Disclosure of pre-existing conditions under the Workers’ Compensation and Rehabilitation Act 2003

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1. Introduction

Amendments to the *Workers’ Compensation and Rehabilitation Act 2003* (WCR Act) in October 2013 introduced provisions for prospective employers to obtain information from prospective workers during a recruitment and selection process, to assist with determining a candidate’s capacity to perform the inherent requirements of a role in the presence of a relevant pre-existing injury or medical condition.

It is important to differentiate that the provisions outlined in this guideline only apply to prospective workers, who are new to the organisation/business to which they are applying for employment, not to existing workers applying for internal role transfers, secondments or promotions.1

The changes to the WCR Act that came into effect on 29 October 2013 enable prospective employers to:

- Obtain a prospective worker’s consent to access their workers’ compensation claims history from the workers’ compensation regulator (Regulator).
- Give a prospective worker a written notice:
  - requesting that the prospective worker disclose any pre-existing illnesses or injuries of which they are aware, which could reasonably be aggravated by performing the outlined employment related duties
  - informing the prospective worker that a failure to disclose or a false or misleading disclosure means that the employee may not be entitled to compensation under the WCR Act for a work-related aggravation of the pre-existing illness or injury.

The WCR Act does not require prospective employers to exercise these rights; rather the rights may be exercised at the discretion of the prospective employer. Importantly, these rights operate subject to rights prospective workers have against unlawful discrimination, which is addressed in this guideline.

2. Purpose

This Guideline for Disclosure of pre-existing conditions under the *Workers’ Compensation and Rehabilitation Act 2003* provides an overview to stakeholders of the potential implications if considering changes to current human resource management, specifically recruitment processes or management of workers’ compensation claims, in light of recent amendments to the WCR Act. Although every effort has been made to provide informative and accurate advice on the implication of such changes, it is recommended that the content of this document and any subsequent changes to processes be made in consultation with legal advice. Refer to Schedule One for a summary of key points to consider.

3. Recruitment

Recruitment practices across Queensland Health are bound by the Public Service Commission Directive relating to recruitment and selection and HR Policy B1: Recruitment and Selection, or equivalent HR policy for prescribed employer Hospital and Health Services (HHSs). The flowchart below outlines the current general steps involved in the recruitment process from identifying a vacancy to advertising approval, and highlights the additional steps that should be considered before the rights conferred by the WCR Act are exercised locally. Note the following additional steps would also be required for any temporary, base-grade or other non-advertised position, which is open to external applicants.

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1 See Schedule Two: Glossary of Terms ‘prospective worker’ definition for further detail
3.1 Job demands/task analysis of a role

A job demands or task analysis outlines the essential physical and cognitive skills and attributes required to perform the role. Whereby, a role description is a list of tasks, duties and responsibilities of a role. When developing a job demands analysis the document produced must provide meaningful information which addresses the essential physical and cognitive skills. The document must be:

- relevant and job-related (taking into account the environment in which the role is performed)
- reliable and objective (i.e. not based on speculation)
- quantifiable and specific (e.g. if lifting is a requirement of the role, the maximum weight in kg required to be lifted and the frequency of occurrence should be documented).

To ensure that a job demands analysis accurately reflects the role within the organisational structure they should be reviewed:

- every two years;
- when a vacancy occurs in a position (prior to advertising)
- when organisational change significantly impacts on the role
  or
- when significant change to the role occurs.

3.2 Queensland Health information for applicants

Queensland Health has an ‘Information for Applicants’ guide that prospective workers can view online prior to submitting their application for job vacancies. This guide can be reviewed and updated by recruitment teams at the local level if considering implementing a pre-employment check/request for personal information under the WCR Act provisions.
4. Selection

Selection of candidates must be made using the merit principle, which is the extent to which a candidate’s abilities, aptitude, skills, qualifications, knowledge and personal qualities match the key attributes of the vacant position. It is recognised however that differing approaches to advertising for and selecting candidates may be undertaken depending on individual roles and localities, as such the flowchart below outlines the major steps involved from advertisement to filling the vacancy. The additional steps that should occur if using the WCR Act provisions for obtaining relevant pre-existing injury information from recruitment candidates are indicated in red throughout the flowchart.

Flowchart: Additional steps in the selection process for disclosure under the WCR Act
4.1 Recruitment under the WCR Act (additional steps)

The WCR Act additional steps are only considered to be available for applicants who are new to the organisation/business to which they are applying for work, not existing workers applying for internal role transfers, secondments or promotions. A new applicant in this regard is known as a ‘prospective worker’ under the WCR Act. (Refer to Schedule Two – Glossary of terms).

