



25 October 2018

The Honourable Kenneth Hayne AC QC
Commissioner
Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Dear Justice Hayne

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – Insurance Hearings and discrimination

The Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) welcomes the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) and its important role in examining insurance industry practices.

VEOHRC is the Victorian statutory authority responsible for regulating the conduct of public and private entities under the *Equal Opportunity Act 2010* (Vic) (**EO Act**). VEOHRC has a number of relevant regulatory functions under the EOA, such as an external dispute resolution service, a systemic investigation function, education and research functions and a review of compliance function.

Summary of VEOHRC Submission

I have followed the recent Royal Commission insurance hearings with interest, in particular, the case studies involving consumers with a disability.

I write to inform the Royal Commission of the important framework that discrimination law provides regarding insurer conduct, specifically with respect to people with a disability.

I urge the Royal Commission to consider the role of discrimination law as part of its Round 6 examination of a regulatory framework best placed to protect and promote community standards and expectations within the financial services sector.

I respectfully submit that, like ASIC and APRA, anti-discrimination regulators such as VEOHRC need to have robust and fit for purpose regulatory mechanisms. This is critical to ensure those more vulnerable in our community, such as people with a disability, have fair and lawful access to financial services.

Discrimination before the Royal Commission

In Round 6, the Royal Commission conducted part of its inquiry into the insurance industry. The VEOHRC notes several case studies have emerged from the Royal Commission indicating some concerning practices in the insurance industry relating to people with a disability (see **Attachment 1**).

These hearings of the Royal Commission have demonstrated the difficulty customers with physical or mental health conditions may encounter in accessing insurance products and services, making claims, and having complaints considered in a timely and fair manner.¹

Evidence heard before the Royal Commission has revealed concerning case studies where insurance customers have been wrongly sold insurance policies or been unable to make insurance claims based on previous mental health conditions. The hearings have shown that there may be practices in the insurance industry which systemically disadvantage those with a disability.

While the Royal Commission has, in accordance with its Terms of Reference, drawn attention to behaviour constituting misconduct, the conduct identified may also be discriminatory under state and federal anti-discrimination laws, and in this respect, also fail to meet community expectations.

In light of the above I provide the response below as relevant to the Royal Commission's Policy Questions arising from the Module 6 case studies, including:

- Question 1, regarding whether the current regulatory regime is adequate to minimise consumer detriment;
- Question 36, regarding external oversight of financial services entities;
- Question 37, regarding consequences for financial services entities for failing to prevent and remedy breaches of financial services laws and other regulatory obligations.

VEOHRC response to Module 6 policy Questions

The Royal Commission's focus has necessarily been on consumer, financial and prudential laws and regulations which are designed to protect the insured from unscrupulous corporate conduct and set standards of compliance for insurers.

However, in addition to this regulation there are applicable and important discrimination laws which insurers must also abide by.² As service providers, insurers have legal obligations under discrimination laws in both State and federal jurisdictions.³

A failure to comply with discrimination laws constitutes unlawful conduct. Discrimination laws are not a 'best practice' standard for which to aim. Discrimination laws expressly prohibit unlawful behaviour and regulate this behaviour through a mix of educative, research and enforcement functions. It is also complaint based jurisdiction which can provide claimants with legal redress.

Victorian discrimination law framework

The critical elements of the Victorian discrimination framework applicable to the provision of insurance is set out at **Attachment 2**. In summary, under the Victorian *Equal*

¹ For instance, see the matters outlined in the closing submissions of Counsel Assisting with respect to treatment of vulnerable consumers (at 6466 and 6479), claims handling (at 6470), and the need for appropriate education and training (at 6464): Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (21 September 2018).

² These may also be relevant considerations pursuant to *Corporations Act 2001* section 912A(1)(c). I note that this provision requires a financial services licensee to "comply with financial services laws" which are defined in the *Corporations Act 2001* (Cth) at (d) as including "any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services". Accordingly I consider this includes provisions under Part 4, Division 4 of the *Equal Opportunity Act 2010* (Vic), which requires service providers (including insurers) to ensure that a person is not unlawfully discriminated against.

