

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

Guideline

QH-GDL-212-1:2018

1. Introduction

Amendments to the *Workers' Compensation and Rehabilitation Act 2003* (WCR Act) in October 2013 and September 2015 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 in October 2013, and were further amended on 24 September 2015², enable prospective employers to:

- Give a prospective worker a written notice:
 - requesting that the prospective worker disclose any pre-existing illnesses or injuries of which they suspect or ought reasonably to suspect, would 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 Attachment One for a summary of key points to consider.

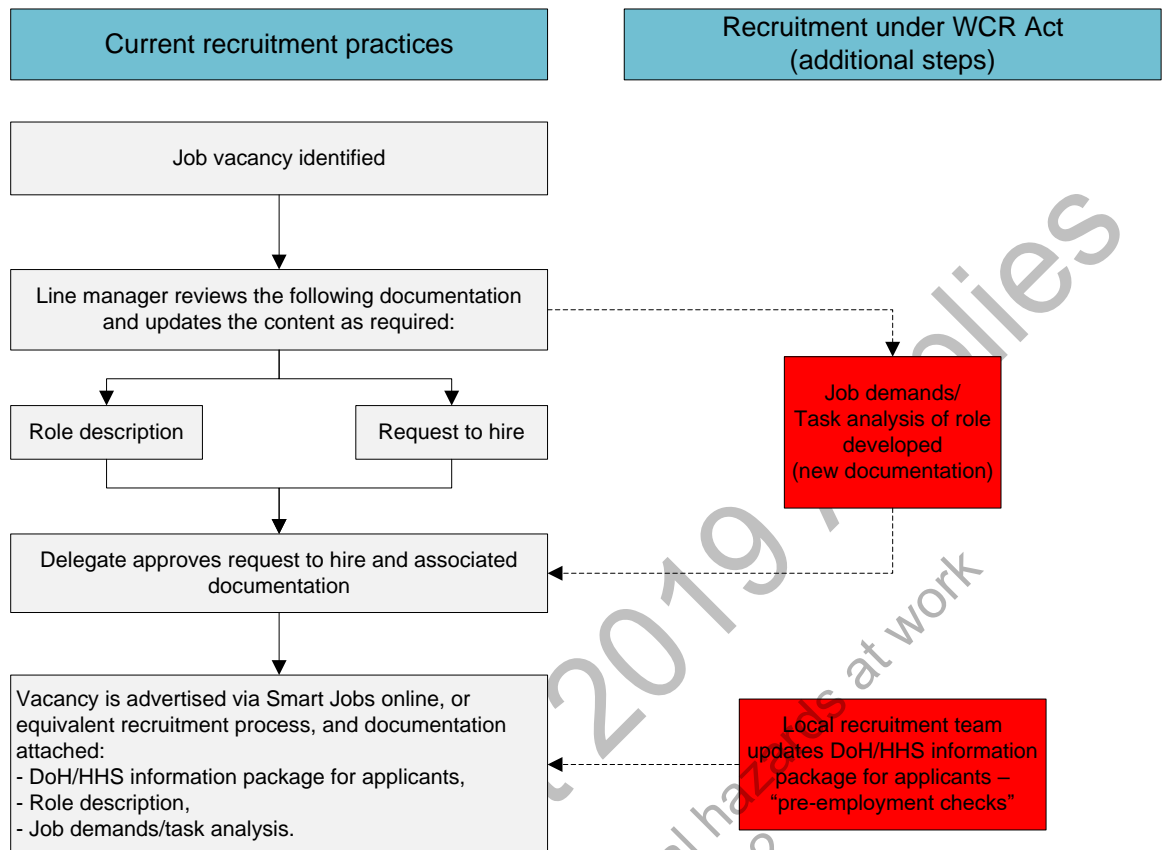
3. Recruitment

Recruitment practices across Queensland Health are bound by the Public Service Commission Directive relating to recruitment and selection and Recruitment and Selection HR Policy B1. 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.

¹ See Attachment Two: Glossary of Terms 'prospective worker' definition for further detail

² Further amendments to the WCR Act came into effect on 24 September 2015, narrowing access to a prospective worker's pre-existing conditions history by removing a prospective employer's right to access a claims history from the Workers' Compensation Regulator (formerly s 571D of pre-amended Act; repealed from the amended WCR Act in force since 24 September 2015).

