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INSURANCE AND MENTAL ILLNESS: PROSPECTS FOR CHANGE

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Abstract

An insurer's discretion to both freely allocate different premiums to consumers and deny cover to overly risk consumers is essential for the insurance sector's sustainability. This discretion conflicts with a consumer's right to be free from discrimination, protected by the Human Rights Act 1993. Both a dearth of judicial decisions favouring the consumer and an archaic legal position around pre-contractual non-disclosure obligations have tipped this conflict in favour of the insurer. This paper considers two distinct forms of discrimination towards sufferers of mental illness and analyses two prospects for change. Firstly, this paper considers how the unjustifiable reliance on blanket exclusion clauses to avoid indemnifying sufferers of mental illness may be challenged by Ingram v QBE Insurance (Australia) Limited (Human Rights) [2015] VCAT 1936. Secondly, this paper considers how legislative reform can remedy New Zealand's common law position around pre-contractual non-disclosure, a position currently resulting in indirect discrimination towards mental illness sufferers. Ultimately, this paper concludes that the implications of Ingram v QBE Insurance are more symbolic than practical. However, if drafted effectively, legislative reform is a viable prospect for overcoming forms of discrimination.

Keywords

Human Rights Act 1993, human rights, insurance, non-disclosure

Table of Contents

I Introduction

Society has historically failed to treat mental illness in the same way it treats physical disabilities. Before the late twentieth century, common law courts had been reluctant to recognise "purely mental, as opposed to physical, injuries".[1] Only recently has New Zealand's comparatively high rates of mental illness been a catalyst for increasing discourse around the subject. The discussion has prompted the newly elected Government to launch a national inquiry into mental health and addiction, expected to be completed in October 2018.[2]

Notwithstanding an increase in discourse around mental illness, institutional discrimination against sufferers of mental illness remains. Societal progress has stalled as New Zealand's insurance sector continues to rely on generalisations and preconceptions about mental illness in its justification for denying consumers cover.

In particular, the insurance sector discriminates against sufferers of mental illness in two distinct forms.[3] Firstly, insurers have been found to unjustifiably rely on blanket exclusion clauses, relating to mental illness, allowing insurers to avoid indemnifying policyholders.[4] The Human Rights Act 1993 (HRA) protects people in New Zealand from discrimination by private actors. However this protection does not preclude insurers from exercising their right to base insurance policies on a policyholder's corresponding risk. By virtue of s 48, insurers are allowed to deny cover or allocate increased premiums to consumers who suffer from psychiatric illness.[5] This is only permitted if the discrimination is reasonably based on actuarial or statistical data.[6]

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[1] Geoff McLay "Nervous Shock, Tort and Accident Compensation: Tort Regained?" (1990) 30 VUWLR 197 at 202.

[2] New Zealand Government "Key Dates" (4 July 2018) Government Inquiry into Mental Health and Addiction <www.mentalhealth.inquiry.govt.nz/>.

[3] Tim Gunn "Mental health and insurance" (17 August 2017) New Zealand Law Society <www.lawsociety.org.nz/>.

[4] Jenée Tibshraeny "Psychiatrists call for government review on the way life insurers treat people with mental illness; Underwriter explains extent to which industry goes to fairly assess possible risks of mental illness" (9 March 2017) Interest <www.interest.co.nz/>.

[5] Human Rights Act 1993, s 48.

[6] Section 48.

Problematically, many insurers fail to reasonably base mental illness exclusion clauses on the required actuarial or statistical information. Instead insurers have been found to underwrite mental illness exclusions into their policies on the basis of out-dated preconceptions of mental illness. Insurers have been described as "paranoid" about issuing insurance to people who have suffered stress or mental illness.[7] Typically victims of unjustified discrimination settle with insurers outside of court, perpetuating the issue, as insurer behaviour is rarely legally challenged.[8]

A second and distinct form of discrimination has been the reliance on non-disclosure clauses to avoid indemnifying policyholders who have failed to disclose information about their mental health.[9] Australia and the United Kingdom, both of whom New Zealand's insurance law is based, have reformed their legal positions around duties of disclosure. Rather than follow suit, New Zealand has retained an archaic legal position, enabling insurers to continue to rely on non-disclosure clauses, to the detriment of sufferers of mental illness. As a result, sufferers of mental illness are reluctant to seek medical assistance for fear of their medical records being tarnished and future insurance prospects being diminished.[10]

Two recent developments have the potential to limit these forms of discrimination. With respect to the unjustified use of blanket exclusions, *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936 (*Ingram v QBE Insurance*) has been deemed a "landmark" case, bringing hope to sufferers that unfair insurers will be held accountable.[11] In regards to the use of non-disclosure clauses, the Minister of Commerce

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[7] Brian Klee "Guidelines on Insurance and the Human Rights Act 1993 – issues to consider" *Financial Alert* (online ed, Wellington, 2 February 2007) <www.srisks.co.nz/>.

[8] Madeline Morris "'It's not about the money': Melbourne woman takes on insurance industry over mental illness travel exclusions" (27 October 2015) ABC News <www.abc.net.au/>.

[9] Gunn, above n 3.

[10] Tim Gunn "Lawyer concerned insurers' archaic practice of good faith risks seeing society take a backwards step when it comes to mental health awareness" (16 August 2017) Interest <www.interest.co.nz/>.

[11] Pat McGrath "Landmark insurance case to change rules for people with mental illness" (18 December 2015) ABC News <www.abc.net.au/>.

and Consumer Affairs has announced a review of New Zealand's insurance contract law.[12] Promisingly, disclosure obligations top suggested issues within the Ministry of Business, Innovation and Employment's (MBIE) Issue Paper.[13]

This paper analyses these two distinct developments and their prospects for reducing discrimination towards sufferers of mental illness. The paper concludes that the implications of *Ingram v QBE Insurance* regarding the use of mental illness exclusions are more symbolic than practical. Nonetheless, this paper also concludes that, if drafted effectively, New Zealand could drastically improve its legal standing around disclosure obligations. Such statutory reform would noticeably benefit sufferers of mental illness.

II Background: The Nature of Insurance and Discrimination

Evaluating any common law or statutory prospects of reducing discrimination first requires an assessment of why insurers discriminate and what forms of discrimination are acceptable. The following section outlines the inherent conflict between how insurers function and a consumer's right to be treated equally. Secondly, this section considers the statutory framework that New Zealand insurers operate. Thirdly, this section summarises the Human Rights Commission's guidelines around the relationship between insurance and human rights, including the Commission's recommendations regarding the practical limitations to an insurer's behaviour.

