# Blanket mental health exclusion clause in travel insurance policy amounted to unlawful discrimination

### Case note: *Ingram* v *QBE Insurance (Australia) Limited (Human Rights)* [2015] VCAT 1936 (18 December 2015)

## Summary

The Victorian Civil and Administrative Tribunal (**VCAT**) found QBE Insurance (Australia) Limited (**QBE**) unlawfully discriminated against Ella Ingram on the basis of her disability, namely a mental illness, contrary to the *Equal Opportunity Act 2010* (**EOA**), when it included a blanket mental health exclusion in the travel insurance policy issued to Ms Ingram and when it rejected her claim by relying on that clause.

## Background facts

In 2011, Ms Ingram purchased a travel insurance policy with QBE for an overseas study trip. She had no pre-existing illnesses at that time. In early 2012, Ms Ingram was diagnosed with a depressive illness and cancelled her trip under medical advice.

Ms Ingram made a claim for cancellation costs of her trip. QBE denied the claim, relying on a clause that excluded any claim directly or indirectly caused by a mental illness. QBE claimed the policy was based on detailed statistical modelling and an analysis of claims arising from a range of causes including mental illness which showed that there is a high risk of cancellation by reason of mental illness. As such, QBE claimed that even if it had discriminated against Ms Ingram (which it denied), the discrimination was lawful by reason of statutory exceptions under discrimination laws.

## Relevant law

The EOA (as well as the *Disability Discrimination Act 1991* (Cth) (**DDA**)) prohibits discrimination because of a person’s disability when providing goods and services.

Under s.47 of the EOA an insurer can lawfully discriminate against another person on the basis of a disability (or other attribute) by refusing to provide an insurance policy to the other person, or in the terms on which an insurance policy is provided, if:

1. the discrimination is based on reasonable actuarial and statistical data and, taking into account that data and other relevant factors, the discrimination is reasonable or if (and only if) actuarial or statistical data is not available or reasonably obtainable, the discrimination is reasonable taking into account any other relevant factors (**actuarial and statistical data exception**) or
2. avoiding the discrimination would cause an unjustifiable hardship on the insurer (**unjustifiable hardship exception**).

The insurer bears the onus of proving the above defences once the complainant has proved unlawful discrimination.

## Findings

QBE conceded that Ms Ingram had a ‘disability’ when it denied her claim, but argued that she did not have a disability at the time the insurance policy was issued, as Ms Ingram did not have depression at that stage. However, s.4 states that ‘disability’ includes ‘a disability that may exist in the future’.

VCAT found that this definition must be interpreted in a way that is compatible with the right to equality, as required by s.32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), and in keeping with the EOA object of eliminating discrimination to the greatest possible extent. Therefore, although neither QBE nor Ms Ingram were aware that she might later develop depression when she was issued the policy, VCAT held that she was nonetheless a person for whom a disability may exist in the future, and therefore had a disability within the meaning of the EOA.

VCAT held that QBE directly discriminated against Ms Ingram by:

1. including the mental illness exclusion clause, which unfavourably treats any person (including Ms Ingram in this case) who develops a mental illness at some time in the future during the life of the policy and makes a claim on that basis and
2. denying indemnity to Ms Ingram because of her mental illness. (There was no dispute that this amounted to unfavourable treatment on the basis of her disability.)

As VCAT was satisfied that Ms Ingram had been directly discriminated, it then considered QBE’s defences.

### ‘Actuarial and statistical data’ exception not made out

QBE failed to prove that the statistical data it attempted to rely on at the hearing existed when the policy was created, or was known to anyone involved in drafting or approving the policy wording.

Some of the reports relied on by QBE post-dated the acts of discrimination, so could not have formed the basis for the exclusion clause. QBE did not produce any evidence pertaining to what was actually considered when the policy (or earlier versions of the policy) was prepared. The evidence from QBE’s expert and lay witnesses was also found to be unreliable.

Accordingly, VCAT found there was insufficient evidence to show that the mental illness exclusion was reasonably based on actuarial or statistical data, so QBE failed to satisfy this exception.

### ‘Unjustifiable hardship’ exception not made out

In assessing the unjustifiable hardship exception, VCAT proceeded on the basis that the exclusion clause would be removed from the policy and the remaining terms would apply unchanged. In weighing up the considerations for the ‘unjustifiable hardship’ exception, VCAT found that:

* the community would benefit from the clause’s removal because this would lessen the stigmatising effect of negative attitudes towards mental illness and
* there was no proof that insurers would have to increase the price of travel insurance or bear losses for offering insurance at the current premium rates if the clause was removed.

As such, VCAT found that the ‘unjustifiable hardship’ defence did not apply and ‘[t]he scales weigh in favour of people…being able to be properly assessed on their policy claims in the same way people with physical disabilities are assessed.’

Member Dea awarded Ms Ingram $4,292.48 for economic loss and $15,000 for non-economic loss, recognising the hurt and humiliation caused by QBE’s stigmatising decision and the fear it caused Ms Ingram about future discrimination. However, Member Dea refused to make a declaration that QBE unlawfully discriminated against Ms Ingram, despite finding that it had done so, to avoid the impression that her decision extends beyond the dispute between the parties or to other insurers.

## Commentary

This case is a positive example of how the Charter can encourage a human rights promoting interpretation of legislation. However, the dispute was hard-fought and protracted, taking almost 4 years, demonstrating deficiencies in the current legislation. These could be rectified by amending the EOA to:

* require insurers to be more transparent about the data used to justify discrimination
* specify what constitutes ‘other relevant information’ upon which insurers can rely to decline insurance and
* empower the Victorian Equal Opportunity and Human Rights Commission to enforce compliance with the EOA, rather than relying on individuals to do so.

Gregory Buchhorn and Melanie Schleiger are lawyers at Victoria Legal Aid, which represented Ms Ingram with the generous assistance of Ms Claire Harris of counsel.

The full decision is available online at: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2015/1936.html?stem=0&synonyms=0&query=Ingram>.