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



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:

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

3.2 Queensland Health information for applicants

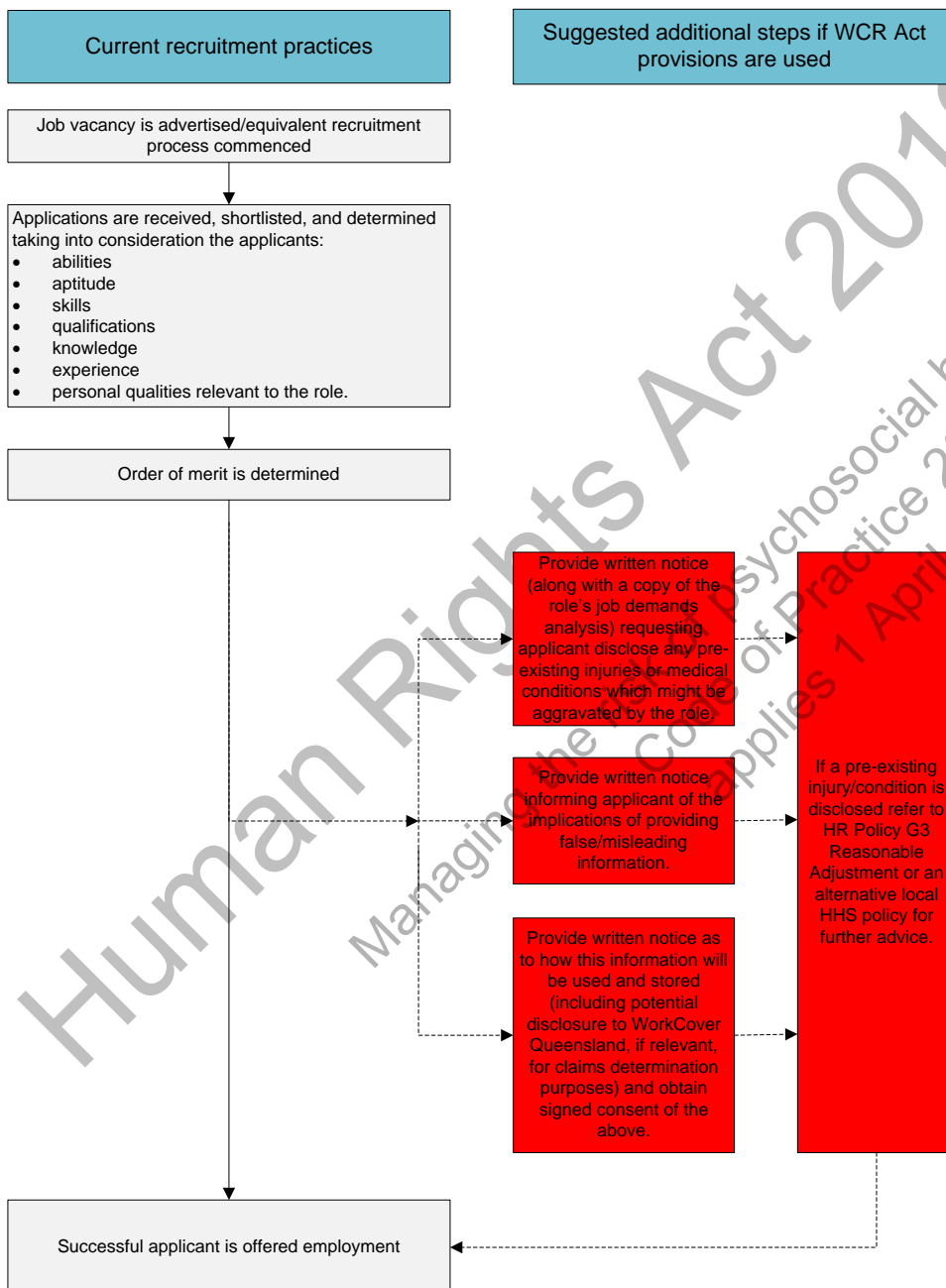
Queensland Health has an 'Information for Applicants' guide that prospective workers can view online prior to submitting their application for job vacancies. This guide can be reviewed and updated by recruitment

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 Attachment Two – Glossary of terms).

