ANTI DISCRIMINATION COMMISSION QUEENSLAND

Submission

to

Finance and Administration Committee

Inquiry into the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015*

by the

Anti-Discrimination Commission Queensland

27 July 2015

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Introduction

1. The Anti-Discrimination Commission Queensland (Commission) is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991*.

2. The functions of the Commission include promoting an understanding, acceptance and public discussion of human rights in Queensland, and dealing with complaints alleging contraventions of the *Anti-Discrimination Act 1991* and of whistle-blower reprisal. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.

3. The Commission has been dealing with complaints of discrimination and sexual harassment for over twenty years. Our work also includes engaging with stakeholder groups, providing training, and receiving feedback on human rights issues such as discrimination in workplaces and applying for work.

4. The highest number of complaints the Commission deals with is consistently in the work area, and impairment is consistently the attribute with the highest number of complaints across all areas. In the 2013 to 2014 reporting period, 64% of complaints accepted by the Commission were associated with work, 35% alleged impairment discrimination in work, and 4% alleged requests for unnecessary information in the work area.

5. This submission is based on our experiences and knowledge acquired in carrying out our functions, and focuses on the provisions relating to access to documents and information.

Executive summary

6. The Commission supports restoring the limitation on access to claims histories by removing the right of prospective employers to obtain from the Regulator the claims histories of job applicants.

7. The right of the insurer or document holder to refuse to provide a workers' compensation document where there is suspicion it is intended for an unlawful purpose, should also be restored.

8. The Commission recommends amendment of sections amending sections 571A to 571C to make it clearer that the obligation to disclose relates to injuries or medical conditions that are in existence during the recruitment process.

Background

Pre-2013 amendments to the *Workers' Compensation and Rehabilitation Act 2003*

9. In addition to prohibiting discrimination on the basis of impairment and other attributes in areas of activity such as work, the *Anti-Discrimination Act 1991* (AD Act) also prohibits requesting information on which discrimination might be based.[1] Requests for unnecessary information occur mostly in applying for work.[2]

10. Before the 2013 amendments to the Workers Compensation and Rehabilitation Act 2003 (WCAR Act), it was settled law that job applicants should not be asked in a blanket way about their medical history, however it was lawful to enquire whether any special services or facilities might be required, and whether any medical condition might impact their ability to perform the essential components of the position. The Commission publishes a fact sheet called 'Incapacity and work' to assist both employers and employees in managing illness and injury in the work area.[3]

[1] *Anti-Discrimination Act 1991*, section 124, Unnecessary information.
[2] For an example, see *Willmott v Woolworths Ltd* [2014] QCAT 601, where job applicants were required to provide their date of birth and gender, and to upload documents such as a birth certificate or passport to prove their right to work in Australia.
[3] http://www.adcq.qld.gov.au/resources/brochures-and-guides/fact-sheets/incapacity-and-work.

11. There are also a number of cases under the AD Act decided by the tribunal relating to information from pre-employment medicals, particularly in the early operation of the AD Act.[4]

12. In 2005 the WCAR Act was amended and introduced an offence for a person to seek to obtain or use a workers' compensation document (e.g. a claims history) in an employment selection process, or in deciding whether the employment of the worker is to continue. This provision (section 572A) was, and remains, consistent with the AD Act prohibition on seeking information on which unlawful discrimination might be based.

13. The prohibition on access to documents was strengthened by an amendment to section 572 allowing the insurer to refuse to provide a document if it suspected on reasonable grounds that the document is required for a purpose prohibited by section 572A.

2013 amendment of chapter 14 of the *Workers' Compensation and Rehabilitation Act 2003*

14. The 2013 amendments to the WCAR Act included the introduction of a new part 1 to chapter 14, headed 'Information and documents about pre-existing injuries and medical conditions of prospective workers. New sections 571A to 571C impose an obligation on job applicants to disclose, if asked by the employer, any existing medical conditions or injuries that might be aggravated by performing the duties of the position. The new section 571D enables an employer to obtain a job applicant's claims history.

15. Also, the provision enabling an insurer to refuse to provide a document if it suspected the document was required for a prohibited reason[5] was removed.

[4] See for example, *Flannery v O'Sullivan* [1993] QADT 2; *Gehrig v McArthur River Mining Pty Ltd* [1996] NTADComm 4; *Stevens v Queensland Police Service* [1998] QADT 6; *MacDonald & Ors v Queensland Rail* [1998] QADT 8; *Hobbs v Anglo Coal (Moranbah North Mgt) Pty Ltd & Hendry* [2004] QADT 28.

[5] *Workers' Compensation and Rehabilitation Act 2003*, section 572(3)(d).

