



Prof Birgit Kuschke
University of Pretoria:
South Africa



WELCOME

All attendees
and
especially panel members

PANEL MEMBERS

1. Marco Frigessi di Rattalma (Italy)
2. Peggy Sharon (Israel)
3. Yves Thiery (Belgium)
4. Ian Enright (Australia)



Prof Marco Frigessi di Rattalma

**Professor of European Law,
University of Brescia,**

Italy



Dr Peggy Sharon

**Senior Partner
Levitan, Sharon & Co
(specialising in insurance
and reinsurance law)**

Israel



Dr Yves Thiery

Senior Associate, Curia, Brussels

**And Senior Research Fellow,
KU Leuven,**

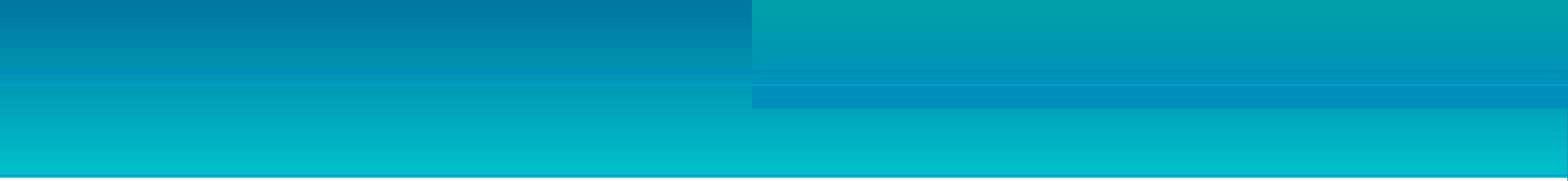
Belgium



Ian Enright

Reinsurance Group of America
And
University of Technology

Australia



Purpose of the study
was to assess
universal trends, attitudes
and the development of international law
on discrimination in insurance.



The
Belgian *Test Achats* case

**really put the cat
amongst the pigeons**

Full international report

with tables of all the answers

on the Congress CD
and will be published
on AIDA the website

29 countries responded:

Argentina, Australia, Belgium, Brazil, Chile,
Colombia, Costa Rica, Denmark, Finland, France,
Germany, Greece, Hong Kong, Hungary, Israel, Italy,
Japan, Mexico, New Zealand, Poland, Portugal,
Republic of China: Taiwan, Republic of Korea, South
Africa, Spain, Switzerland, Turkey, Great Britain and
Uruguay.

Non-discrimination

Direct derivative of the
principle of equality,
relating to the human right to dignity.

A mechanism to counter discrimination
is the enforcement of fundamental or human rights.

*Zurich Insurance Company v Ontario,
Zurich Insurance Co v Ontario Human Rights
Commission:*

A fundamental tension
between human rights law
and insurance practice exists.

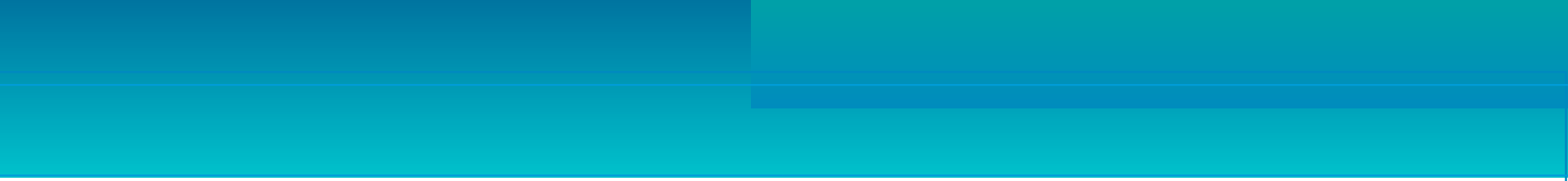
Justification for insurance discrimination

- (a) a form of personalisation of the insurance product.
- (b) maintain financially sound underwriting policies

International, regional and national laws

prohibit discrimination
on the basis of
defined prohibited or listed grounds.