³ The Australian Human Rights Commission has issued *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act* (2016).

Opportunity Act 2010 (Vic) (**EO Act**), it is unlawful to discriminate against a person with a disability (including a mental health condition) in the provision of insurance, including by refusing to provide a service,⁴ or by subjecting a person to a detriment in connection with the provision of that service.⁵ Service providers also have obligations to make reasonable adjustments for people with disabilities, so that they may access or derive a substantial benefit from the service.⁶

The EO Act provides certain limited exceptions to discrimination in the provision of insurance. Section 47 of the EO Act permits insurers to lawfully discriminate against another person if the discrimination is permitted under relevant federal legislation, or if the discrimination is based on actuarial and statistical data on which it is reasonable to rely, and is reasonable having regard to the data and any other relevant factors.

Discrimination laws provide a mechanism for individuals to seek redress through either VEOHRC's dispute resolution services, or by determination of a complaint at the Victorian Civil and Administrative Tribunal (**VCAT**). Among other powers, VEOHRC may also investigate systemic breaches of the EO Act, (discussed further below).

The Federal framework

The Victorian discrimination law provisions relating to disability and the provision of insurance as a service is broadly mirrored under the *Disability Discrimination Act (DDA)*.⁷ The Australian Human Rights Commission (**AHRC**) has functions and powers to redress unlawful discrimination under Part IIB.⁸ In particular, the AHRC provides conciliation for written complaints relating to instances of alleged unlawful discrimination,⁹ as well as for representative complaints.¹⁰ The President may also conduct an inquiry into a complaint¹¹ and may obtain information relevant to such an inquiry.¹² The AHRC also has a power to request a respondent to a complaint to disclose the source of actuarial and statistical data upon which the act of discrimination was based.¹³

VEOHRC investigation

In October 2017, VEOHRC commenced an Investigation into potential unlawful discrimination in the travel insurance industry. The Investigation followed the case of *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936, where QBE was found to have unlawfully discriminated against Ms Ingram on the basis of her mental health condition. The VCAT found that QBE was unable to produce data sufficient for it to rely on the exception in section 47 of the EOA. This case, and the response of insurers, highlighted the complexity of whether and how insurers can validly claim an exception under the Act.

The VEOHRC Investigation is examining the terms on which travel insurance is offered and provided in relation to those who have, or have had, a mental illness. Pursuant to its investigation powers, VEOHRC has requested five major travel insurers provide it with the actuarial and/or statistical data that justifies differential treatment for people with a mental health condition. This is a critical area where consumers are unlikely to be able to access the information relied on by insurers to issue policies that discriminate, and therefore be satisfied that insurers are lawfully relying on section 47 of the EO Act as an exception to unlawful discrimination.

⁴ Section 44(a), *Equal Opportunity Act 2010* (Vic).

⁵ Section 44(c), *Equal Opportunity Act 2010* (Vic).

⁶ Section 45, *Equal Opportunity Act 2010* (Vic).

⁷ Section 24, 29A, and 46 of the *Disability Discrimination Act 1992* (Cth).

⁸ *Australian Human Rights Commission Act 1986* (Cth).

⁹ Section 46P, *Australian Human Rights Commission Act 1986* (Cth).

¹⁰ Section 46PB, *Australian Human Rights Commission Act 1986* (Cth).

¹¹ Section 46PF, *Australian Human Rights Commission Act 1986* (Cth).

¹² Section 46PI, *Australian Human Rights Commission Act 1986* (Cth).

¹³ See section 107 of the *Disability Discrimination Act 1992* (Cth).

We are in the process of finalising the Investigation, including any suggested actions and consideration of whether insurers have complied with the laws outlined above.