A The Nature of Insurance

Insurance has two fundamental characteristics. Firstly, insurance involves transferring risk from one individual to a group.[14] Secondly, insurance involves sharing losses on some equitable basis, by all members of the group.[15] The primary function of insurance is the provision of security. As explained by the Human Rights Commission: "Insurance

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[12] Thomas Coughlan "Government signals insurance shake-up" (23 May 2018) Newsroom <www.newsroom.co.nz/>.

[13] Ministry of Business, Innovation and Employment *Issues Paper: Review of Insurance Contract Law* (May 2018) at [31].

[14] Emmett Vaughan and Therese Vaughan *Fundamentals of Risk and Insurance* (10th ed, John Wiley & Sons Inc, United States of America, 2008) at 34.

[15] At 34.

involves pooling contributions or premiums from a group of people using the resulting pool to pay members of the group who make a claim."[16] Although insurance does not reduce the probability of an event occurring, it reduces the probability of financial loss resulting from the event.[17] This process of risk transfer and indemnification facilitates various everyday economic transactions and plays an important part in promoting economic growth.[18] At an individual level, insurance helps persons "cope with unforeseen life events and provid[es] businesses with greater certainty".[19]

Insurers are private entities with rights to either deny or accept risks and to offer consumers cover based on their assessment of the cost of covering any claims.[20] Accordingly, insurers will charge a higher premium for insurance policies that cover a higher risk. If the claim's risk outweighs the benefit gained from the premium, the insurer may refuse to accept the risk outright.[21] The insurance industry's sustainability relies on the right to accept or decline contracts of insurance and to charge premiums commensurate to risk.[22]

B Human Rights Legislation and Insurance Exception

When insurers discriminate between different consumers in order to adequately cover each consumer's risk, there is a prima facie breach of the HRA. Section 44 makes it unlawful for any person, who supplies goods, facilities or services to the public, to: refuse the provision of those goods, facilities or services; or treat anyone less favourably in connection with the provision of those goods, facilities or services, by reason of any of the prohibited grounds.[23] Psychiatric illness is defined as a prohibited ground of

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[16] Human Rights Commission *Guidelines: Insurance and the Human Rights Act 1993* (November 2007) at 5.

[17] Vaughan and Vaughan, above n 14, at 35.

[18] Damian Ward and Ralf Zurbruegg "Does Insurance Promote Economic Growth? Evidence from OECD Countries" (2000) 67(4) JRI 489 at 489.

[19] Ministry of Business, Innovation and Employment, above n 13, at 7.

[20] Jason Courtney "The Insurer's Right to Choose Risk" *The ANZIIF Journal* (online ed, February 2017) at 9 <www.anziif.com/>.

[21] At 7.

[22] At 1.

[23] Human Rights Act, s 44.

discrimination.[24] Section 44(2) clarifies that the term "facilities" includes facilities by way of insurance.

This prohibition of discrimination does not stop insurers from exercising their right to base insurance policies on a policyholder's corresponding risk. Both an individual insurer's profitability and the sustainability of the sector as a whole rely on an insurer's ability to choose which risks to accept.[25] Among a number of outlined exceptions, s 48 of the HRA seeks to balance an individual's right to be free from discrimination with an insurer's right to prudently control its exposure to risk. Section 48 allows insurers to treat consumers differently on the basis of sex, disability or age, if the different treatment is based on actuarial or statistical data relating to life-expectancy, accidents or sickness or on reputable medical or actuarial advice or opinion.[26] The exception is conditional on the different treatment being reasonable, having regard to data, advice or opinion and any other relevant circumstances.[27]

C Human Rights Commission Guidelines

In 2007, the Human Rights Commission published a set of guidelines concerning the interaction between insurance and the HRA. The guidelines were purportedly a result of "an increase in reported mental illness, developments in the area of human genetics and relevant case law from other jurisdictions and … experience of the practical application of the legislation".[28]

The guidelines explicitly state that, under the HRA, insurers cannot refuse insurance under any of the prohibited grounds in the Act.[29] However insurers are permitted to, and commonly do, define the scope of their insurance policies by relying on exclusion clauses based on grounds relating to sex, disability and age. It is unlawful for insurers to

[24] Human Rights Act, s 21(1)(h).
[25] Courtney, above n 20, at 9.
[26] Human Rights Act, s 48(1)(a).
[27] Section 48(1)(b).
[28] Human Rights Commission, above n 16, at 3.
[29] At 8.

discriminate on any of the other prohibited grounds of the HRA, as they are deemed "irrelevant in the provision of insurance".[30]

The guidelines differentiate between blanket exclusion clauses and refusals to insure. The Commission describes blanket exclusion clauses as "a way of defining cover, clarifying what a policy does (and does not) cover and alerting potential applicants to what they are buying".[31] In contrast to a refusal to insure, blanket exclusion clauses are lawful "because everyone is treated the same".[32] In theory these policies apply "equally to all applicants when they are issued as … they all run the risk of developing an excluded condition in the future – no one is treated unfavourably".[33] The Commission reasons that blanket exclusions are a "necessary trade-off for reasonable cover".[34] Without exclusion clauses, many policies would not be commercially viable for insurers to offer. However, if conditions or eventualities are not covered, it is "best practice" to make this clear to consumers before they take out the policy, so they are aware of the cover's scope.[35]

The guidelines also distinguish between the exclusion of pre-existing conditions and the refusal to insure. The former is legally justified as insurance is still provided, but on terms which exclude conditions that already exist. Pre-existing condition exclusions separate consumers with a condition at the time of taking out the insurance and those who subsequently develop a condition.[36] Decisions to exclude pre-existing conditions must consider a consumer's particular circumstances. Further, insurers must establish that it is reasonable to exclude a condition by reference to data or other relevant factors.

When considering whether differential treatment is justified under s 48 of the HRA, the court must consider whether such treatment is reasonable. The guidelines suggest that case law from Australia and Canada will inform New Zealand courts on how to interpret

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[30] Human Rights Commission, above n 16, at 9.
[31] At 10.
[32] At 10.
[33] At 10.
[34] At 10.
[35] At 10.
[36] At 11.

the reasonableness standard. In *QBE Travel Insurance v Bassanelli* [2004] FCA 396, the Federal Court of Australia employed an objective test, holding that it was insufficient for an insurer to assert that actuarial or statistical data is reasonable.[37] The Commission clarifies that an insurer must establish that the information relied upon is reasonable in relation to the particular circumstances of the individual applying for insurance.[38] Additionally, in *Zurich Insurance Co v Ontario (Human Rights Comm)* [1992] 2 SCR 321, the Canadian Supreme Court required that for a discriminatory insurance practice to be reasonable, it must be based on a "sound and accepted insurance practice" and there must be "no practical alternative".[39] The guidelines outline a general principle that insurers should "tailor decisions to individual cases and conditions".[40] Likewise insurers should be prepared to explain certain decisions and acknowledge the limitations of their underlying data.

