



**Villamanta Disability  
Rights Legal Service Inc.**

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### Editorial

The Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service would like to wish our readers a safe holiday season.

It is important to remember that the Christmas season can be particularly difficult for people with disabilities in disability accommodation, people with mental illness and those who are isolated from the community.

We end the year on a positive note, knowing that a number of issues that significantly affect the lives of people with disabilities have been raised and aired in 2015. We urge all who are interested to ensure that 2016 is a year of action given the important reports that have been released in the last six months and the myriad of recommendations made.

We value our relationships with the sector and thank those who have worked alongside us throughout the year. Our Annual Reports detailing our work in the last financial year can be found on our websites.

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## NEW OFFICES FOR VILLAMANTA

A reminder that Villamanta Disability Rights Legal Service Inc. has moved to new offices. Their new address is at the end of this newsletter.

## Closing Dates for DDLS and Villamanta

DDLS	Closes 24 December 2015 Opens 11 January 2016
Villamanta	Closes 23 December 2015 Opens 4 January 2016

## Report of the *Review of the Disability Standards for Education 2005*

In December the report from the review of the *Disability Standards for Education 2005* was released. Unsurprisingly given the short time frame allowed for submissions and the flawed notification process, very few submissions were received given that the breadth of Australians covered by this legislation must be in the millions.

The reviewers seemed unable or unwilling to grapple with the fact that the Standards are a piece of legislation. Their ability to be enforced as a piece of legislation was almost completely ignored. This is the second review since the Standards were brought into law. Given the lack of any recommendations with regard to the legislation itself, despite wide-ranging criticisms, it seems that another five-year review has passed with a wasted opportunity for reform.

Of great concern, the consultants have been asked for many months how one can review the submissions they have received. Despite countless requests, that information has not been forthcoming.

The report can be found at: <https://docs.education.gov.au/node/38936>

# Ombudsman's Phase 2 Report - Reporting and Investigation of Abuse in the Disability Sector

This month, the Ombudsman released their Phase 2 Report on Incident Reporting.

The prevalence of abuse in the disability sector has already been established. In this report, the Ombudsman looked at the process of reporting incidents, and the management of those reports.

The Ombudsman found flaws in how reports were made, how they were communicated and what actions were triggered. Of concern was the fact that the Ombudsman admitted that there had been numerous reviews on the same subject going back to 2006. Clearly, as the sector understands, reviews in and of themselves are of little use.

The Ombudsman concludes that the inconsistent, ineffective and inefficient reporting processes perpetuate poor practice in circumstances where we know abuse is already underreported.

The observation that comments in reports and reviews noting that DHHS appears to be focused on procedures and risk management, rather than ensuring client wellbeing, is also disturbing as again it implies that DHHS and their funded agencies simply ignore reports and do little in response to them.

The recommendations from the Ombudsman repeat the recommendations in the Phase 1 Report and make explicit recommendations for the improvement of DHHS Incident Reporting. All recommendations have been accepted by DHHS.

To view the report, go here: <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports>.

## **Ingram v QBE Insurance (Australia) LTD – VCAT**

Discrimination in the application of travel insurance.

### **Facts:**

In 2011, the applicant, Ms Ella Ingram, decided to join a school tour to New York scheduled for 30<sup>th</sup> March to 11<sup>th</sup> April 2012. The deposit and other instalments were all paid. Some of the costs were applied to a travel insurance policy issued by the respondent, QBE Insurance (Australia) Ltd.

In January 2012, for the first time, Ms Ingram experienced symptoms of depression. She was subsequently diagnosed and received treatment. Consequently, she decided not to attend the planned school trip. In May 2012, Ms Ingram's mother lodged a claim for the cost of the trip, at

\$5,860, on the QBE policy. This was denied by QBE on 17<sup>th</sup> August 2012 and the refusal confirmed on 4<sup>th</sup> December 2012.

In refusing the claim, QBE relied on a general exclusion claim that said no cover is available where the claim arises directly or indirectly due to mental illness, including depression. QBE claimed to Ms. Ingram's mother that mental illness is excluded because of the high risk of cancellation due to such illness. They cited statistics based on detailed statistical modelling and analysis as a basis for refusing the claim.

