportunity Act.
Consideration	The Commission provided participants in the Investigation the opportunity to understand and respond to the Commission’s preliminary views and findings about compliance with the Equal Opportunity Act, and our recommendations.
Outcomes	All five insurers were notified about the Commission’s intention to publish a report including Investigation findings and recommendations. The insurers were given an opportunity to provide feedback about the Commission’s findings and recommendations that were relevant to a particular insurer.

1.5 About this report

1.5.1 PURPOSE

The purpose of this report is to provide a public and transparent record of the Investigation, including why the Commission decided to commence the investigation, how the Commission undertook the investigation, what the Commission found and the Commission's recommended way forward.

The purpose of the report is not to penalise individual insurers. Rather, the report reflects the process and outcome of the Investigation, which was undertaken with the cooperation and participation of the insurers. The Commission recognises that tackling systemic discrimination is not just about enforcement. It is about working in partnership with organisations and industries to reflect on current practice and find practical ways to prevent further discrimination.

The report seeks to identify systemic discrimination embedded in current industry practice. It makes recommendations to support insurers to implement the positive duty by eliminating discrimination against people with mental health conditions as far as possible. The Commission has approached this task acknowledging the complexities of the law, including the application of legal exceptions.

Notes

- 1 *Equal Opportunity Act 2010* (Vic) s 44.
- 2 For example, the Public Interest Advocacy Centre, Mental Health Australia, Beyond Blue and SANE.
- 3 Actuaries Institute, *Mental Health and Insurance* (Green Paper, October 2017).
- 4 Australian Bureau of Statistics, 2008, *National Survey of Mental Health and Wellbeing: Summary of Results, 2007* (Catalogue No. 4326.0), October 2008.
- 5 Based on Financial Ombudsman Service Australia (Determination, Case number: 428120, 31 March 2017) (*'Determination 428120'*).
- 6 From 1 November 2018, the Australian Financial Complaint Authority.
- 7 See Public Interest Advocacy Centre, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (26 April 2018), and Beyond Blue, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018). See also Beyond Blue, Submission to the Australian Government Treasury regarding the 'Review of the financial system external dispute resolution framework' (October 2016).
- 8 Beyond Blue, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018).
- 9 Based on a consumer experience outlined in Public Interest Advocacy Centre, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (26 April 2018).
- 10 Beyond Blue, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018).
- 11 Insurance Council of Australia, *Review of the General Insurance Code of Practice* (Final Report, June 2018).
- 12 Parliamentary Joint Committee on Corporations and Financial Services, Life Insurance Industry (Report, 27 March 2018).
- 13 Australian Human Rights Commission, *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)* (Guidelines, November 2016) (*'DDA Guidelines'*).
- 14 'QBE firm on mental illness exclusion, despite tribunal loss', *Insurance News* (online, 8 February 2016) <<http://www.insurancenews.com.au/corporate/qbe-firm-on-mental-illness-exclusion-despite-tribunal-loss>>.
- 15 Beyond Blue, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018).
- 16 *Equal Opportunity Act 2010* (Vic) s 139.
- 17 *Ibid* s 47.
- 18 Primarily by reviewing submissions to and transcripts of hearings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, and publicly available determinations of the Financial Ombudsman Service (from 1 November 2018, the Australian Financial Complaints Authority).
- 19 Second Reading Speech, Equal Opportunity Bill 2010. Victorian Parliament, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, (Rob Hulls, Attorney-General).
- 20 See Chapter 2 for QBE's contribution to the investigation.
- 21 *Equal Opportunity Act 2010* (Vic), Part 9.
- 22 This includes research undertaken by leading advocacy organisations such as Mental Health Australia, Public Interest Advocacy Centre, Beyond Blue and Choice. In addition, the Commission considered the following research: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth laws* (Issues Paper 44, 15 November 2013); Anti-Discrimination Commissioner of Tasmania, *Volunteers, Age and Insurance* (Investigative Report, 2013); South Australian Commissioner for Equal Opportunity, 'Disability Discrimination and Insurance' (March 2014) *Law Society of South Australia Bulletin*; Actuaries Institute, *Discrimination: what do actuaries need to be aware of?* (Review, November 2013); Actuaries Institute, *Mental Health and Insurance* (Green Paper, October 2017); Beyond Blue, Submission to the Development of the Consular Strategy 2017–2019 Mental Health (November 2016); *DDA Guidelines* (n 13).
- 23 The Commission consulted with Mental Health Australia, Beyond Blue, Victoria Legal Aid, the Public Interest Advocacy Centre, SANE Australia, the Insurance Council of Australia, the Actuaries Institute and the Australian Human Rights Commission.
- 24 For example, *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 and *Determination 428120* (n 5).
- 25 *Equal Opportunity Act 2010* (Vic) s 129.
- 26 Victorian Equal Opportunity and Human Rights Commission, Investigations Policy (30 August 2011).
- 27 See discussion on the positive duty in Chapter 3 of this report.