The guidelines specifically addressed the issues surrounding insurance and mental illness. The Commission recognised that inaccurate diagnoses of mental illness had significantly increased insurers' financial risk and led to the reliance on exclusion clauses to limit those risks. However the Commission reasoned that: "While mental illness cannot be measured in the same way as physical disability, it does not follow that it is impossible to quantify the risk."[41] Accordingly, insurance underwriters should assess mental illness as they do physical disabilities, "using reputable medical, psychiatric and actuarial advice as guidance".[42] If a consumer's mental illness subjects the insurer to a greater risk, an increased premium or exclusion must be applied to the same standard as for a physical disability and be justified with adequate data.[43]

In summary, the guidelines illustrate that the human right to be free from discrimination is strongly challenged by an insurer's right to allocate risk. Parliament has compromised

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[37] Human Rights Commission, above n 16, at 12.
[38] At 12.
[39] At 12.
[40] At 12.
[41] At 14.
[42] At 14.
[43] At 14.

by entitling an insurer to discriminate if it is reasonably justified. The guidelines clarify that discrimination is only limited to certain grounds and suggest that any justification must be individualised. Unfortunately, as discussed below, insurers have breached these statutory limitations.

III Unlawful Discrimination and Consequential Problems

Understanding the forms of unlawful discrimination prevalent in the insurance sector and why they are problematic is essential to understanding the significance of prospects for change. This section describes two forms of unlawful discrimination prevalent in the insurance sector. Furthermore the section outlines the repercussions discrimination causes sufferers of mental illness and the persistent nature of the problem.

A Reported Forms of Discrimination by Insurers

Notwithstanding the Human Rights Commission's efforts to restrict discrimination to justifiable situations, New Zealand's insurance legal landscape continues to facilitate both direct and indirect discrimination.

As noted earlier, insurers continue to rely on blanket exclusion clauses to avoid indemnifying policyholders because of their mental illness. This is *direct* discrimination as certain consumers are refused a benefit based on their disability and are disadvantaged as a result.[44] Information required to justify blanket exclusion clauses should be "substantial, up-to-date and relevant to the type of cover".[45] In practice however, insurers often deny cover to sufferers of mental illness on "undocumented grounds" or impose "unreasonable terms and conditions including inflated premiums".[46]

A 2011 Mental Health Council of Australia report found that the insurance industry relies on "broad and often stigmatised assumptions" about mental illness.[47] In the report, 60 per cent of survey respondents were denied cover, charged higher premiums or faced mental

[44] Human Rights Commission, above n 16, at 6.
[45] Klee, above n 7, at 2.
[46] Gunn, above n 3, at 1.
[47] Andy Kollmorgen "Faulty Analysis" *CHOICE* (online ed, Australia, February 2014) at 40.

illness exclusion clauses.[48] A 2013 review of the Australian travel insurance sector found only four of 29 surveyed insurers covered claims relating to mental illness.[49] A New Zealand survey of mental health consumers found that 20 per cent of respondents had been discriminated by financial institutions including insurers.[50] Furthermore, in New Zealand, insurers have rejected applications for insurance based on a mental illness suffered fifteen years earlier than the insurance application.[51]

Secondly, insurers will avoid policies ab initio due to the pre-contractual non-disclosure of mental illness. [52] Avoiding claims for non-disclosure may seem within an insurer's entitlement. On its face, this practice appears to treat all consumers the same. However, stigmatisation has meant that information about mental illness is disproportionately withheld from insurers. New Zealand's out-dated insurance contract law has enabled insurers to avoid policies for non-disclosure often when the cover is unrelated to the mental illness.[53] By inconspicuously having a detrimental effect on those suffering from mental illness, the use of non-disclosure clauses can be defined as *indirect* discrimination.[54]

B Consequences to Sufferers of Mental Illness

Unjustified discrimination has effects wider than depriving individuals from indemnification. The inaccessibility or unaffordability of certain forms of insurance prevents individuals from doing things they otherwise could. For instance a sufferer of mental illness may be deprived of travelling with the freedom they would have had with access to travel insurance. Similarly, although health insurance is comparatively less necessary in New Zealand due to the country's national health system and accident compensation scheme, mental illness sufferers may be unable to afford the benefits of

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[48] Kollmorgen, above n 47, at 40.

[49] At 41.

[50] Mental Health Council of Australia and beyondblue "Mental Health, Discrimination and Insurance: A Survey of Consumer Experiences 2011" (2011) at 6.

[51] Cleo Fraser "Mental Health Disclosures Could Cost You Life Insurance" (30 July 2017) Newshub <www.newshub.co.nz/>.

[52] Gunn, above n 3, at 1.

[53] Coughlan, above n 12, at 1.

[54] Human Rights Commission, above n 16, at 6.

private health care. For some people, the inability to acquire insurance means they may forego the activity completely.[55] For instance, people may likely refrain from driving entirely unless they can acquire motor car insurance.

Academics Rüsch, Angermeyer and Corrigan contend that sufferers of mental illness frequently encounter both public stigma and self-stigma.[56] Public stigma results in structural discrimination, including that by "private and public institutions that intentionally or unintentionally restrict opportunities of persons with mental illness".[57] In New Zealand, public stigma has led to insurers holding an "inbuilt institutionalised bias".[58]

Institutionalised discrimination can add to the public stigma experienced by sufferers of mental illness. Frank Quinlan, CEO of Mental Health Australia has said:[59]

> "Insurance companies seem to think that there are two kinds of people in the world, and if you're one of the people with mental illness then you're excluded from products that we all take for granted".

Moreover, insurance policy exclusions regarding mental illness deter sufferers from seeking professional help, potentially contributing to New Zealand's "mental health crisis".[60]

C Persistence of Insurance Discrimination

Insurer discrimination towards those with mental illness is not a new phenomenon. In 1993, Australia's Human Rights and Equal Opportunity Commission produced an extensive two-volume report into the human rights of people with mental illness. The

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[55] Timothy Edmonds *Insurance and the discrimination laws* (House of Commons Library, Briefing Paper 4601, 29 October 2015) at 11.

[56] Nicolas Rüsch, Matthias Angermeyer and Patrick Corrigan " Mental illness stigma: Concepts, consequences, and initiatives to reduce stigma" (2005) 20 EPA 529.

[57] At [20].

[58] Gunn, above n 3, at 1.

[59] Morris, above n 8, at 1.

