**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**

Contents

[Introduction 3](#_Toc425773000)

[Executive summary 3](#_Toc425773001)

[Background 4](#_Toc425773002)

[Pre-2013 amendments to the *Workers’ Compensation and Rehabilitation Act 2003* 4](#_Toc425773003)

[2013 amendment of chapter 14 of the *Workers’ Compensation and Rehabilitation Act 2003* 5](#_Toc425773004)

[Access to documents and information 7](#_Toc425773005)

[Claims histories and workers’ compensation documents 7](#_Toc425773006)

[Disclosing existing medical conditions and injuries during recruitment 8](#_Toc425773007)

# 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

1. 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.
2. 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.
3. 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*

1. 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]](#footnote-1) Requests for unnecessary information occur mostly in applying for work.[[2]](#footnote-2)
2. 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]](#footnote-3)
3. 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]](#footnote-4)
4. 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.
5. 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*

1. 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.
2. Also, the provision enabling an insurer to refuse to provide a document if it suspected the document was required for a prohibited reason[[5]](#footnote-5) was removed.
3. 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.
4. 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

1. 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.
2. 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 —

1. the document or part is protected by legal professional privilege; or
2. 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
3. the document holder believes the matter contained in the document would meet the requirements of the *Right to Information Act 2009*, schedule 3; or
4. the document holder suspects on reasonable grounds that the claimant or worker requires the document for a purpose prohibited by section 572A.
5. 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

1. 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.
2. 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.

…

1. 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.

1. The expression ‘employment process’ is defined to mean any process for considering and selecting a person for employment.
2. 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.
3. In order to achieve greater clarity and understanding for employers and employees, the Commission suggests:
	1. the word ‘pre-existing’ should be replaced with either ‘existing’ or ‘current’; and
	2. the meaning of pre-existing injury or medical condition be incorporated into the body of the obligation to disclose provision.
4. 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.
5. 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*.
6. The Commission thanks the Committee for the opportunity to make this submission.
1. *Anti-Discrimination Act 1991*, section 124, Unnecessary information. [↑](#footnote-ref-1)
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. [↑](#footnote-ref-2)
3. http://www.adcq.qld.gov.au/resources/brochures-and-guides/fact-sheets/incapacity-and-work. [↑](#footnote-ref-3)
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. [↑](#footnote-ref-4)
5. *Workers’ Compensation and Rehabilitation Act 2003*, section 572(3)(d). [↑](#footnote-ref-5)