16. The Bill was introduced and passed quickly, with the amendments to chapter 14 commencing on 29 October 2013. The Commission responded quickly and produced fact sheets to assist employers, workers and other stakeholders understand how these new provisions operated with the AD Act. The Commission was able to assist attendees of the QCOMP Expo and joined with WorkCover in providing information through a webinar. The fact sheets were also made available from the WorkCover web pages dedicated to the 2013 amendments. The detailed fact sheet accompanies this submission.

17. The 2013 amendments operate with the AD Act as follows:

    - an employer may ask a job applicant to disclose any existing medical conditions or injuries that might be aggravated by performing the duties of the position (WCAR Act).
    - the employer can use the information to consider reasonable adjustments for the applicant to perform the job, and whether any special services or facilities would cause unreasonable hardship for the employer (AD Act).
    - the employer can only refuse to employ the applicant because of the medical condition or injury if the applicant is not able to perform the essential components of the job (AD Act).
    - the employer cannot ask the applicant to disclose past medical conditions or injuries (AD Act).
    - if the applicant has an existing medical condition or injury and knowingly makes a false or misleading disclosure, the applicant is not entitled to compensation or damages for any event that aggravates the medical injury or medical condition, if he is employed under the employment process (WCAR Act).
    - an employer may obtain, with the applicant's consent during a recruitment process, a copy of the applicant's worker's claims history summary.

- the claims history can only be used during the recruitment process (WCAR Act) to consider reasonable adjustments, special services or facilities, whether the applicant can perform the essential components of the job, and any reasonable work health and safety issues (AD Act).

Access to documents and information

Claims histories and workers' compensation documents

18. The Commission supports the proposed removal of the ability of an employer to obtain the claims history of a job applicant, by removing section 571D of the WCAR Act. The claims history has limited use and value to an employer in the recruitment process. The limited use is far outweighed by the potential misuse of the information to the detriment of the applicant.

19. Also, the right of the insurer to decline to provide a workers' compensation document on suspicion of it being required for a prohibited reason, should be restored. This involves re-instating subsection 572(3)(d). Before the 2013 amendments, section 572 provided:

> **572 Claimant or worker entitled to obtain certain documents**
>
> (1) A person who is a claimant or worker for any provision of this Act may, by written notice, ask the Authority or the insurer (the document holder) to give the person a copy of documents required to be kept by the document holder that relate to the person's application for compensation of claim for damages.
>
> (2) The document holder must give the claimant or worker a copy of the documents requested within 20 business days after the claimant or worker gives the notice, unless the document holder has a reasonable excuse for not doing so.
>
> (3) Without limiting subsection (2), it is a reasonable excuse for the document holder not to give the document or part of the document if —
>
> (a) the document or part is protected by legal professional privilege; or
>
> (b) the document or part would alert the claimant or worker to the document holder's reasonable suspicion of fraud in relation to the application for compensation or claim for damages; or

> (c) the document holder believes the matter contained in the document would meet the requirements of the *Right to Information Act 2009*, schedule 3; or
>
> (d) the document holder suspects on reasonable grounds that the claimant or worker requires the document for a purpose prohibited by section 572A.

20. The rationale for deleting subsection 572(3)(d) is not apparent from the Explanatory Notes, and was not subject to parliamentary debate.

Disclosing existing medical conditions and injuries during recruitment

21. Sections 571A to 571C of the WCAT Act provide a mechanism for the notification, during a recruitment process, of existing injuries or medical conditions that might be aggravated by performing the duties of the position. Section 571A is a definition section, the obligation to disclosure is provided for in s571B, and section 571C provides for the consequence of a false or misleading disclosure. The consequence of knowingly making a false or misleading disclosure is loss of entitlement to compensation or damages in respect of any event that aggravates the injury or medical condition.

22. The provisions refer to 'pre-existing injury or medical condition'. The obligation in section 571B provides:

> (1) If requested by a prospective employer, a prospective worker must disclose to the prospective employer the prospective worker's pre-existing injury or medical condition, if any.
>
> …

23. Without the definitions in section 571A, the obligation appears to relate to any pre-existing injury or medical condition. However, 'pre-existing injury or medical condition is defined for the purpose of the provisions as follows:

> ***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 the subject of the employment.

24. The expression 'employment process' is defined to mean any process for considering and selecting a person for employment.

25. In the Commission's experiences, both employers and employees have misunderstood the obligation to relate to any injury or medical condition that the job applicant has experienced in the past. This misunderstanding has led to applicants not being offered the job and, in some cases, complaints to the Commission.

26. In order to achieve greater clarity and understanding for employers and employees, the Commission suggests:

    (a) the word 'pre-existing' should be replaced with either 'existing' or 'current'; and

    (b) the meaning of pre-existing injury or medical condition be incorporated into the body of the obligation to disclose provision.

27. These suggested measures should also assist in balancing the interests of workers in having a fair chance at obtaining employment even though they may have past or current injuries or medical conditions, and the interests of employers in being able to recruit people who are able to perform the essential elements of the job.