4.2 Pre-existing conditions disclosure

The WCR Act requires a prospective employer's 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 a job demands/task analysis will provide the description of the relevant duties of the role being recruited to, 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 or ought to reasonably suspect, would 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.

4.3 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 workers' compensation or to seek damages for any work-related event that aggravates the pre-existing injury or medical condition. The practical implications are discussed in further detail at section 5.

4.4 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 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.

4.5 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 circumstances 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 is required to consider the facts relating to the injury and event when deciding to either accept or reject an application for workers' compensation. Relevant issues include:

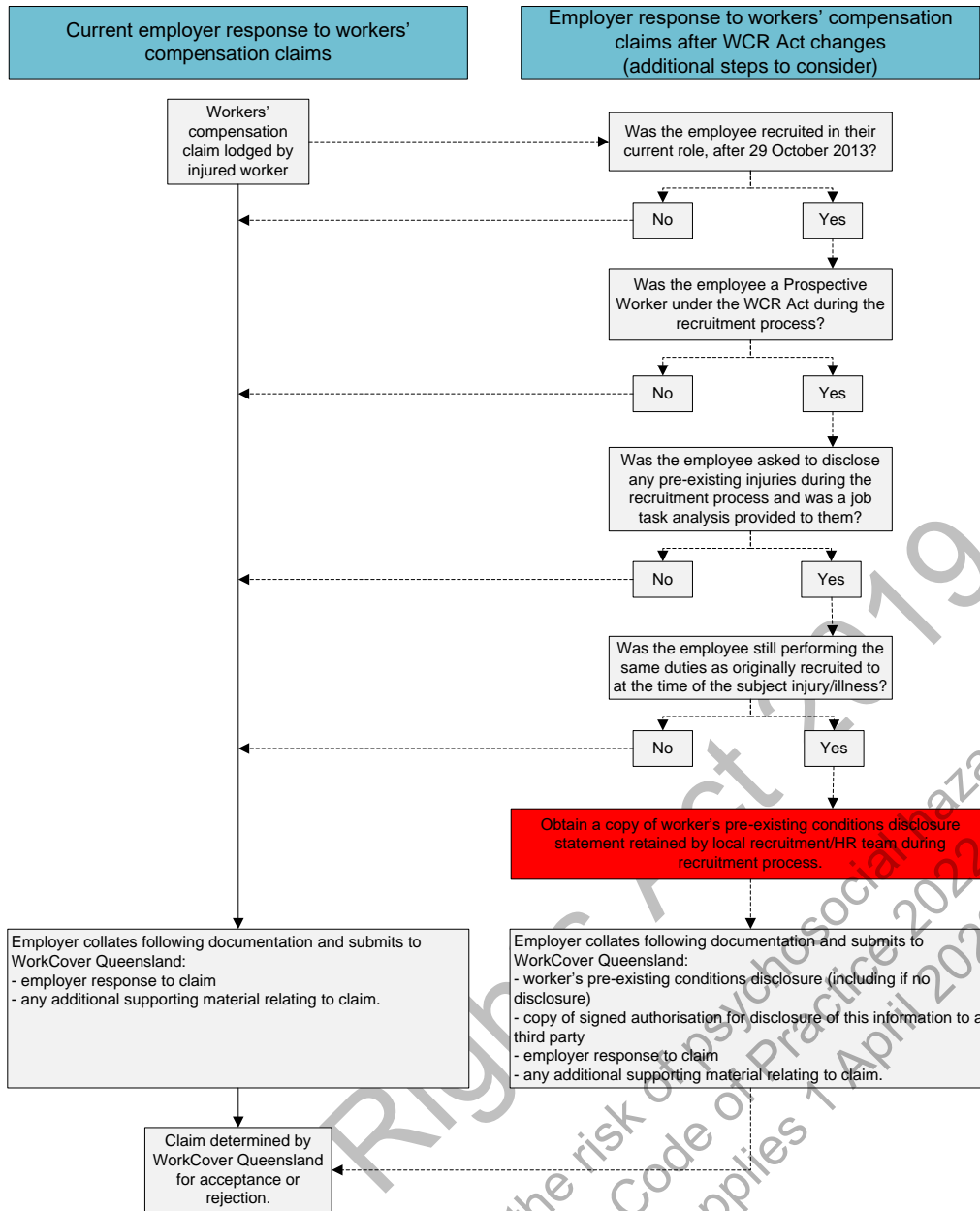
- Is the claimant a worker? (as defined by the WCR Act)
- Was the application for compensation lodged within the required timeframe?
- Did the work-related event cause the injury?