[60] "Does Insurance Cover Mental Health?" Advice Financial (27 November 2017) <www.advicefinancial.co.nz/>.

report found that insurers took insufficient or no account of the type of mental illness, its severity, its prognosis or its consequences.[61] The report concluded that, in light of contemporary expert medical opinion, "the insurance industry remains unjustifiably cautious – to the point of discrimination in its assessments of risk".[62]

That the 1993 report was produced two and half decades ago, and discrimination has endured, suggests that any meaningful change will be challenging. In fact 2014 comments from beyondblue CEO Kate Carnell point to "no significant progress" being made from over twelve years of lobbying the insurance industry.[63] However, the two legal developments this paper discusses have the potential to reduce discrimination by insurers.

IV First Prospect for Change: Ingram v QBE Insurance (Australia) Ltd

In 2015, the Victorian Civil Administrative Tribunal (VCAT) made a "landmark" decision regarding discrimination in relation to the reliance on a mental illness exclusion clause.[64] Although the case received considerable media attention at the time, the wider implications of the case are uncertain. This section provides a summary of the case, evaluating the reasoning behind the tribunal member's decision.

A Facts

In late 2011, Ella Ingram decided she would join a school tour to New York scheduled for April 2012. She paid her deposit and subsequent instalments, part of which contributed towards a travel insurance policy issued by QBE Insurance (Australia) Ltd (QBE) on 8 December 2011.[65]

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[61] Human Rights and Equal Opportunity Commission "Report of the National Inquiry into the Human rights of People with Mental Illness" (1993) at 449.

[62] At 540.

[63] Kollmorgen, above n 47, at 41.

[64] McGrath, above n 11, at 1.

[65] *Ingram v QBE Insurance (Australia) Limited (Human Rights)* [2015] VCAT 1936 [*Ingram v QBE Insurance*] at [42].

In January 2012, Ingram experienced depression for the first time in her life. After receiving inpatient treatment, Ingram and her doctor decided to withdraw from the New York trip.[66] A claim for the costs of the trip was lodged in May 2012.

On 17 August 2012, QBE denied Ingram's claim, relying upon a general exclusion that denied cover where the claim arose directly or indirectly from mental illness, including depression.[67] Later confirming the refusal, QBE reasoned that the decision was based on detailed statistical modelling.

B Arguments

Ingram argued that the inclusion of a mental illness exclusion directly discriminated against her in the terms on which the travel insurance was provided.[68] Ingram claimed that this was a breach of s 44(1)(b) of the Equal Opportunity Act 2010 (Vic) (EOA). Further, by refusing to indemnify her due to her mental illness, QBE treated her unfavourably because of her disability.[69] Ingram argued that this amounted to direct discrimination under s 44(1)(a) of the EOA.

Ingram sought a declaration that QBE unlawfully discriminated against her, compensation for economic loss of $4292.48 and $20 000 in compensation for hurt and humiliation.[70]

In its defence QBE denied discriminating against Ingram. QBE argued that it did not refuse to provide insurance to Ingram because of her disability, but that the insurance policy wording contained an exclusion for mental illness.[71] In the alternative, QBE said that if it were found to have discriminated, the discrimination was lawful as an EOA or Disability Discrimination Act 1992 (Cth) (DDA) exception applied.[72]

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[66] *Ingram v QBE Insurance*, above n 62, at [2].
[67] At [4].
[68] At [5].
[69] At [5].
[70] At [6].
[71] At [7].
[72] At [7].

C Evaluation

Member Dea's judgment can be broken down into four segments. Firstly, Member Dea clarified the legislative landscape. Secondly, she addressed and dismissed a preliminary argument advanced by QBE. Thirdly, she found that QBE had directly discriminated against Ingram. Finally, she considered and rejected any statutory exceptions claimed by QBE.

1 Legislation

Section 44(1)(a) of the EOA prohibits discrimination by means of refusing to provide goods or services to another person.[73] Similarly, s 44(1)(b) prohibits discrimination in the terms on which goods or services are provided to another person.[74] Direct discrimination is defined under s 8(1) of the EOA as occurring "if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute."[75] The list of prohibited attributes includes "disability" under s 6(e) of the EOA. The term "disability" includes "a mental or psychological disease or disorder" under s 4(d)(i) of the EOA. This mirrors the definition under the DDA.[76]

2 Preliminary point

QBE contended that, under the EOA and DDA, Ingram did not have a disability at the relevant time because her depression was non-existent when the insurance policy was issued in late 2011.[77] Despite acknowledging that the EOA and DDA are beneficial legislation that should be read widely, QBE argued that this did not mean that the proper meaning could be supervened when that meaning was clear.[78]

Member Dea rejected this argument. Referring to the Productivity Commission's review of the DDA, she found that the definition of disabilities included "disabilities that people have now, have had in the past, *might have in the future* or are believed to have".[79]

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[73] Equal Opportunity Act 2010 (Vic), s 44(1)(a).
[74] Section 44(1)(b).
[75] Section 8.
[76] Disability Discrimination Act 1992 (Cth), s 4.
[77] *Ingram v QBE Insurance*, above n 65, at [32].
[78] At [40].
[79] At [39] (emphasis added).

Additionally, s 32 of the Charter of Human Rights and Responsibilities Act 2006 states: "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights".[80] Member Dea held that "a Charter consistent interpretation" would take a wide definition of "disability".[81] This achieved the EOA's objective of "eliminating discrimination to the greatest possible extent by ensuring that all persons with disabilities, past, current or future, may rely on its protections".[82] She concluded that Ingram's diagnosis of depression fell within the definition of "disability" under the EOA.

3 Direct discrimination

The insurance policy contained a general exclusion stating that there is no cover under any section of the policy for any claim arising directly or indirectly from a member of the travelling party suffering any "mental illness including dementia, depression, anxiety, panic attack, stress, bipolar, mania, schizophrenia or other nervous disorder."[83] Ingram argued that the exclusion's express purpose was to ensure that no person with a mental illness could make a claim on that illness.[84]

Member Dea noted that the mental illness exclusion, which applied to all people who take up an offer of insurance (as a blanket exclusion), "has the facially neutral characteristics" of indirect discrimination.[85] However she found the exclusion to be more "targeted" than indirect discrimination.[86] The exclusion is solely directed towards anyone who first develops mental illness after the insurance policy is issued, and therefore should be classified as *direct* discrimination.

Member Dea held that QBE's unfavourable treatment towards Ingram amounted to prima facie breaches of both ss 44(1)(a) and 44(1)(b) of the EOA.

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[80] Charter of Human Rights and Responsibilities Act 2006 (Vic), s 32.
[81] *Ingram v QBE Insurance*, above n 65, at [48].
[82] At [48].
[83] At [24].
[84] At [52].
[85] At [58].
[86] At [58].

4 Exceptions

Following the finding of direct discrimination, QBE attempted to rely on defences under ss 46(2)(f) and 29A of the DDA.