4.2 Claims history summary

A claims history summary is a document issued by the Regulator that identifies any applications for compensation and claims for damages made by a person, as well as a broad description of the relevant injury. A prospective employer can only obtain a prospective worker’s claims history summary during a recruitment process, with the consent of the prospective worker. There are strict limitations on the use and disclosure of a claims history summary obtained by a prospective employer for a recruitment process. The prospective employer must not:

- disclose the contents or information to anyone else
- give access to the document to anyone else
- use the contents or information for any purpose other than the subject recruitment process.

In accordance with the WCR Act it is an offence for a person to obtain or attempt to obtain, or use or attempt to use, a workers’ compensation document or claims history summary in any other circumstances.

4.3 Pre-existing conditions disclosure

Relevantly, the WCR Act requires a request for a prospective worker to disclose any relevant pre-existing conditions during the recruitment process to be in writing and include:

- a description of the nature of the duties associated with the role
- a warning that if the prospective worker knowingly makes a false or misleading disclosure, the prospective worker will not be entitled to statutory compensation or damages for any event that aggravates a pre-existing injury or medical condition.

It is expected the job demands/task analysis is the document that will provide the description of the relevant duties and so inform a prospective worker’s assessment of the likelihood of potential aggravation to a relevant pre-existing injury or medical condition (refer to Section 3.1).

The prospective worker can be requested to provide a signed statement disclosing any relevant pre-existing injuries or illnesses which they suspect may be aggravated by performing the duties of the role. If the prospective worker believes they have no relevant pre-existing conditions which would impact on their ability to perform the job, then a declaration should be obtained to this effect.

It is important to note that the WCR Act requires the prospective worker to be given reasonable time to comply with a request for disclosure. Further, a prospective worker is not required to make a disclosure if they are selected for the role by the prospective employer prior to having had reasonable opportunity to comply with the request.
4.4 Supplying false/misleading information

Under s571C of the WCR Act, a false or misleading disclosure refers to a prospective worker providing information, or failing to provide relevant information, that leads a prospective employer to reasonably believe the duties of the role would not aggravate the prospective worker’s pre-existing injury or medical condition. A consequence of giving a false or misleading disclosure is the subject worker will not be entitled to statutory compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition. The practical implications are discussed in further detail at section 5.

4.5 Unlawful discrimination

Using information obtained about an applicant during the recruitment process must be done in compliance with the Anti-Discrimination Act 1991 (AD Act). Unlawful discrimination may occur if personal injury information that is obtained, for example a claims history summary, is used to refuse employment to a candidate solely because:

- the person is assumed to have a predisposition to an illness or injury
- or
- it is assumed, without medical information, that the person cannot perform the role or the work will aggravate an established illness or injury.

4.6 Reasonable adjustment

Even if there is evidence an applicant would have difficulty safely performing the role, the effect of the AD Act is that a prospective employer may have to make reasonable adjustments (e.g. by providing services or modifying facilities), to enable a person with an impairment who is chosen on the basis of merit, to carry out the job demands of a position. Relevantly, prospective employers can use information about a prospective worker’s pre-existing injury or medical condition to consider:

- whether a prospective worker is able to perform the genuine occupational (inherent) requirements of the job
- whether adjustments can reasonably be made to accommodate a prospective worker’s impairment
- whether particular modifications will assist the prospective worker to perform the required work duties
- any reasonable work, health and safety issues for the prospective worker or other persons at the workplace.

Any decision on the issue of reasonable adjustment should be based on evidence and the particular circumstance of the prospective worker. Conclusions based on unsupported generalisations about impairment should be avoided. Variations between individuals with particular types of impairment, the degree of impairment experienced by the person, as well as the person’s individual characteristics, i.e. skills, qualifications and experience should be considered. Refer to Reasonable Adjustment HR Policy G3 or equivalent local HHS HR policy for more information.

5. Lodgement of a workers’ compensation claim

WorkCover Queensland’s usual practice is to consider the facts relating to the injury and event when deciding to either accept or reject an application for compensation. Relevant issues include:

- Is the claimant a worker?
• Was the application for compensation lodged within the required timeframe?
• Did the work-related event cause the injury?

An application for compensation must be made in the approved format by the claimant and must be lodged with WorkCover Queensland. The application must be accompanied by a medical certificate in the approved format.

Under s571C of the WCR Act, if a prospective worker has knowingly made a false or misleading disclosure in response to a request about any pre-existing injury or medical condition as discussed above, then the prospective worker (if they become employed) is not entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition. However, a number of relevant practical considerations arise, which are outlined in the flowchart below.

