

18 January 2019

Mental Health Royal Commission Establishment
Department of Premier and Cabinet
1 Treasury Place
Melbourne Vic 3002

To Whom It May Concern

Royal Commission into Mental Health Terms of Reference

The Victorian Equal Opportunity and Human Rights Commission welcomes the establishment of the Royal Commission into Mental Health, as well as the Victorian Government's advance commitment to implement all of its recommendations.

The Royal Commission will be an important catalyst for change, helping to improve the lives of people with disability, and also the lives of their families and carers.

We welcome the invitation to contribute to the Royal Commission's Terms of Reference and strongly urge the Victorian Government to include a focus on:

- discrimination against, and other violations of the rights of, people with mental illness
- the role of equal opportunity and human rights law – including the *Equal Opportunity Act 2010* and the *Charter of Human Rights and Responsibilities Act 2006* – in improving the lives of people with mental illness.

About the Commission

The Commission is an independent statutory body with responsibilities under the Equal Opportunity Act and the Charter, among other laws. Our role is to protect and promote human rights and eliminate discrimination, harassment and victimisation, to the greatest extent possible.

As part of our functions, we respond to enquiries about, and resolve complaints of, disability discrimination. We also conduct related research and investigations. In this, we are expertly guided by our Disability Reference Group, comprised of people with direct and indirect experiences of disability.

In exercising our functions, the Commission has gained critical knowledge of systemic violations of the rights of people with mental illness in Victoria.

humanrightsccommission.vic.gov.au
Enquiry Line 1300 292 153 or (03) 9032 3583

Level 3, 204 Lygon Street, Carlton, Vic 3053

Telephone 1300 891 848 Fax 1300 891 858 TTY 1300 289 621 Interpreters 1300 152 494
Email information@veohrc.vic.gov.au

Enquiry and complaint data

Disability discrimination comprises the largest number of enquiries and complaints that the Commission receives each year. Issues related to mental health make-up a significant proportion of those enquiries and complaints.

The tables below detail the number of disability discrimination complaints and enquiries the Commission received between 2015 and 2018. These figures may not capture all relevant matters due to the way data is recorded, for example due to privacy requirements and other factors such as non-disclosure.

Year	Total no. of disability discrimination enquiries	No. of mental health discrimination enquiries
2017 – 2018	1,845	130
2016 – 2017	1,749	107
2015 – 2016	1,808	131

Year	Total no. of people who made disability discrimination complaints	No. of those complainants whose disability relates to mental health
2017 – 2018	448	43
2016 – 2017	415	73
2015 – 2016	316	111

Of those complainants whose disability relates to mental health, employment is the area of discrimination most commonly reported to the Commission. This is followed by goods and services, education and accommodation.

By way of illustration, it is common for complainants to allege that employers have failed to make reasonable adjustments with respect to their mental illness, or subjected their performance to heightened scrutiny after learning of the illness. In a further example, it is common for complainants to allege that schools and universities have refused reasonable adjustments for students with mental illness, including refusing to extend deadlines and timeframes for sitting exams.

In addition, through the course of our work, the Commission continues to receive anecdotal accounts of discrimination and other rights violations related to mental illness, including in closed environments.

Investigation into mental health discrimination in the travel insurance industry

In October 2017, the Commission announced an investigation into potential systemic unlawful mental health discrimination in the travel insurance industry.

The investigation followed *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936, in which the Victorian Civil and Administrative Tribunal found that insurer QBE had unlawfully discriminated against Ms Ingram, a teenager, on the basis of her mental illness. According to the tribunal, QBE was unable to produce data sufficient for it to rely on the exception in section 47 of the Equal Opportunity Act.

Under the Act, it is unlawful to discriminate against a person with a disability (including a mental illness) in the provision of insurance, including by refusing to provide a service,¹ or by subjecting a person to a detriment in connection with the provision of that service.² Service providers must also make reasonable adjustments for people with disabilities, so that they may access or derive a substantial benefit from the service.³

The Act provides certain limited exceptions to discrimination in the provision of insurance. Section 47 permits insurers to lawfully discriminate against another person if the discrimination is:

- permitted under relevant federal legislation
- 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.

The *Ingram* case, and the response of various insurers, highlighted the complexity of whether and how insurers can validly claim an exception under the Act.

Our 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 our investigation powers, we have requested information from major travel insurers, including any 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 Act as an exception to unlawful discrimination.

We anticipate that our investigation report will be publicly available by mid-2019.

We also note that the Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry has uncovered discrimination against people with a mental health condition or disability in the financial services sector.⁴

Use of force, restraint and seclusion

Closed environments

Protecting human rights in closed environments is one of the Commission's strategic priorities. A particular focus of our work in this area is ensuring the human rights of people with mental illness.

In November 2017, following an investigation into the practical implications of implementing the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the Victorian Ombudsman recommended that the Department of Justice and Community Safety:

- propose how it will implement strategies to minimise the use of force at the Dame Phyllis Frost Centre
- request the Commission to review the proposal, in accordance with section 41(c) of the Charter.⁵

In October 2018, following a separate investigation into the imprisonment of a woman found unfit to stand trial, the Victorian Ombudsman recommended that the Department of Justice and Community Safety request the Commission to review the application of the following policies and practices to prisoners with mental impairment at Dame Phyllis Frost Centre:

- the use of behavioural management plans and separation to address behaviours of concern
- strip-searching
- use of restraints
- personal care support.⁶

It further recommended that, once completed, the department develop a plan to apply the Commission's findings and recommendations to other prisons.⁷

The department has accepted both recommendations,⁸ and the Commission is presently liaising with the department and other relevant agencies to progress these reviews as soon as practicable.