(a) Reliance on Data

Section 46(2)(f) permits discrimination by an insurer where it is proven that the discrimination was based on actuarial or statistical data on which it was reasonable for the insurer to rely and that the reliance was reasonable having regard to the data and other relevant factors.[87]

QBE presented one actuarial and a range of statistical reports as evidence. QBE invited the VCAT to infer that the statistical data was taken into account when it decided to include the exclusion within Ingram's travel insurance policy.[88] However, six of the nine documents presented by QBE were produced after the standard form insurance policy was worded, and therefore could not have been considered by QBE at the relevant time.[89]

Further, in cross-examination, QBE's National Manager admitted that his evidence about the prevalence of mental illness arose from observations of the media and impressions, rather than actuarial data.[90] Because QBE automatically rejected claims involving mental illness, payments were never made and no actuarial data around the cost of insuring mental illness sufferers existed. Although Member Dea was willing to infer that the exclusion was included for a reason, that reason could have been based on personal perceptions of mental illness or "general industry practice".[91] QBE had not proven on the balance of probabilities that it had relied on statistical data at the time of policy formulation.[92] The defence failed under this first limb.

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[87] *Ingram v QBE Insurance*, above n 65, at [89].
[88] At [100].
[89] At [112].
[90] At [102].
[91] At [113].
[92] At [117].

In the alternative, Member Dea held that, even if QBE had relied upon statistical data when forming the insurance policy, it did not establish that it was reasonable to do so.[93]

(b) Unjustifiable hardship

Section 29A says that it is not unlawful to discriminate if avoiding that discrimination would impose an unjustifiable hardship.[94] This implies that some hardship is justifiable and a financial burden may be justified, given the DDA's overarching objective to eliminate discrimination.[95]

Member Dea framed the question as "whether QBE would suffer unjustifiable hardship if the mental illness exclusion was omitted from all policies issued."[96] Evidence presented by QBE exhibited a consequential loss of $3 212 818 per annum.[97] However this figure conflated statistics relating to the prevalence of mental illness and statistics relating to the incidence of claims. Furthermore, it failed to consider that an insurance policy would likely be altered to mitigate losses. For example, more stringent prerequisites for claims alongside a widened pre-existing condition clause would lower QBE's risk.

Due to "significant reservations" about the report relied on by QBE, Member Dea held that there was insufficient evidence to prove unjustifiable hardship under s 29A of the DDA.[98]

Ingram was awarded $4 292.48 for the economic loss relating to her cancelled trip and $15 000 for non-economic loss.

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[93] *Ingram v QBE Insurance*, above n 65, at [121].
[94] At [70].
[95] At [127].
[96] At [130]
[97] At [174].
[98] At [244].

V Implications of Ingram v QBE Insurance

Following Member Dea's decision, the question most pertinent to both insurers and sufferers of mental illness is whether the decision will tangibly impact the insurance sector. The case can appropriately be applied to a New Zealand context.[99] The following section outlines that, although its common law application is limited, the case has a potentially positive impact on reducing public stigma insofar as it contributes to the wider discourse around mental illness.

A Case Precedent and Application

The case has been considered "a positive example" of how Victoria's Charter of Human Rights and Responsibilities can encourage a human rights interpretation of legislation.[100] Principally, Member Dea's decision is an example of the judiciary attempting to balance the consumer's right to receive services free from discrimination and the insurer's right to treat consumers differently based on risk.

Ingram v QBE Insurance has been heralded as a case that will "change the rules" for mental illness sufferers.[101] The decision can be reconciled with the New Zealand Human Rights Commission's guidelines which highlight the importance of individualised justifications for discrimination. However, in practical terms, the case was decided on whether QBE's imposition of a blanket mental illness exclusion was based on actuarial or statistical data upon which it was reasonable for QBE to rely.[102] The case emphasises that an insurer must "be able to articulate the nature and scope of the risks it chooses and

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[99] The IMF's 2017 report on New Zealand's insurance industry noted that New Zealand's insurance market is "dominated by the branches and subsidiaries of Australian groups", while Australian-owned operations represent 75 per cent of the New Zealand market, by assets; see *New Zealand: Financial Sector Assessment Program: Detailed Assessment of Observance - Insurance Core Principles* [*New Zealand: Insurance Core Principles*] IMF Country Report No. 17/121, May 2017 (Report of the International Monetary Fund) at 4. Furthermore, the World Health Organisation's 2017 report on global estimates for mental illnesses shows that New Zealand has the fourth highest prevalence of anxiety disorders in the world, with 7.3% of the population, while Australia is fifth in the world with 7.0%, see *Depression and Other Common Mental Disorders: Global Health Estimates* WHO/MSD/MER/2017.2, 2017 (Report from World Health Organization) at 21.

[100] Victoria Legal Aid "Blanket mental health exclusion in travel insurance policy amounted to unlawful discrimination" (January 2016) at 3.

[101] McGrath, above n 11, at 1.

[102] Courtney, above n 22, at 1.

those it declines, based upon the existence and reliance of empirical evidence".[103] In this particular case, QBE did not have sufficient evidence to establish that the exclusion was based on actuarial or statistical data.

Rather than condemn the use of mental illness exclusion clauses entirely, *Ingram v QBE Insurance* shows that, if relied upon, such clauses must be based on relevant actuarial and statistical data. This was made clear when Member Dea cautiously declined to make the declaration sought by Ingram, saying:[104]

> "I have decided not to make a declaration to ensure that an impression is not given that my decision automatically extends beyond the dispute between these parties and, in particular, to avoid an impression that it applies to all insurers".

Consequently, policyholders wanting to make similar claims to Ingram should be aware that the case turned on QBE's failure to provide sufficient evidence.

B Reducing Stigma and Practical Implications

Notwithstanding the limits of its application, the significance of the decision should not be downplayed. As recognised by Member Dea, the result has the potential to benefit the community by "lessen[ing] the stigmatising effect of negative attitudes towards mental illness".[105] By prompting positive discourse about mental illness, media attention around the case itself has beneficial repercussions towards reducing public stigma.

Insurers will be more wary about relying on exclusion clauses with no credible actuarial or statistical backing. Insurers may revaluate their use of mental illness exclusions.[106] A balance between insurer and consumer rights may be more evenly struck if individual consumers are treated on a case by case basis. Whether insurers will go so far as to justify each policy individually is unlikely as the cost of doing so would be significant.

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[103] Courtney, above n 22, at 1.

[104] *Ingram v QBE Insurance*, above n 65, at [260].

[105] At [240].

[106] Shannon O'Hara "Mental illness exclusion held to be discriminatory" (February 2016) Carter Newell Lawyers <www.carternewell.com/page/>.