28. The Commission's preferred approach is that the request for disclosure is only made after the applicant is offered the position. This then reduces the potential for discrimination, whether conscious or unconscious, in the worker not being considered for the position. It is also more consistent with the objects, purposes and provisions of the *Anti-Discrimination Act 1991*.

29. The Commission thanks the Committee for the opportunity to make this submission.

FACT SHEET Medical information & recruitment

Claims histories, injuries & medical conditions existing during the recruitment process

What this fact sheet is about

This fact sheet is about the rights and responsibilities of people applying for work and prospective employers in relation to pre-existing injuries and medical conditions, as well as claims histories. It explains how the *Anti-Discrimination Act 1991* and the *Workers' Compensation and Rehabilitation Act 2003* work together about these matters.

Queensland legislation

Unless there is a valid exemption under the *Anti-Discrimination Act 1991*, it is unlawful to make recruitment decisions based on a person's impairment, perceived impairment or their previous or current injuries or medical conditions.

Relevant exemptions (discussed in detail later in this factsheet) are:

- a worker not being able to perform the genuine occupational requirements for a position;
- an employer fixing reasonable terms for a person with restricted capacity;
- an employer being exposed to unjustifiable hardship in making adjustments or providing special services or facilities to enable a worker to perform the job; and
- an employer making reasonable decisions to protect the health and safety of people at a place of work.

Generally, it is unlawful for an employer or recruitment agent to ask for information on which unlawful discrimination might be based.

However, under the *Workers' Compensation and Rehabilitation Act 2003* a prospective employer can:

- give a written request to a job applicant to disclose any pre-existing injury or medical condition that might be aggravated by performing the duties of the job;
- ask a job applicant to consent to the prospective employer obtaining a copy of the applicant's claims history from the Workers' Compensation Regulator.

Using this information about an applicant in the recruitment process must be done in compliance with the *Anti-Discrimination Act*. A valid exemption must apply in order to exclude a person from the recruitment process based upon this information.

A person who has been unfairly excluded from employment on the basis of an injury or medical condition has a right to make a complaint of discrimination under the *Anti-Discrimination Act*.

The definition of 'prospective employer' is wide enough to include a recruitment agent.

Pre-existing injury or medical condition

Pre-existing injury or medical condition means:

- an injury or medical condition that exists during the period of the recruitment process;

that

- a person suspects, or should suspect, would be aggravated by performing the duties of the job.

Requests to disclose

A request to disclose must be in writing and set out:

- the duties of the job; and
- a warning that if the applicant knowingly makes a false or misleading disclosure, the applicant (or other claimant) will not be entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition.

A comprehensive description of the job duties and the environments in which the duties are to be performed, will better assist an applicant to assess the likelihood of aggravating a pre-existing injury or medical condition.

The applicant must be given a reasonable time to comply with the request. There is no obligation for the applicant to make a disclosure if they are engaged before having a reasonable opportunity to comply with a request.

Disclosures

Disclosures should be made in writing, and the applicant and the employer should keep a copy of both the request and the disclosure for their own records.

Non-disclosures

Non-compliance could result in the applicant being excluded from the recruitment process.

Where a valid request has been made, an applicant must disclose any pre-existing injury or medical condition.

In some circumstances, not disclosing a pre-existing injury or medical condition that would be aggravated by the duties of the job might constitute a false or misleading disclosure.

False or misleading disclosures

A false or misleading disclosure is doing or saying anything that would lead a prospective employer to reasonably believe that the duties of the job would not aggravate the applicant's pre-existing injury or medical condition.

A consequence of giving a false or misleading disclosure is, the applicant (or other claimant) will not be entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition.

Meaning of compensation and damages

'Compensation' is the amounts for earnings and medical expenses payable by WorkCover Qld (or other insurer) for injuries sustained by a worker.

'Damages' is compensation for injury to a worker arising out of any other liability of an employer (e.g. negligence, breach of contract).

Compensation under the Anti-Discrimination Act

A range of outcomes is available under the *Anti-Discrimination Act*, including compensation for loss or damage. Such compensation might be excluded where the conduct aggravates a pre-existing injury or medical condition that was not disclosed in response to a proper request during the recruitment process.

Claims histories

A claims history summary is a document issued by the Workers' Compensation Regulator that states:

- the number of applications for compensation made by the person;
- the number of claims for damages made by a person; and
- the nature of the applications and claims.

A prospective employer can **only** obtain a person's claims history summary:

- during a recruitment process; and
- with the consent of the person.

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.

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; or
- use the contents or information for any purpose other than the purpose of the recruitment process.

It is an offence for the prospective employer to use or disclose the contents or information in any other way.