- ▣ Constitutions
- ▣ General anti-discrimination laws
- ▣ Specific financial services, insurance
or general consumer laws; codes of conduct



Personal, demographic, economic,
and social characteristics
form the basis for

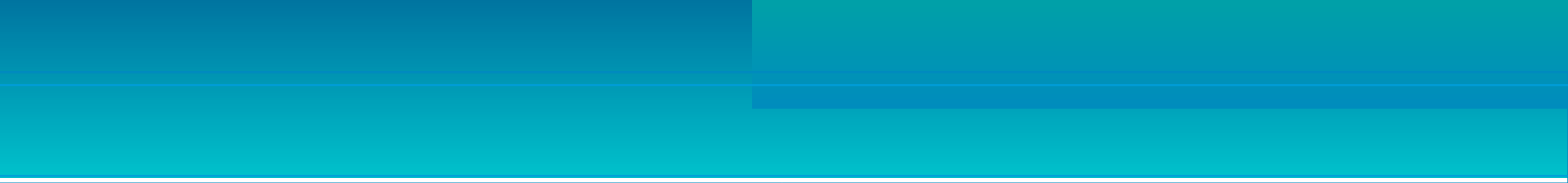
economic price and deal discrimination;
and
statistical discrimination,
based on the theory of stereotyping.



Concern raised for 'marginal cases':

Insured is temporarily lacking
in the criteria
required for proper risk differentiation

(i.e. surgically treated epilepsy; cancer remission)





A.CONSTITUTIONS

Specific discriminating factors
listed in the constitutions
of the participating countries
that could mostly affect insurance:

Age; gender/sex; and disability.

.

Other factors

nationality/ ethnic or social origin;
race/colour; language; education;
or religious beliefs;
philosophical and political beliefs;
pregnancy; marital status; sexual orientation;
culture;

Age as discriminating factor in constitutions

Only 6 constitutions

Brazil; Finland; France, Japan, South Africa, and
Switzerland

refer *specifically to age* as a discriminating factor

B. Specific anti-discrimination laws

Specific *gender* legislation
has been enacted in

Australia; Colombia; Finland; Greece; Japan; Korea;
Switzerland and extensively in Denmark.

Age regulated by separate legislation

only in Australia and Brazil.

(under review by Australian Law Reform
Committee)



Identified as
the most general factor
of discrimination,

yet
appears to be the least regulated

Acts
that focus specifically on
disability discrimination

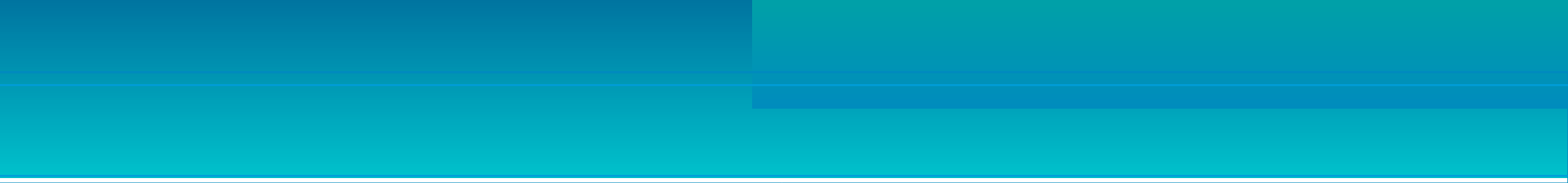
apply in

Australia; Hong Kong; Israel; Mexico and
Spain

Genetic discrimination:

Belgium, France, Israel, Poland, Portugal and
Switzerland
regulate in legislation.