Regulatory responses

In its closing address on insurance, Counsel Assisting identified that this round of hearings has demonstrated that “external dispute resolution schemes” – like the Financial Ombudsman Service – are an important mechanisms for redress for consumers.¹⁴

I note that Anti-Discrimination laws are one such external aspect of the legal and regulatory framework that ensures insurers act to community standards. For consumers, complaints made under discrimination law are a mechanism to hold insurers to account.¹⁵

However, complaint-based frameworks place the enforcement burden on consumers. The burden can be compounded when a complainant suffers from a mental health condition. To this end, I note that VEOHRC has received just 10 complaints relating to insurance and disability discrimination the last five years.¹⁶ In this context the power for a regulator such as VEOHRC to investigate systemic discrimination is critical because it relieves the burden from consumers and enables VEOHRC use more robust enforcement powers in order to eliminate discrimination to the greatest extent possible.

Reform options

In considering whether the current regulatory regime is adequate to minimise consumer detriment and whether there is appropriate external oversight of financial services entities, I urge you to consider the role of Australia’s discrimination laws. Discrimination laws are also relevant to assessing the adequacy of consequences for financial services entities for failing to prevent and remedy breaches of financial services laws.

While the Investigation function outlined above provides an important role for VEOHRC, I note that amendments to the EO Act in 2011 narrowed the circumstances in which VEOHRC can conduct investigations, by creating additional procedural requirements¹⁷ and removing certain powers to compel the production of information or documents.¹⁸ Previously, VEOHRC’s investigative and public inquiry functions were also complemented by enforcement mechanisms, including the ability to seek enforceable undertakings and issue compliance notices.¹⁹ Both these mechanisms were later repealed. For the Commission to maximise its ability to promote and advance the objectives of the EO Act,²⁰ a suite of regulatory tools is required, including to undertake preventative and responsive compliance actions.²¹

Relevantly, the EO Act was also originally enacted with a broad public inquiry function that enabled VEOHRC, with the Attorney-General’s consent, to undertake public inquiries into

¹⁴ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (21 September 2018), 6476.

¹⁵ See also, for instance the cases of *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, *QBE v Bassanelli* [2004] FCA 396; Financial Ombudsman Service (FOS) Determination 428120, decided 31 March 2017.

¹⁶ Date range approximately from July 2013 to June 2018.

¹⁷ The previous section 127 of the Act provided that the VEOHRC could conduct an investigation into any matter that raised an issue that is serious in nature and that indicated a possible contravention of the Act and related to a class or group of persons. An investigation could be conducted if it would advance the objectives of the Act. The current provision requires that before an investigation is conducted, there should be an attempt to resolve the matter through dispute resolution or the Tribunal.

¹⁸ *Equal Opportunity Act 2010* (Vic), No 16 of 2010 s 132 (repealed 22 June 2011).

¹⁹ *Equal Opportunity Act 2010* (Vic), No 16 of 2010 s 132 (repealed 22 June 2011).

²⁰ *Equal Opportunity Act 2010* (Vic), section 155(1)(b).

²¹ Julian Gardner, *An Equality Act for a Fairer Victoria (Equal Opportunity Review Final Report)*, June 2008, p 110. When considering these previous functions, it is useful to have regard to similar enforcement provisions of the Equality and Human Rights Commission (UK) as a comparable jurisdiction with positive equality duties under the *Equality Act 2010* (UK).

serious matters of public interest concerning any matter relating to the operation of the EO Act.²² This broader function, if reinstated, would enable VEOHRC to also conduct public inquiries that address systemic causes of discrimination; including those related to the provision of services such as insurance, to further promote the progressive realisation of equality.

Accordingly, as a means of improving the current regulatory regime for financial services entities, I respectfully submit consideration be given to recommending that the VEOHRC's previous functions under the EO Act are reinstated, in relation to the threshold requirements of the investigative function,²³ the conduct of public inquiries²⁴ and compliance powers.

I would welcome the opportunity to provide the Royal Commission with any further information regarding Victoria's discrimination laws, should you require it. Please contact Gemma Leigh Dodds, Senior Legal Adviser, on (03) 9032 3405.

Yours sincerely,

A solid black rectangular box redacting the signature of Catherine Dixon.