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 at the time of recruitment and selection, then the prospective worker (if they are subsequently employed by the prospective employer) is not entitled to compensation or to seek damages for any work-related 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



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 or ought to reasonably suspect, would 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. Legislation

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 provisions outlined under s571A to s571C of the WCR Act.

Legislation	Relevant section of the Act or Regulation	Impact on HR recruitment practices	Impact on access to compensation/potential discipline arising from fraud
<i>Workers' Compensation and Rehabilitation Act 2003</i> (Qld)	<ul style="list-style-type: none"> • s571A • s571B • s571C 	<ul style="list-style-type: none"> • s572A Yes	Yes
<i>Anti-Discrimination Act 1991</i> (Qld)	<ul style="list-style-type: none"> • s14 • s25 	<ul style="list-style-type: none"> • s35 • s36 Yes	No
<i>Information Privacy Act 2009</i> (Qld)	<ul style="list-style-type: none"> • IPP 11(1) (a) • IPP 11 (1) (b) 	Yes	No
<i>Public Service Act 2008</i> (Qld)	<ul style="list-style-type: none"> • s25 • s153 	<ul style="list-style-type: none"> • s187 • s188 Yes	Yes

7. Supporting documents

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://gheps.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.

Version Control

Version	Date	Comments
3.0	October 2018	Amended to reflect wording in legislation
2.0	January 2016	Amended to reflect change in legislation
1.0	March 2015	Guideline developed

Attachment 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 to.
- Documentation provided to candidates should outline the process required of candidates under the pre-employment checks section.
- 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.

Attachment Two – Glossary of terms

Term	Definition / Explanation / Details	Source
Employment process	Any process for considering and selecting a person for employment – i.e. a recruitment and selection process.	<i>Workers' Compensation and Rehabilitation Act 2003</i> (s571A)
False or misleading disclosure	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.	<i>Workers' Compensation and Rehabilitation Act 2003</i> (s571A)
Inherent job requirements	The requirements that are fundamental, intrinsic or essential to the position. These requirements must be determined objectively and based on evidence.	<i>Anti-Discrimination Commission Queensland</i>
Job demands analysis	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.	Department of Health
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).	<i>Workers' Compensation and Rehabilitation Act 2003</i> (s571A)
Prospective employer	A person conducting an employment process to select a prospective worker for employment.	<i>Workers' Compensation and Rehabilitation Act 2003</i> (s571A)
Prospective worker	A person subject to an employment process for selection for employment. For a person already employed by an accountability area* within Queensland Health, they are a prospective worker when considered for employment with a different accountability area. A person already employed by an accountability area within Queensland Health is not a 'prospective worker' under the WCR Act when considered for employment within the accountability area with which they are already employed. *Accountability area: Department of Health divisions and agencies and each HHS.	<i>Workers' Compensation and Rehabilitation Act 2003</i> (s571A)
Regulator	The public service officer appointed by the Governor in Council as the Workers' Compensation Regulator.	<i>Workers' Compensation and Rehabilitation Act 2003</i> (s326)

Unjustifiable hardship	<p>The <i>Anti-Discrimination Act 1991</i> 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:</p> <ul style="list-style-type: none"> • nature of the special services or facilities • cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged • financial circumstances of the employer • disruption that supplying the special services or facilities might cause • nature of any benefit or detriment to all people concerned. <p>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.</p>	<i>Anti-Discrimination Act 1991</i>
WorkCover Queensland	Queensland Health’s workers’ compensation insurer.	<i>Workers’ Compensation and Rehabilitation Act 2003 (s 380)</i>
Workers’ compensation	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.	<i>Workers’ Compensation and Rehabilitation Act 2003 (s 9)</i>