Surprisingly, QBE has kept the wording of its mental illness exclusion unchanged.[107] Presumably, QBE has since gathered actuarial and statistical data to base its exclusion on. Alternatively in New Zealand, discourse around mental illness has instigated positive change. In July 2017, Cover-More, owned by Swiss insurer Zurich, announced it would trial removing a general exclusion from its policies for claims relating to mental illness.[108] Cover-More's CEO, Mike Emmett, said that an applicant would be treated the same as if they were going through assessment for a physical medical condition. If the trial is successful, other insurers may follow suit.

VI Non-disclosure Clauses

This section summarises New Zealand's legal position regarding insurance and the duty of good faith. Specifically this section outlines the law of non-disclosure clauses within insurance contracts; the law's damaging effect on sufferers of mental illness; and how this amounts to indirect discrimination.

A Duty of Good Faith and Disclosure in New Zealand

As stated by Hardie Boys J, "[it is a] fundamental principle that the contract of insurance is one of the utmost good faith on both sides".[109] In New Zealand, an essential element of the duty of good faith is the insured's duty of disclosure. Although it is arguably necessary that there be some incentive for a consumer to provide information to an insurer, New Zealand's duty of disclosure has become out-dated.[110] New Zealand's insurance contract law maintains a position leaning strongly in favour of the insurer.[111]

While overseas jurisdictions have reformed the law around non-disclosure, easing the burden on the insured, New Zealand's multiple reform efforts have never been enacted.[112]

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[107] Maryvonne Gray "Midweek Wrap: QBE maintains mental illness stance" (10 February 2016) <www.insurancebusinessmag.com/>.

[108] Tamsyn Parker "Insurer trials cover for travellers with mental illness" *NZ Herald* (online ed, 19 July 2017).

[109] *State Insurance General Manager v McHale* [1992] 2 NZLR 399 at 406.

[110] Coughlan, above n 12, at 1.

[111] Bevan Marten "The insurance reform to pay attention to" (24 May 2018) Newsroom <www.newsroom.co.nz/>.

[112] At 1.

The result is that insurers are able to avoid insurance policies altogether due to the non-disclosure of mental illness, even when unrelated to the policy in question.[113]

The Australian Treasury outlines two distinct aspects of the duty of disclosure:[114]

> "First, there is a general duty not to misrepresent material facts. Second, there is a duty to disclose material facts. Both aspects of the duty protect the insurer from accepting a risk which is greater than it appears to be."

1 Misstatement

In New Zealand the law around misstatement is codified by the Insurance Law Reform Act 1977 and Contract and Commercial Law Act 2017.

For life insurance, under s 5 of the Insurance Law Reform Act 1977, a contract of insurance can be avoided if a statement is both substantially incorrect and material.[115] A "material" statement is defined under s 6(2) to be a "statement that would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether he would have taken or continued the risk upon substantially the same terms."[116]

For non-life insurance, under s 37(1) of the Contract and Commercial Law Act 2017, the insurer can cancel a contract that they have been induced to enter due to a misrepresentation.[117]

2 Non-disclosure

Although New Zealand's position is preserved strongly through case law, the Marine Insurance Act 1908 effectively codifies the duty of disclosure applicable to all insurance contracts in New Zealand.[118] The insured is under a duty to disclose all material

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[113] Coughlan, above n 12, at 1.
[114] Australian Treasury *Review of the Insurance Contracts Act 1984* (Cth) (2004) at 27.
[115] Insurance Law Reform Act 1977, s 5; Ministry of Business, Innovation and Employment, above n 13, at [35].
[116] Insurance Law Reform Act, s 6.
[117] Ministry of Business, Innovation and Employment, above n 13, at [36].
[118] At [32].

information, known or ought to be known by the insured, to the insurer.[119] Under s 18(2) of the Marine Insurance Act, information is material if it "would influence the judgment of a prudent insurer in fixing the premium or determining whether he or she will take the risk".[120] This position was upheld to apply to all forms of insurance in *Jaggar v QBE Insurance*.[121]

The insurer must establish that the information would be material to both a prudent insurer and the actual insurer.[122] New Zealand courts are uncertain whether this requires the insurer to establish that a prudent insurer would have merely factored the information into their deliberations, or that upon receiving the information, would have refused to take on the risk or change the premium charged. It is likely that New Zealand courts would follow the majority decision in the House of Lords case *Pan Atlantic,* which endorsed the former insurer-friendly approach.[123]

This duty of disclosure has been strongly criticised for "expressly" holding consumers "to a standard an ordinary person cannot necessarily expect to meet".[124] The Law Commission's 1998 report asks: "how can the ordinary consumer be expected to know what circumstances would influence the judgment of a prudent insurer?"[125] In *State Insurance v McHale*, Richardson and Hardie Boys JJ noted "the law in New Zealand as to materiality and the duty of disclosure is not satisfactory. It can lead to uncertainty and injustice".[126] Effectively, an insured will only succeed by showing that the insurer had waived disclosure; would not be influenced by disclosure; or did not and ought not to have known about the disclosure. Subject to the circumstances of each case, these will often be difficult to establish.

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[119] *State Insurance General Manager v McHale*, above n 109, at 409.
[120] Marine Insurance Act 1908, s 18.
[121] *Jaggar v QBE Insurance International Ltd* [2007] 2 NZLR 336 (CA) [*Jaggar v QBE Insurance*] at [26].
[122] At [40].
[123] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL) at 532.
[124] Marten, above n 111, at 1.
[125] NZ Law Commission *Some Insurance Law Problems* (NZLC R46, 1998) at [4].
[126] *State Insurance General Manager v McHale*, above n 109, at 415.

Such criticism has led to multiple reform efforts, none of which have come to fruition. Two Law Commission reports in 1998 and 2004; a 2006 Ministry of Economic Development report; and a Minister of Commerce cabinet paper in 2008 have all noted the need for change.[127] The failure to reform the law has perpetuated a flawed insurance sector and resulted in unfair treatment of consumers, including sufferers of mental illness.

B Effect on Sufferers of Mental Illness

As noted in the Minister of Commerce's 2008 cabinet paper, the current duty of disclosure can create a power imbalance between insurers and consumers.[128] There is little incentive for insurers to ask specific questions to gain information and consumers will not often understand their duty to disclose.[129]

Insurers can exploit this power imbalance to avoid indemnifying policyholders. Ambiguous questionnaire documents make it difficult for prospective consumers to know what information to disclose.[130] Non-disclosed information, such as that concerning a consumer's mental illness, can then be relied upon by an insurer to avoid that insurance policy.[131] The Insurance and Financial Services Ombudsman (IFSO) has emphasised that since the inception of its dispute resolution service, there has been "a constant stream" of applicants disputing cases of non-disclosure.[132]

C Indirect Discrimination

Using non-disclosure clauses to avoid indemnification is, prima facie, not discriminatory. Insurers are entitled to use non-disclosure clauses no matter the nature of the withheld information, so long as it is material. Indeed, the reliance on non-disclosure clauses does not amount to the type of direct discrimination clearly illustrated through unjustified mental illness exclusion clauses.