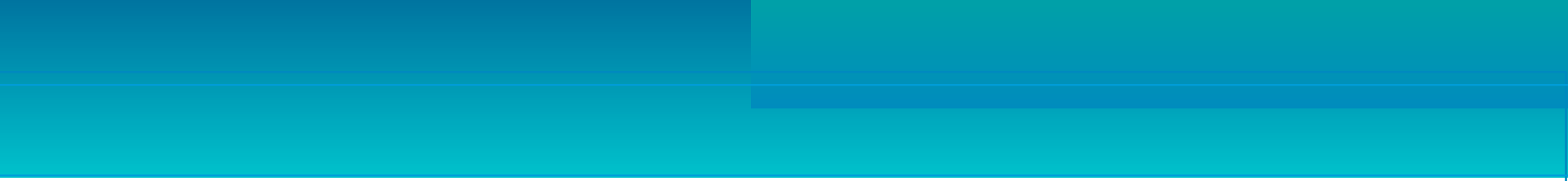
Hong Kong and Australia,
address the issue
in self-regulating codes of practice or conduct.



From the reports provided,
it appears that
the Swiss legal system
is the most extensively regulated by statute

C. Specific insurance legislation

**Very few laws
that focus specifically on insurance
discrimination**



*Gender, pregnancy
and maternity
discrimination*

Hungary, Spain, Denmark, Greece, Poland



Age discrimination

Britain

Republic of China: Taiwan



*Other discriminating factors
in insurance legislation*

Pre-existing conditions (Hong Kong)

Disability (Hong Kong)

Occupation (Switzerland)

Genetic Testing (Poland; Switzerland; Portugal)

Other insurance industry codes of conduct or rules

Only 11 were reported:

Turkey, Britain, Colombia, Hong Kong; Taiwan,
Portugal, Australia, Japan, Switzerland, Israel & Mexico

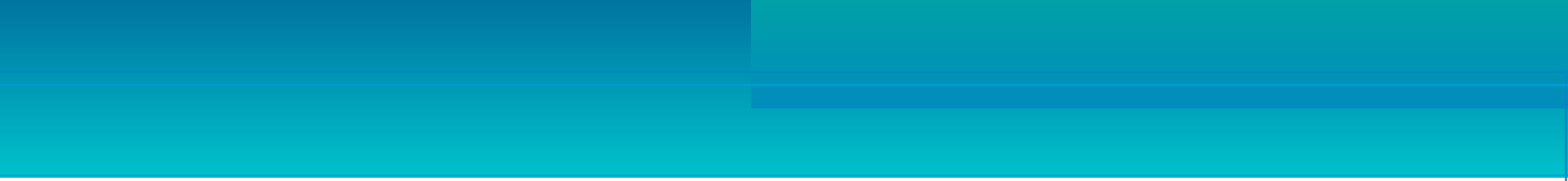


Portugal:
Insurance Institute Regulations

Insurer guarantees
application of actuarial and statistical data
will be
justified, proportionate and non-discriminatory

Insurance Supervisory Act of Switzerland

Insurer has
a duty to protect the insured
from 'abuse'.



To disadvantage
an insured or beneficiary

through unequal treatment
that cannot be justified
legally or for technical insurance reasons

Reaction to *Test Achats* judgment

Statutory enactments:

Belgium; Denmark; Finland; Greece;
Hungary; Poland; Spain; Britain;

No implementation:

Italy and Portugal



**CONCLUSIONS
DRAWN
FROM NATIONAL REPORTS**



New Zealand Society of Actuaries (Inc)

Guidance Notes:

Groupings do not necessarily introduce bias



The right to equality
does not prohibit discrimination

but rather *unfair* discrimination

Not all discrimination is necessarily unfair.