## **Applicant and Respondent's Arguments**

### **Ms. Ingram's Argument**

Ms Ingram argued the mental illness exclusion in QBE's policy treated her unfavourably because of her disability and directly discriminated against her in the terms through which it provided travel insurance. She argued this conduct was a breach of section 44(1)(b) of the *Equal Opportunity Act 2010* (Vic) ('EOA'). Ms. Ingram also argued that by refusing to indemnify her in August and December 2012 on the basis of her mental illness, QBE treated her unfavourably because of her disability and directly discriminated against her, breaching section 44(1)(a) of the EOA.

She sought a declaration that QBE unlawfully discriminated against her, compensation for economic loss of \$4,292.48 (the cost of flight costs) and \$20,000 in damages for hurt and humiliation.

### **QBE's Response**

QBE denied discriminating against Ms. Ingram. It claimed it did not refuse to provide insurance to Ms. Ingram because of her disability; rather the policy wording contained an exclusion for mental illness. QBE claimed even if it did discriminate against Ms Ingram either under ss 44(1)(a) and (b), that discrimination was lawful as an EOA (under section 47(1)(b)) and/or a *Disability Discrimination Act 1992* (Cth) (DDA) exception (Under section 46(2)(f)) applied.<sup>1</sup>

## **Summary of Decision**

Member Anne Dea held on the following issues;

1. At all relevant times, Ms. Ingram had a 'disability' within the meaning of that term in the EOA
2. Ms. Ingram was successful in both her claims of discrimination. QBE engaged in direct discrimination in breach of section 44 of the EOA in two ways:
  - First, when it issued her with a policy which included the mental illness exclusion and;
  - Second, when it refused her indemnity relying on the terms of that exclusion
3. QBE couldn't rely on the statutory exceptions under the EOA or DDA to excuse the discrimination as it did not produce evidence to prove that it was more probable than not:

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<sup>1</sup> These sections are similarly worded. They permit discrimination, on behalf on an insurer, where the discrimination is based on actuarial or statistical data on which it is reasonable for them to rely on.

- QBE's acts of discrimination were based on actuarial or statistical data. Thus, the exception in section 41(1)(b) of the EOA and section 46(2)(f) of the DDA which depend on this data do not apply.

- It would have suffered unjustifiable hardship if it had not included the mental illness exclusion in the policy issued to Ms. Ingram. Thus the exception in section 29A of the DDA did not apply.

4. Ms Ingram is entitled to economic loss in the sum of \$4,292.48 and non-economic loss in the sum of \$15,000 for hurt and humiliation. Finally she is entitled only to costs associated with her expert being required for one additional day.
5. Ms. Ingram was denied an application for a declaration that QBE had engaged in unlawful discrimination as Member Dea did not want to give the impression her decision automatically applied beyond the dispute between the two parties or to all insurers.

## Full Decision

1. QBE contended that because Ms Ingram did not have the depressive illness when the policy was issued on 8<sup>th</sup> December 2011, she did not at that time have an attribute protected by the EOA and therefore could not succeed in her first claim.<sup>2</sup> However, section 4(e) of the EOA defines disability as including 'a disability that may exist in the future'. Member Dea interpreted this provision widely reading the words without limitation. Therefore, she found that the definition of disability applies to a person at a point in time when a future disability did not yet exist or had not been diagnosed, was not known to the person or others or was not otherwise apparent. As such, given Ms. Ingram was diagnosed in February 2012 with a depressive illness, a 'disability' under the EOA, she was found to be a person for whom, at December 2011, a disability may exist in the future. After this point, Ms Ingram clearly had a disability in the diagnosed depression.

2. Ms. Dea determined that Ms. Ingram was discriminated against in 2 manners.

### Mental Illness Exclusion

As Ms. Ingram was determined to have a disability as at December 2011, the issue was whether the inclusion of the mental illness exclusion in Ms. Ingram's policy was an act of unfavourable treatment or a proposed act. It was held to be direct discrimination. The exclusion was determined to be directed to anyone who first develops a particular disability after the policy is issued. Thus by including the policy, QBE proposed to treat unfavourably any person who in the future, during the life of the policy, developed a mental illness. As Ms. Ingram falls under the definition of 'disability' (see above) the mental illness exclusion was proposed unfavourable treatment and thus a contravention of section 44(1)(b) of the EOA.