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[127] Ministry of Business, Innovation and Employment, above n 13, at [25].

[128] NZ Minister of Commerce "Insurance: Contracts, Agency and Assignments" (2008) at 3.

[129] At 3.

[130] Gunn, above n 10, at 1.

[131] Gunn, above n 3, at 1.

[132] Mina Martin "NZ urged to change insurance law to stop "ruining lives"" (2 March 2017) Insurance Business NZ <www.insurancebusinessmag.com/>.

However, the IFSO emphasises that pre-existing medical conditions are the most common things consumers fail to disclose.[133] Alongside the issues of ambiguous questionnaires, there is a propensity for mental illness sufferers to withhold information for fear of stigmatisation or because they consider it irrelevant. The result is the reliance on non-disclosure clauses results in indirect discrimination, as it disproportionately impacts sufferers of mental illnesses.

VII Overseas Insurance Reform

Before considering prospects for reform, it is necessary to consider the common law jurisdictions which our insurance law was originally based. This section summarises the Australian and English positions, in light of their recent reform.

A Australia

In 1984 the Australian government passed the Insurance Contracts Act 1984, moving away from the English law of the time.[134] The Act was a result of a comprehensive report by the Australian Law Reform Commission in 1982.[135]

The Australian legislation "fundamentally alters the nature of good faith" by separating the duty of utmost good faith and the duty of disclosure.[136] Although the Insurance Contracts Act has reformed the law for insurance generally, subsequent amendments have dichotomised commercial and domestic insurance.[137] Domestic insurance is the most relevant to sufferers of mental illness.

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[133] Gunn, above n 10, at 1.

[134] Prof R Merkin (for UK Law Commission) *Reforming Insurance Law: Is There a Case for Reverse Transportation?* (2007) at [2.1].

[135] At [2.2]

[136] At [3.6].

[137] More broadly, the Australian law replaces the prudent *insurer* standard for a reasonable *insured* standard. Section 21(1) requires a potential insured to disclose every matter that it knows, or that a reasonable person in the circumstances could be expected to know, will be a relevant matter in the insurer's decision on whether to accept the risk, and if so, on what terms.

Under s 21A of the Act, Australia has virtually abolished the duty of disclosure for certain domestic insurance policies.[138] Section 21A applies to motor vehicle, house, contents, sickness and accident, consumer credit and travel insurance under reg 2B of the Insurance Contracts Regulations 1985.[139] Instead of requiring disclosure, s 21A requires the insurer to provide the insured with specific questions that are relevant to the insurer's decision to accept the risk.[140]

By requiring insurers to ask specific questions, the legislation avoids the potential for insurers to rely on non-disclosure clauses when avoiding policies, reducing the potential for indirect discrimination currently experienced in New Zealand.

B United Kingdom

The UK has separated consumer insurance and commercial insurance through two distinct statutes. The Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA) governs consumer insurance and the Insurance Act 2015 governs commercial insurance.

For commercial insurance, the Insurance Act replaces the common law duty to disclose all material information with a duty to make a fair presentation of the risk, under s 3(1).[141] Importantly, for consumer insurance, CIDRA replaces the common law duty of disclosure with a duty on the consumer to take reasonable care to not make a misrepresentation.[142] Under s 3, reasonable care is determined in light of all relevant circumstances.[143] Section 3(2) provides examples of factors to be taken into account, including how clear and specific the insurer's questions were and the type of consumer

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[138] Merkin, above n 134, at [2.2].

[139] At [4.18].

[140] Australian Treasury, above n 114, at 27.

[141] This duty requires an insured to either disclose material circumstances that the insured knows or ought to know under s 3(4)(a); or to provide sufficient information to put a prudent insurer on notice to make further inquiries under s 3(4)(b).[141] Information must be provided in a reasonably clear and accessible manner and substantially correct or made in good faith.[141] The Act encourages a back and forth conversation between insurer and insured so that, through cooperation, the insurer can offer a policy adequately reflecting the insured's risk.

[142] Consumer Insurance (Disclosure and Representations) Act 2012 (UK), s 2(2).

[143] Section 3(1).

insurance contract and its target market.[144] A dishonest misrepresentation is deemed to amount to a lack of reasonable care under s 3(5).[145]

By transitioning to a duty to not provide misrepresented information, CIDRA eases the burden on the insured. This aligns the UK's position to one similar to the United States' position which imposes a duty not to conceal information.[146] CIDRA also distinguishes between deliberate or reckless misrepresentations and careless misrepresentations. Under Schedule 1, deliberate or reckless misrepresentations allow the insurer to avoid the contract ab initio.[147] Conversely, careless misrepresentations result in different remedies depending on the effect of the misrepresentation:

(i) If the insurer would have otherwise not accepted, the insurer may avoid the contract, refusing all claims but returning the premiums.[148]

(ii) If the insurer would have varied the terms of the contract, the contract must be treated as if it were entered into on those terms.[149]

(iii) If the insurer would have charged a higher premium, the insurer may reduce the claim amount paid by that amount.[150]

Overall, the UK legislation overcomes most issues relating to the "overly onerous" obligation for a consumer to disclose everything that what would influence the judgement of a prudent insurer.[151] Similarly the reformed legislation makes the remedies more proportionate to the harm caused by non-disclosure, as avoidance is limited to deliberate or reckless misrepresentations.

VIII Second Prospect for Change: New Zealand Statutory Reform

Minister of Commerce and Consumer Affairs Kris Faafoi has acknowledged that insurance contract law reform in Australia and the UK has left New Zealand "lagging

[144] Sections 3(2)(a) and 3(2)(c).
[145] Section 3(5).
[146] *State Insurance General Manager v McHale*, above n 109, at 409.
[147] Consumer Insurance (Disclosure and Representations) Act 2012 (UK), sch 1(2).
[148] Schedule 1(5).
[149] Schedu1e 1(6).
[150] Ministry of Business, Innovation and Employment, above n 13, at [45].
[151] At [52].

behind" in the area of non-disclosure.[152] Although the Insurance Council of New Zealand's Fair Insurance Code provides a form of self-regulation, it applies only to certain types of insurance and has been inadequate in preventing myriad disputes around non-disclosure.[153] MBIE's May 2018 Issues Paper has outlined three problems with New Zealand's current position on disclosure:

(i) Consumers do not understand what they are required to disclose;

(ii) Consumers may not be aware of their duty to disclose all material information; and

(iii) The consequences for breaching disclosure obligations can be disproportionate. [154]

A Understanding what to disclose and suggested reform

As noted earlier, an ordinary person cannot be expected to know what information will influence the judgement of a prudent insurer. A consumer's obligation to interpret the meaning of the word "material" in this way is considered overly onerous.[155] The duty exists even if the questions provided by the insurer do not target the undisclosed information in question. A consumer may answer all questions provided in the questionnaire and still breach a non-disclosure clause.