For example in South Africa:

Discrimination is from the outset
assumed or deemed to be unfair

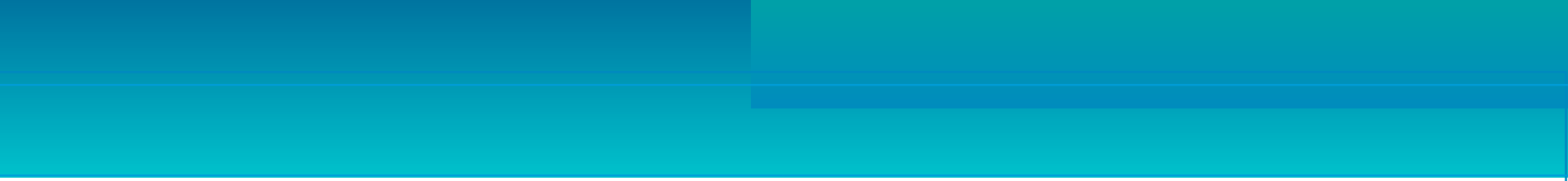
unless

it is established to be fair
in accordance with specific statutory criteria.



Promotion of Equality
and
Prevention of Unfair Discrimination Act

4 of 2000



Extensive legislation
to prohibit most forms of discrimination,
it allows for 'affirmative action'
to redress past unfair discrimination



Determine
which attribute or characteristic

has the potential
to impair the fundamental human dignity
or to affect it adversely

Yet in a comparable manner



It appears that a general opinion persists

that discrimination is not
and should *not be totally prohibited*
in all situations,
but tolerated
where it can be justified
as a proportionate means
of attaining a legitimate aim.

Swiss Report confirms:

discrimination can only be tolerated where it is

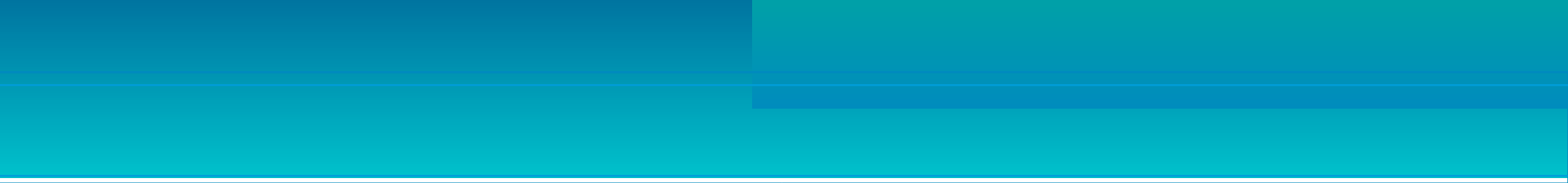
- (a) based on generally accepted actuarial methods;
- (b) does not exclude persons entirely from insurance;
and
- (c) the factors are applied equally to all applicants.



One should rather speak of

‘differentiation’
than
‘discrimination’

in the context of insurance



Should not follow
a blanket discriminatory practice,

but rather approach insurance
on a case by case basis tailored on
individualisation.



Is this approach and its implementation

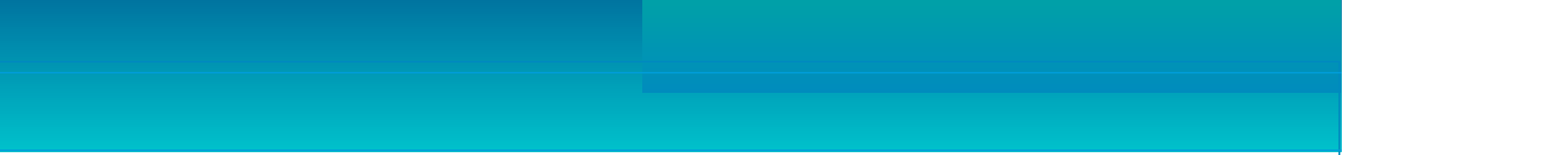
Practical, economical and attainable?

Generally accepted that
absolute exclusion
is unacceptable

based solely on
a single
general discriminatory factor
such as age.