Catherine Dixon
Executive Director

²² *Equal Opportunity Act 2010* (Vic), No 16 of 2010 s 128 (repealed 22 June 2011).

²³ *Equal Opportunity Act 2010* (Vic), No 16 of 2010 s 132 (repealed 22 June 2011) s 127.

²⁴ *Equal Opportunity Act 2010* (Vic), No 16 of 2010 s 128 (repealed 22 June 2011).

Attachment 1

Submissions and evidence heard before the Royal Commission relating to discrimination insurance

1. The Royal Commission heard of concerning surveillance practices, including that claimants with a mental health claim are monitored and placed under surveillance by the insurer twice as frequently as those with physical claims.²⁵
2. The Royal Commission heard of a life insurer selling an insurance policy to a 26 year old man with Downs Syndrome, who did not understand what he was agreeing to.²⁶
3. In another instance, an insurer sold a policy to a consumer with a mental health condition in receipt of a disability pension, where it was clear that person lacked sufficient capacity to make the decision to purchase the policy.²⁷
4. In its submission to the Royal Commission, the Consumer Action Law Centre noted the susceptibility of vulnerable customers to buying low value insurance. It submitted that two insurers had engaged in unconscionable conduct by engaging in the “systemic practice of selling low value insurance to a vulnerable and/or disadvantaged cohort of customers”.²⁸
5. The Royal Commission heard how a woman with breast cancer was denied insurance because of an out-dated medical definition in the insurance policy.²⁹
6. Cross examination of Commlnsure’s representative suggested that Commlnsure knew that its definition of a heart attack could discriminate against its female customers, as it was harder for women to reach the troponin level specified in the definition.³⁰

²⁵Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (13 September 2018), 5665-5666, 5704-5714.

²⁶ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (11 September 2018), 5406-5417.

²⁷ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (11 September 2018), 5491.

²⁸ Consumer Action Law Centre, Submission on Round 6 Hearings - Case Studies, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (undated).

²⁹ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (21 September 2018), 6472.

³⁰ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (21 September 2018), 6473.

7. The Royal Commission heard a consumer's income protection insurance from TAL was cancelled while she underwent treatment for cancer, due to an alleged failure to disclose a previous, yet unrelated, mental health condition where the woman had previously visited a psychologist.³¹ The Public Interest Advocacy Centre ('PIAC') responded to the hearing on this matter submitting that the decision of the insurer was "deeply disturbing".³² It submitted that the consumer always maintained she did not have a mental health condition and had provided a letter from the psychologist she had previously seen as evidence.³³ PIAC also submitted that it was likely the decision to avoid the policy had breached State and Federal anti-discrimination legislation due to it not being based on actuarial or statistical data and was not otherwise based on relevant factors.³⁴
8. In a separate case study, a representative from insurer TAL conceded that, despite FOS making a recommendation in favour of the insured, its case managers had also engaged in a "fishing expedition" to try and reject a claim for failure to disclose an unrelated pre-existing history of work related stress.³⁵
9. Evidence before the Commission suggested that claimants of TAL were bullied and had their activities monitored by a private investigators as a part of the insurer's tactics to deny insurance claims.³⁶ Counsel Assisting noted the possibility of making a finding that it had engaged in misconduct and that it was open on the evidence for the Commissioner to find that the insurer had exacerbated a customer's mental health condition.³⁷ The TAL representative accepted that TAL's conduct was "deeply troubling" in relation to a legitimate mental health claim.³⁸ The TAL representative has now committed to review all mental health claims that TAL declined for non-disclosure between 2013 and 2016.³⁹

³¹ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (13 September 2018), 5763.

³² Public Interest Advocacy Centre, Submission on findings concerning case study of second insured and TAL, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, (27 September 2018), 3.

³³ *Ibid*, 3.

³⁴ *Ibid*, 3.

³⁵ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (21 September 2018), 6477.

³⁶ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (13 September 2018), 5718.