To best overcome the indirect discrimination faced by sufferers of mental illness, New Zealand would benefit from following Australia and the UK by separating consumer and commercial insurance. Past reform proposals have involved retaining the duty of disclosure. However for reasons stated below, it is more strongly argued that New Zealand should follow the UK and abolish the insured's duty to disclose.

1 Existing Reform Proposals

One method of reform is for Parliament to retain the duty of disclosure, but remove the prudent insurer standard. This overcomes the problem of asymmetric information, as an insured is still obliged to provide information which the insurer might otherwise not be

[152] Coughlan, above n 12, at 1.
[153] Ministry of Business, Innovation and Employment, above n 13, at [72].
[154] At [48].
[155] At [52].

aware of. The Law Commission's 2004 report proposed this in its draft Insurance Contracts Bill.[156] The Bill defined material information to be where the insured knew, or ought to have known in the circumstances, both the information and that disclosure of the information would influence the judgement of a prudent insurer.[157] This blameworthy concept would excuse non-disclosure by an insured who did not reasonably know the information would be relevant for an insurer.

2 Adoption of the UK Approach

The "hybrid" materiality test proposed by the Law Commission incorporates the knowledge of a prudent insured with the judgement of a prudent insurer.[158] Such an approach may create some confusion for the insured. If the ultimate aim is to ease the burden placed on consumers and to ensure there is some clarity on what they are to disclose, New Zealand should adopt an approach similar to the UK.

Replacing the common law duty of disclosure with a statutory duty to take reasonable care to not make a misrepresentation encourages consumers to provide relevant information. It does so without the risk that insurers will subsequently avoid claims due to the non-disclosure of information that ordinary consumers would not have thought to be relevant.

To prevent the burden shifting too far, New Zealand would benefit from following the UK in explaining that "reasonable care" is to be determined in the light of all relevant circumstances.[159] Mirroring the UK, New Zealand's legislation should include examples of the relevant circumstances to be taken into account.[160] By including "how clear, and how specific, the insurer's questions were" as one of the necessary considerations, the law indirectly pushes the burden on to insurers to make sure they are asking the right questions.[161] The requirement of specificity prevents insurers from merely asking general

[156] NZ Law Commission Life Insurance (NZLC R87, 2004).
[157] Merkin, above n 134, at [4.65].
[158] At [4.65].
[159] Consumer Insurance (Disclosure and Representations) Act 2012 (UK), s 3(1).
[160] Section 3(2).
[161] Section 3(2)(c).

open-ended questions which flips the onus on to the insured to disclose otherwise irrelevant information.

Adopting the UK approach allows sufferers of mental illness to disclose all information that they deem relevant to the insurer's decision. The approach incentivises the insurer to ask the specific questions required to help with its decision to accept the risk. Sufferers of mental illness will be assured that if they accurately and honestly answer what is asked of them, in the insurer's questionnaire, they will not have breached any non-disclosure clauses.

B Awareness of the Duty

The power imbalance between the insurer and insured referred to in the Minister of Commerce's cabinet paper is exacerbated by the consumer's ignorance of the duty of disclosure. Currently the Fair Insurance Code requires insurers to explain what information consumers are required to disclose when applying for insurance.[162] This form of self-regulation has failed to ensure that consumers know about their duty.

If the UK approach is adopted, this issue will not be so prominent. However if the duty of disclosure is retained, consumers would benefit from a statutory requirement that insurers include a clear and comprehensible explanation of what the insured's duty is within their questionnaires.

C Disproportionate Remedies

In New Zealand, the remedy for breach of a non-disclosure clause is avoidance ab initio. This means that insurers are able to avoid a claim "even if the disclosure of the relevant facts would not have made them decline cover".[163] Avoidance for non-disclosure is inconsistent with the cancellation remedy for misrepresentation legislated for in the Contracts and Commercial Law Act 2017.[164] Furthermore, if a consumer has previously

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[162] NZ Insurance Council *Fair Insurance Code* (2016) at [9].
[163] Ministry of Business, Innovation and Employment, above n 13, at [57].
[164] Section 37(1)(a).

had an insurance contract voided, he or she may be unable to obtain future insurance. These issues suggest that the remedy for non-disclosure should be updated.

As noted in the 2008 cabinet paper, New Zealand would benefit from aligning the remedies for misrepresentation and non-disclosure.[165] If the duty of disclosure is retained, balance would be better struck by separating careless and fraudulent non-disclosure, limiting avoidance to the latter. Careless non-disclosure should not result in such damaging consequences to otherwise innocent consumers. If the UK approach is adopted, the duty of disclosure will be replaced by the duty to take reasonable care to not make a misrepresentation. In this case, allowing the insurer to cancel the contract aligns with the statutory remedy for contractual misrepresentation under s 37 of the Contract and Commercial Law Act 2017.

A more proportionate remedy combined with a positive change to the duty of disclosure will drastically reduce the damage to sufferers of mental illness who have inadvertently failed to disclose information about their mental wellbeing.

D Will the Reform be Enacted?

Scepticism regarding New Zealand's latest reform effort is forgivable, considering reform has repeatedly failed in the past. Nevertheless, the review has been undertaken early in the new Government's regime. Additionally, there is a broad consensus that change needs to be made, with the Minister of Commerce and Consumer Affairs saying that legislative change is a "pretty clear assumption".[166] With the insurance industry accepting the change is coming, consumers can be hopeful that these latest reforms will come to effect.

IX Conclusion

An insurer is entitled to choose its exposure to risk by structuring its insurance policies with blanket exclusions and non-disclosure clauses. Blanket exclusion clauses must be justified by actuarial or statistical data. *Ingram v QBE Insurance* shows that it is a breach

[165] NZ Minister of Commerce, above n 128, at [12].
[166] Coughlan, above n 12, at 1.

of human rights law to include mental illness exclusion clauses merely on impressions and preconceptions. Although the *Ingram v QBE Insurance* may not have the prospects for significant change as widely purported in the media, increasing discourse around mental illness has encouraged insurers to rethink their mental illness exclusions.

New Zealand's out-dated law around the duty of disclosure facilitates indirect discrimination towards sufferers of mental illness. Right now the Government has the opportunity to reform the law and radically reduce the overly onerous position consumers currently face. The UK's statutory reform provides a sound model for New Zealand to base its reform efforts. With the results of the Government's review still to eventuate and statutory change a real prospect, consumers should wait in hope that positive change will come soon.

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