Flowchart: Additional steps in the selection process for disclosure under the WCR Act

1. Current employer response to workers' compensation claims
   - Workers' compensation claim lodged by injured worker
     - Was the employee recruited in their current role, after 29 October 2013?
       - No
       - Yes
         - Was the employee a Prospective Worker under the WCR Act during the recruitment process?
           - No
           - Yes
             - Was the employee asked to disclose any pre-existing injuries during the recruitment process and was a job task analysis provided to them?
               - No
               - Yes
                 - Was the employee still performing the same duties as originally recruited to at the time of the subject injury/illness?
                   - No
                   - Yes
                     - Obtain a copy of worker's pre-existing conditions disclosure statement retained by local recruitment/HR team during recruitment process.

2. Employer response to workers' compensation claims after WCR Act changes (additional steps to consider)
   - Employer collates following documentation and submits to WorkCover Queensland:
     - worker's pre-existing conditions disclosure (including if no disclosure)
     - copy of signed authorisation for disclosure of this information to a third party
     - employer response to claim
     - any additional supporting material relating to claim.
   - Claim determined by WorkCover Queensland for acceptance or rejection.
5.1 Pre-existing conditions disclosure statement

Personal information collected from the prospective worker at the time of recruitment and selection about any pre-existing injuries or illnesses that the prospective worker suspects will be aggravated by their performance of the role may be used under the following circumstances:

- to determine whether the prospective worker can safely perform the inherent requirements of the role:
  - in the presence of relevant pre-existing injuries or illnesses
  - giving consideration to reasonable adjustment.
- to provide WorkCover Queensland with information relevant to the determination of a workers’ compensation claim.

5.2 Information privacy

All records should be administered in accordance with the Information Privacy Act 2009 (IP Act) which requires:

- written consent by the employee to the collection and dissemination of the personal information
- an employee’s prior knowledge and understanding of the purpose for which the information is collected and to whom it may be disclosed
- agencies to have transparent policies and practices on personal information handling
- agencies to ensure the rights of employees to access information relating to themselves
- secure storage and strict confidentiality of data, with information made available only when strictly necessary.

Employers may consider reviewing their local privacy policy to ensure it covers the points outlined above as well as specifying why they are collecting the personal information, how that information may be used and stored (whether the prospective worker is employed or not), and for what timeframe.

Local selection panels may wish to review the Queensland Government Information Standard on Privacy to ensure recruitment processes are in line with those procedures, noting that all prospective workers have a right to appeal decisions made in relation to recruitment to positions.

Reference may be made to the Queensland State Archives – General Retention and Disposal Schedule for Administrative Records to ensure recordkeeping procedures align with those requirements.

6. Legislative references

The following legislative references apply in the Queensland jurisdiction and need to be considered when planning changes to current recruitment and selection practices to incorporate the new provisions outlined under s571A to s571D of the WCR Act.

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Relevant section of the Act or Regulation</th>
<th>Impact on HR recruitment practices</th>
<th>Impact on access to compensation/potential discipline arising from fraud</th>
</tr>
</thead>
</table>
| Workers’ Compensation and Rehabilitation Act 2003 (Qld) | • s571A  
• s571B  
• s571C | • s571D  
• s572A | Yes  
Yes |
7. **Additional resources**

The following resources may be useful when considering this guideline:

- Public Service Commission Directive No. 15/13: Recruitment and selection
- Recruitment and Selection HR Policy B1 (QH-POL-212)
- Reasonable Adjustment HR Policy G3 (QH-POL-210)
- Queensland Health Recruitment and Selection tools available on QHEPS - [http://qheps.health.qld.gov.au/hr/recruitment/home.htm](http://qheps.health.qld.gov.au/hr/recruitment/home.htm)
- Queensland Government Information Standard on Privacy
- Queensland State Archives – General Retention and Disposal Schedule for Administrative Records.
Guideline for Disclosure of pre-existing conditions under the Workers’ Compensation and Rehabilitation Act 2003

Schedule One – Implementation process

A summary of the key points to consider if implementing a requirement for prospective workers to disclose pre-existing conditions during a recruitment process, as provided under the Workers’ Compensation and Rehabilitation Act 2003 (WCR Act), are outlined below:

- Review local recruitment and selection policy to ensure it aligns to the WCR Act.
- Job demands/task analysis should be developed for each role being recruited.
- Documentation provided to candidates should outline the process required of candidates under the pre-employment checks section.
- Documentation will need to be developed to provide the ability for candidates to give their written consent for claims history summary to be provided by the Regulator to the prospective employer.
- Documentation needs to outline the implications that a prospective worker faces if they are found to have provided false or misleading information during the recruitment process.
- Documentation should be developed that outlines what, how, when personal information will be collected and for what purpose.
- Ensure a ‘reasonable adjustment policy’ is current and aligns to the WCR Act changes.
- Review recruitment and selection paperwork archiving and retrieval processes.