³⁷ TAL, Submissions on Behalf of the TAL group, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (1 October 2018).

³⁸ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (21 September 2018), 6477-6479.

³⁹ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (21 September 2018), 6477-6481.

10. Several consumer organisations have raised concerns with the Royal Commission about the difficulty individuals have accessing general insurance, including travel insurance, when they have, have had or are imputed to have a mental health condition.⁴⁰

⁴⁰ Transcript of Hearing, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (10 September 2018), 5301.

Attachment Two

Equal Opportunity Act – legislative framework

Anti-discrimination obligations

1. The Act prohibits direct and indirect forms of discrimination in the provision of services. Section 44 of the EO Act provides that it is unlawful to discriminate on the basis of a range of protected attributes, including disability, by refusing to provide a service, in the terms on which a service is provided, or by subjecting a person to any other detriment.
2. A mental illness is a disability, as defined in the EO Act.
3. Section 45 of the EO Act also requires service providers to make reasonable adjustments for people with a disability in order to access the service or derive any substantial benefit from the service. Service providers will in many instances be obliged to consider and implement appropriate measures such as the way in which it provide information about insurance, interacting with customers, as well as considering the claims and dispute processes in place.
4. Under section 47 of the EO Act 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:
 - a. the discrimination is permitted under the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* or *Age Discrimination Act 2004*; or
 - b. the discrimination is based on actuarial or statistical data on which it is reasonable to rely, and the discrimination is reasonable having regard to that data and any other relevant factors; or
 - c. if actuarial or statistical data is not available and cannot reasonably be obtained the discrimination is reasonable have regard to any other relevant factors.
5. The insurer bears the onus of proving the above defences, if a person alleging discrimination has made out a claim of unlawful discrimination.
6. Under section 15 of the EO Act, all persons with a duty under the EO Act, including insurers, have a duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible (**the positive duty**). A contravention of the positive duty may be the subject of an investigation by VEOHRC.

Complaints of discrimination

7. A person who claims that another person has discriminated against them in breach of the EOA may bring a dispute to the VEOHRC. The VEOHRC provides a voluntary dispute resolution service (Part 8, Division 1). Alternatively, a person may make an application to the Victorian Civil and Administrative Tribunal in respect of an alleged contravention of the EO Act (section 122). The Tribunal may make a finding that person has contravened the EO Act and may order compensation, order that a person refrain from a contravention or any other order to redress loss, damage or injury suffered as a result of the contravention (section 125).

Commission powers and functions

8. The EO Act establishes the powers and functions of the VEOHRC. Relevantly, these powers and functions include:
- a. promoting and advancing the objects of the EO Act, and being an advocate for the EO Act (section 155(1)(b));
 - b. establishing and undertaking information and education programs (sections 155(1)(a), 156);
 - c. undertaking research (section 157);
 - d. intervening or appearing as amicus curiae in court or tribunal proceedings (sections 159 and 160);
 - e. issuing practice guidelines (section 148);
 - f. conduct reviews of compliance on request of a person (section 151);
 - g. provide advice about and register action plans (section 152).

VEOHRC's Investigation powers

9. The VEOHRC's power to commence an Investigation is conducted pursuant to Part 9 of the *Equal Opportunity Act 2010* (Vic) (**the EO Act**).
10. Under section 127, VEOHRC may conduct an Investigation into any matter relating to the operation of this Act if
- a. the matter -
 - i. raises an issue that is serious in nature; and
 - ii. relates to a class or group of persons; and
 - iii. and cannot be reasonably expected to be resolved by dispute resolution by making an application to the VCAT;

- b. there are reasonable grounds to suspect that one or more contraventions have occurred; and
- c. the investigation would advance the objective of this Act.

11. Under section 129, VEOHRC may conduct an investigation in the manner it thinks fit and is bound by the principles of natural justice. VEOHRC may ask any party to provide information in relation to an investigation if it is reasonably necessary for the purpose of conducting an investigation (section 130). After conducting an investigation the VEOHRC may take any action it thinks fit (section 139).