Using information in a claims history summary and/or disclosure

The *Anti-Discrimination* Act provides specific exemptions in the area of work. Claims history information and disclosures of injury or medical conditions may be used to consider :

- whether an applicant is able to do the genuine occupational requirements of the job;
- whether adjustments can reasonably be made to accommodate an applicant's impairment;
- whether special terms are appropriate for the person to do the work; and
- any reasonable work health and safety issues.

Each of these considerations is explained below.

Genuine occupational requirements

A genuine occupation requirement is an aspect that is essential to the position.

The issue of what is an occupational requirement and whether it is genuine is a wholly factual question.

To determine whether a requirement is essential to the position, it is necessary to look at the factual circumstances and consider whether or not the position would be effectively the same without the requirement.

It is not enough to simply label aspects of the job as genuine occupational requirements. Take care in differentiating between the requirement and the means of performing the task (e.g. imposing an eye sight standard when the task can be safely performed using glasses or contact lenses).

Reasonable adjustment

Consider whether any adjustment or changes can be made to enable the worker do the job. This might include:

- physical aids or adjustments to the work environment;
- changes to the hours of work or number of hours worked;
- incorporating breaks;
- changes to the duties to be performed.

Adjustments should be made to accommodate an impairment unless it would amount to an unjustifiable hardship on the employer.

Unjustifiable hardship

Whether there is unjustifiable hardship depends on the circumstances of the particular case. What might be unjustifiable hardship for one person might not necessarily be unjustifiable hardship for another.

Some of the things to consider include:

- the nature of the special services or facilities required to accommodate the impairment;
- the cost of supplying any special services or facilities, and the number of people who would benefit or be disadvantaged;
- the financial circumstances of the employer;

- any disruption that making the adjustment might cause;
- the nature of any benefit or detriment to all of the people in the particular case.

Special terms for a job

If a worker has restricted capacity to do work genuinely and reasonably required for the position, or requires special conditions in order to be able to do the work, the employer may fix reasonable terms for that worker.

For example, the employer might restrict the duties the worker can perform or limit the number of hours to be worked. Any special terms must be reasonable, taking into consideration the nature of the impairment and the work that the position entails.

Work Health & Safety

An employer has a responsibility to safeguard its employees from unreasonable risks. It is permissible to do an act that is reasonably necessary to protect the health and safety of people at a place of work.

For this exemption to apply there must be an unacceptable risk and the action must relate to that risk. The act must be something a reasonable person would do to protect the health and safety of people at a place of work.

An employer needs to investigate whether there are risks, and assess the level of any risks. Any action taken must be reasonable in relation to the risk. It is not enough to simply follow an organisation's policy such as a health assessment guideline or standards.

Case examples

These examples are from decided cases and other published information. It is important to remember that each case must be dealt with on its own facts.

- Physical work was not an inherent part of a Business Development Manager's job with a building materials company, and the company unlawfully discriminated against an applicant by withdrawing the job offer when a long-term shoulder injury was disclosed. Minor adjustments could have been made to avoid the applicant having to perform physically demanding work.[1]
- It was unlawful discrimination to withdraw an offer of employment based on a history of back pain disclosed in a pre-employment general medical assessment, when the applicant could safely perform the duties of an occupational nurse at a mine site.[2]
- Behaving to a professional standard and following reasonable directions were inherent requirements of the job of an Australian Federal Police officer. Providing constant and intensive supervision of an officer would cause undue hardship, and it was not unlawful to terminate the officer who had developed a personality disorder which caused behavioural problems after suffering a head injury.[3]
- Being able to see colours was an inherent requirement of a fire-fighter.[4] However, a train driver who could not see the colour red could safely drive a train because the safety issue also involved the position of warning signals.[5]
- Where it was not possible to organise the work of an animal refuge to ensure a pregnant worker did not come into contact with cats or cat faeces and the whole of the refuge was a high risk for toxoplasmosis infection, work at the refuge would pose an unacceptable health hazard for the pregnant worker and her unborn child.[6]

Case examples continued

- It was not a genuine occupational requirement that each and every police officer be able to drive a motor vehicle at all times. In the particular case where epilepsy was well managed, the risk of seizure was low and the likely consequence of a seizure was that the officer would have physical warning beforehand, it was found that the officer would not jeopardise the safety of others.[7]

Endnotes

1.Enforceable undertaking given by James Hardie Australia Pty Ltd to the Fair Work Ombudsman on 17 May 2012

2. *Gehrig v McArthur River Mining Pty Ltd* [1996] NTADComm 4

3. *Gibbons v Commonwealth of Australia* [2010] FMCA 115

4.*Van der Kooij v Fire & Emergency Services of WA* [2009] WASAT 221

5.*MacDonald & Ors v Queensland Rail* [1998] QADT 8

6.*Parker v North Queensland Animal Refuge* [1998] QADT 4

7. *Stevens v Queensland Police Service* [1998] QADT 6

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