Where a line manager identifies a vacancy to be filled may benefit from implementing the disclosure provisions under the WCR Act, they must consult with their local HR unit/HR Business Partners to ensure any processes are in compliance with the WCR Act and other legislative provisions, e.g. privacy, recruitment and selection, anti-discrimination.
## Guideline for Disclosure of pre-existing conditions under the Workers’ Compensation and Rehabilitation Act 2003

### Schedule Two – Glossary of terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition / Explanation / Details</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment process</td>
<td>Any process for considering and selecting a person for employment – i.e. a recruitment and selection process.</td>
<td>Workers’ Compensation and Rehabilitation Act 2003 (s571A)</td>
</tr>
<tr>
<td>False or misleading disclosure</td>
<td>Any disclosure that would lead a prospective employer to reasonably believe that the duties that are the subject of the employment would not aggravate the prospective worker’s pre-existing injury or condition.</td>
<td>Workers’ Compensation and Rehabilitation Act 2003 (s571A)</td>
</tr>
<tr>
<td>Inherent job requirements</td>
<td>The requirements that are fundamental, intrinsic or essential to the position. These requirements must be determined objectively and based on evidence.</td>
<td>Anti-Discrimination Commission Queensland</td>
</tr>
<tr>
<td>Job demands analysis</td>
<td>Is a process used to identify the inherent job requirements but can refer specifically to the essential job characteristics which require physical, sensory and psychological capacities and also any physical, biological and chemical hazards or accident risks which may be associated with a given job.</td>
<td>Department of Health</td>
</tr>
</tbody>
</table>
| Pre-existing injury or medical condition  | For an employment process, means an injury or medical condition existing during the period of the employment process that a person suspects or, ought reasonably to suspect, would be aggravated by performing the duties that are the subject of the employment.  
   (This definition is likely to extend to resolved injuries that render the person vulnerable to re-injury such that it would impact on the prospective worker’s ability to perform the inherent requirements of the job). | Workers’ Compensation and Rehabilitation Act 2003 (s571A)              |
| Prospective employer                      | A person conducting an employment process to select a prospective worker for employment.                                                                                                                                          | Workers’ Compensation and Rehabilitation Act 2003 (s571A)              |
| Prospective worker                        | A person subject to an employment process for selection for employment. (For Queensland Health and any relevant HHS with ‘prescribed employer’ status this has the effect that:  
   (a) a Department of Health employee who is considered for employment with a HHS is a ‘prospective worker’ for the HHS  
   (b) an employee of one HHS who is considered for employment with another HHS is a ‘prospective worker’ for the new HHS  
   (c) a HHS employee who is considered for a different role within the same HHS is not a ‘prospective worker’ for the purposes of the provisions of the WCR Act.) | Workers’ Compensation and Rehabilitation Act 2003 (s571A)              |
<p>| Regulator                                 | The public service officer appointed by the Governor in                                                                                                                                                                         | Workers’ Compensation and Rehabilitation Act 2003 (s571A)              |</p>
<table>
<thead>
<tr>
<th>Unjustifiable hardship</th>
<th>Rehabilitation Act 2003 (s326)</th>
<th>Anti-Discrimination Act 1991</th>
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<tbody>
<tr>
<td>The Anti-Discrimination Act 1991 indicates the issue of whether the supply of special services or facilities would impose “unjustifiable hardship” on an employer depends on all the relevant circumstances of the case, including the:</td>
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<tr>
<td>• nature of the special services or facilities</td>
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<td>• cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged</td>
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<tr>
<td>• financial circumstances of the employer</td>
<td></td>
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<tr>
<td>• disruption that supplying the special services or facilities might cause</td>
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<td></td>
</tr>
<tr>
<td>• nature of any benefit or detriment to all people concerned.</td>
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<tr>
<td>Note: If the Queensland Civil and Administrative Tribunal finds reasonable adjustment solutions were warranted and overturns an employer’s claim of unjustifiable hardship, they may impose a variety of remedies including reinstatement where applicable, or monetary compensation for the complainant.</td>
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<thead>
<tr>
<th>WorkCover Queensland</th>
<th>Queensland Health’s workers’ compensation insurer.</th>
<th>Workers’ Compensation and Rehabilitation Act 2003 (s 380)</th>
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</thead>
<tbody>
<tr>
<td>WorkCover Queensland</td>
<td>Queensland Health’s workers’ compensation insurer.</td>
<td>Workers’ Compensation and Rehabilitation Act 2003 (s 380)</td>
</tr>
<tr>
<td>Workers’ compensation</td>
<td>Compensation for work related injury or illness, that is, amounts for a worker’s injury payable by an insurer to a worker, a dependent of a deceased worker or anyone else.</td>
<td>Workers’ Compensation and Rehabilitation Act 2003 (s 9)</td>
</tr>
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