Age or gender, for example,
not on its own the determining factor,
but

in conjunction with statistical and actuarial and
other empirical data,
be applied for risk selection and classification



In the absence
of actuarial and statistical evidence
establishing the insurance risk,

an insurer could not justify
its practice of *outright refusal*

BUT

More readily justified and acceptable :

(i) premium adjustments

(ii) differentiation in selection of benefits

(iii) policy terms and conditions

.



Valuable social function
provided by insurance

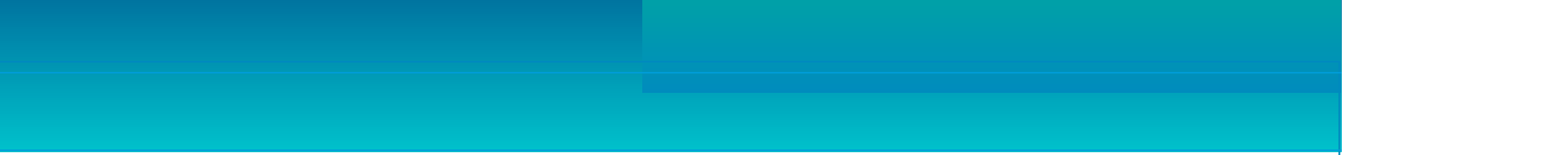
requires protection of
the solvency and profitability
of insurance companies



**In classification of risks
and setting of premiums,**

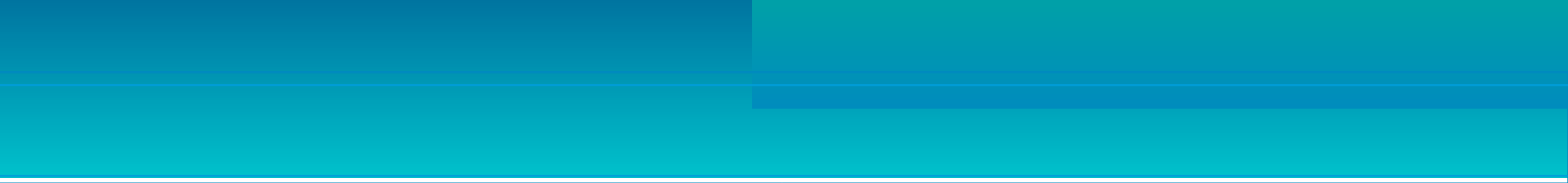
**insurance companies are more likely to
prosper**

**which is in the interests
of *all* their policyholders**



The synergy between
fundamental or human rights protection and
commercial viability

must be recognised and regulated,
by international or national legislation,
or by self-regulation measures
to strike a *balance*



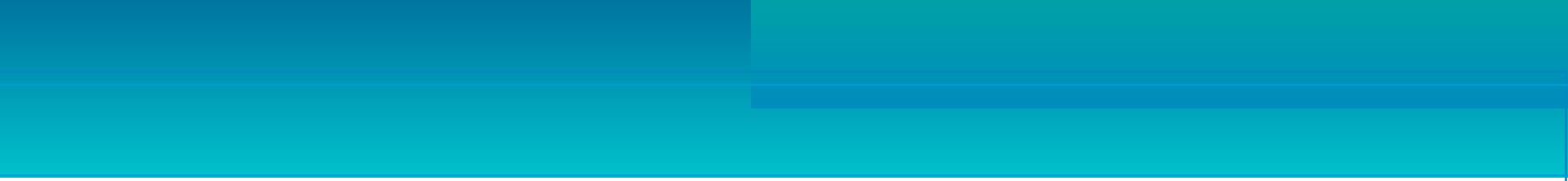
**Preventing discrimination
against one group,
leads in most situations
to counter-discrimination
of the other**



"All the other women in the office are suing you for sexual harassment. Since you haven't sexually harassed me, I'm suing you for discrimination."

In an attempt to strike the balance
one should legally *justify*
the infringement on human rights

This will be one of the issues
addressed by the panel.



Thank you
for your attendance
and
contributions