### The Refusal of Indemnity

It was held that QBE's refusal to provide her the service of indemnity or cover under the policy was in breach of section 44(1)(a) of the EOA. There was no dispute that at the time QBE denied cover, Ms Ingram had a mental illness and QBE relied on that disability as the basis on which the exclusion was said to apply. Accordingly, QBE engaged in direct discrimination contrary to section 44(1)(a) of the EOA.

3. QBE attempted to rely on two separate exceptions to its discriminatory acts.

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<sup>2</sup> That QBE engaged in direct discrimination by issuing Ms. Ingram with a policy containing the inclusion of the mental health exclusion

### Statistical and Actuarial Data

QBE attempted to rely on section 47(1)(b) of the EOA and section 46(2)(f) of the DDA as exceptions to the finding of discrimination based on its refusal to provide a service within the meaning of section 44(1)(a) of the EOA. The sections are described above (See Footnote 1). However, in this case, QBE's actuarial data was prepared for the purposes of the litigation and was clearly unavailable to them at the time it made decisions regarding Ms. Ingram's claim for indemnity. In addition, it was held that there was no evidence QBE turned its mind to the statistical data it provided in the case in refusing Ms. Ingram's indemnity claim nor did they rely on it when formulating the terms of the policy.

### Unjustifiable hardship

QBE attempted to rely on section 29A of the DDA arguing that that it would suffer unjustifiable hardship if it had not included the mental illness exclusion in the policy issued to Ms. Ingram. Member Dea accepted that per the Federal Court's decision in *King v Jetstar Airways* unjustifiable hardship may arise where an insurer experiences a reduction in profits. However, she had significant reservations about QBE's evidence and the Pitt/Kyng report (the actuarial evidence of QBE prepared specifically for the trial) and thus found it had not met its burden of proof of unjustifiable hardship.

4/5. The remedies Ms. Ingram received are set out above. Whilst QBE argued Ms. Ingram should receive no more than \$5, 000 in compensation for non-economic loss, Ms. Dea noted that the broader public discussion about mental health problems has become more prevalent and the Court awards greater (see 270-278 of Judgement) In regards to point 5 Member Dea was reluctant to grant Ms. Ingram an application for a public declaration that QBE had discriminated against her as the particulars of the case seem very specific and she was reluctant to apply them outside the two particular parties nor to any other insurer.

For the reason above, it is uncertain the extent to which this case may be used as precedent. The decision of Member Anne Dea very much seemed based on the particulars of the case and inadequacy of QBE's evidence and she specifically stressed this.

## **Excellence in Advocacy**

Congratulations to DDLS Manager Julie Phillips who received an Excellence in Advocacy Award at the recent National Disability Awards in Canberra. Other recipients of awards can be found at <http://www.idpwd.com.au/2015-national-disability-award-winners/>

## Royal Commission into the Abuse of People with Disabilities

The report from the Federal Senate Community Affairs References Committee's Inquiry into the Abuse of People with Disabilities was released at the end of November. It can be found here

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect).

The report highlighted numerous shocking examples of abuse against people with disabilities in schools, accommodation, day services and other institutions. What is clear to the sector is that the Inquiry, which was to all intents and purposes not resourced, is scratching the surface due to the fact that those with the most complex disabilities were not sought out or supported to make submissions to the inquiry.

What is clear, is that the abuse of children and adults with disabilities is wide-ranging and common practice in many settings. There is currently a push from the community for a Royal Commission into the abuse, in order that all people with disabilities are able to contribute, and that organisations can be called to give evidence on how this abuse has flourished for a number of decades. If you support the call for a Royal Commission, please contact your local Federal Member of Parliament and make your views known.

## Receiving the Advocate Newsletter

Do you know someone who might be interested in receiving this newsletter?  
If so, please contact [admin@ddls.org.au](mailto:admin@ddls.org.au).

## Our organisations

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