Schools

In 2012, the Commission found that students with disabilities were more susceptible to poor mental health than students without disabilities, compounded by the use of restraint and seclusion as behavioural control mechanisms.⁹ We made a number of recommendations, including prohibiting seclusion in all Victorian schools, tighter controls on the use of restraint in schools and additional education and training for teachers related to pervasive bullying, which was found to contribute to the prevalence of poor mental health experienced by students with disabilities.¹⁰

Following the release of our report, the Victorian Government committed to continuing to work with the Commission and other groups, including people with disabilities, 'to identify future partnership opportunities to improve support for students with disabilities and their schools'.¹¹

While the government has made progress in this area, the Commission continues to receive regular information about the inappropriate use of restraint and seclusion on children with disabilities in schools.

In May 2018, the Commission and the Department of Education and Training commenced a program of work that facilitates a human rights approach to diversity and inclusion, for the benefit of students, their families and school staff through the provision of an evidence-based professional development and community engagement program for Victorian schools.

Due to be completed mid-2019, this project is part of the agenda for Victoria to become 'the Education State' with a focus on reducing the impact of disadvantage and building excellence and equity in equal measure for all students. It stems from the significant reforms instituted since our 2012 report, acknowledging the need for schools to develop and continue inclusive practice to promote learning for all students who are vulnerable to experiences of discrimination and disadvantage. It will support schools to improve inclusive practice for, and the human rights of, all students and their families.

Cultural rights as a protective factor for mental health

Strong cultural identity and connection to culture, country and community is a protective factor for the social and emotional wellbeing of Aboriginal youth and, as such, can have a positive impact on mental health. Conversely, a lack of protection of cultural rights may exacerbate emotional trauma of young people and otherwise have a negative impact on their social, emotional and mental health.

A joint report recently published by the Commission and the Commission for Children and Young People found that Aboriginal youth in custody lack opportunities to connect to culture and have minimal access to cultural activities and support.¹² Our report therefore advocates for sufficient opportunities for Aboriginal youth in custody to connect to their culture.

Role of discrimination and human rights law

The Commission notes that the human rights of people with mental illness are protected by numerous laws. Federally, this includes the *Disability Discrimination Act 1992*. In Victoria, it includes the Equal Opportunity Act, the Charter and the *Mental Health Act 2014*.

Over the last few years, however, Victoria has seen a number of serious instances of human rights violations of people with a mental illness, highlighting gaps in the system for many vulnerable Victorians. The Commission's 2017 report on the operation of the Charter details some of these instances, including:

- the lack of appropriate care facilities for people who are found unfit to stand trial
- not being believed as victims of sexual abuse in acute mental health inpatient wards.¹³

More recently, in 2018, the Supreme Court found in *PBU & NJE v Mental Health Tribunal* that mental health patients were being unlawfully provided with electro-convulsive treatment against their will, and in breach of the Charter.¹⁴

These issues highlight that more work is needed to properly protect the human rights of people with mental illness. The Commission therefore urges the Victorian Government to enable the Royal Commission to consider the role of discrimination and human rights law in upholding the rights of people with disabilities, as well as the rights of their families and carers.

Recommendation

That the Victorian Government include in the Royal Commission's Terms of Reference a focus on:

- discrimination against, and other violations of the rights of, people with mental illness
- the role of equal opportunity and human rights law, including the *Equal Opportunity Act 2010* and the *Charter of Human Rights and Responsibilities Act 2006*, in improving the lives of people with mental illness.

Further assistance

The Commission would be happy to assist the Royal Commission in any way we can, especially in relation to the applicability of the Equal Opportunity Act and the Victorian Charter.

Please feel free to contact Simone Cusack, our Head of Policy and Research, on 0409 892 966 or at Simone.Cusack@veohrc.vic.gov.au, if the Commission can be of assistance.

Yours sincerely



Justine Vaisutis
Acting Executive Director

¹ *Equal Opportunity Act 2010* (Vic) s 44(a).

² *Equal Opportunity Act 2010* (Vic) s 44(c).

³ *Equal Opportunity Act 2010* (Vic) s 45.

⁴ See, eg, Victorian Equal Opportunity and Human Rights Commission, *Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2018) 6-8 (which summarises relevant submissions and evidence heard by the Royal Commission).

⁵ Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and inspection of the Dame Phyllis Frost Centre* (2017) 102.

⁶ Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (2018) 66.

⁷ *Ibid.*

⁸ *Ibid* 66; Victorian Ombudsman (n 7) 102.

⁹ Victorian Equal Opportunity and Human Rights Commission, *Held back: The experiences of students with disabilities in Victorian schools* (2012).

¹⁰ *Ibid* 13-14.

¹¹ *Ibid* 193.

¹² Victorian Equal Opportunity and Human Rights Commission, *Aboriginal cultural rights in youth justice centres* (2017).

¹³ Victorian Equal Opportunity and Human Rights Commission, *2017 Report on the operation of the Charter of Human Rights and Responsibilities* (2017).

¹⁴ *PBU & NJE v Mental Health Tribunal* [2018] VSC 564.