

Mr Mick Gentleman MLA
Minister for Workplace Safety and Industrial Relations
ACT Legislative Assembly

CC Mr Michael Young
Executive Director
Workplace Safety and Industrial Relations Division
Chief Minister, Treasury and Economic Development Directorate

Dear Mr Gentleman

Human rights compliance of the *Certificate of Capacity for Work*

Thank you for your letter of 26 October 2015, providing additional information to assist our examination of the *Certificate of Capacity for Work*. In your referral letter of 22 September 2015, you asked for our advice as to whether the *Certificate of Capacity for Work* is consistent with the ACT's privacy, medical records and human rights laws. Our advice is set out below. As requested, we have based our advice on the latest version of the *Certificate* and related Comcare guidance material, which you supplied to us on 26 October 2015. We understand that the Government has been liaising with Comcare on this issue and that various improvements have been made to the forms in question, which have addressed many of the initial concerns raised by stakeholders.

Background

The *Certificate of Capacity for Work* is a new medical certificate that is recommended for use by Comcare, which is the public sector workers' compensation insurer as regulated by the *Safety, Rehabilitation and Compensation Act 1988* (Cth). General practitioners providing medical certificates for ACT public sector workers are therefore likely to use the *Certificate* to certify whether a worker is capable of performing duties following a work-related injury, which will then be provided to the employer and/or the workers' compensation insurer. We also understand that Comcare and other stakeholders, including the Capital Health Network and the Royal Australian College of Physicians, have asked you to approve the form for use in the private sector workers' compensation scheme under the *Workers Compensation Act 1951* (ACT). They are of the view that harmonisation of the relevant forms would create administrative efficiencies and improve health outcomes for injured workers.

In your initial referral letter, you advised that union representatives were concerned that the new *Certificate* would encourage medical practitioners to provide more information than the employer or insurer should reasonably receive in relation to a compensable injury, thereby breaching human rights and privacy laws. We also received a submission from UnionsACT on this matter. In particular, UnionsACT was concerned that:

- The certificate could divulge medical information to employers for non-work related illness, including short absences. In their view, earlier iterations of the form did not clearly indicate the distinction between information sought for compensatory and non-compensatory injuries, which could result in personal medical information being disclosed that is not relevant to an employer or an employee's return to work.
- The certificate would be stored by employers on the employee record, and because employee records are exempt from the *Privacy Act 1988* (Cth), personal medical information would be accessible to anyone with access to the employee record.
- The certificate encourages doctors to include medical and treatment information irrespective of whether this was required for the design of safe return-to-work duties.
- Earlier versions of the certificate did not include adequate information and arrangements to ensure the employee was giving informed consent for the release of their medical information, and whether later versions of the form was sufficient in this regard.

Human rights implications

Respecting the confidentiality of personal medical information is a fundamental aspect of the right to privacy, which is guaranteed in section 12 of the *Human Rights Act 2004* (HR Act). Section 12 of the HR Act prohibits arbitrary or unlawful interferences with an individual's privacy, and involves:

- the right to respect for private and confidential information, particularly the storing, use and sharing of such information; and
- the right to control the dissemination of information about one's private life.

The HR Act, however, recognises that few rights are absolute and in accordance with established international human rights norms, reasonable limits may be placed on the right to privacy with the aim of balancing competing interests. Limitations on human rights must meet the proportionality test under section 28 of the HR Act. To be consistent with the HR Act, therefore, any limitation of the right to privacy must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective that is sought to be realised. In essence, the inquiry under s 28 of the HR Act is two-fold:

- whether the limitation serves an important and significant objective; and
- whether there is a rational and proportionate relationship between that objective and the limitation on rights.

Under section 31 of the HR Act, international law and jurisprudence may be considered when interpreting human rights.

We note that the Comcare scheme, which is utilised by the ACT public sector, is underpinned by the Commonwealth *Safety, Rehabilitation and Compensation Act 1988*, and is therefore not directly

subject to the HR Act, which only applies to Territory laws.¹ However, should the *Certificate of Capacity for Work* be approved for use under the *ACT Workers Compensation Act 1951*, the HR Act will be of direct relevance. As a legislative instrument, any limitations of rights authorised by the *Certificate* will be subject to the reasonable limits test in s 28 of the HR Act.

Important and significant objective

The two workers' compensation schemes operating in the ACT, pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (Cth) for ACT public sector workers, and the *Workers Compensation Act 1951* (ACT) for ACT private sector workers, are aimed at providing rehabilitation and compensation for injured employees. The legislation underpinning both schemes requires the employer and insurer to provide suitable duties and/or workplace modifications that allow the worker to return to duty as soon as possible. You advised that this requires employers and insurers to give consideration to the types of work that a person is fit to perform:

Proper consideration in this respect cannot be limited to the medical symptoms arising from the compensable injury alone. Rather, consideration must be given to the skills, experience, physical and medical capabilities of the worker relative to the work available. Failure to consider these aspects potentially puts the health of the injured worker and others at risk.²

We consider that the provision of appropriate medical, rehabilitation and return to work services to improve the health, recovery and return-to-work outcomes of injured employees is an important and significant objective.

Rational and proportionate connection

Section 28 of the HR Act requires that even where a limitation on the right to privacy pursues a legitimate objective, it must still be shown to have a rational and proportionate connection to that objective. Relevant factors include:

- whether the information disclosed is limited to that which is necessary for managing the claim and assisting with return to work services;
- whether the worker gives informed consent to the disclosure; and
- whether there are sufficient protections for safeguarding the information.

Necessary information: Proportionality requires that the least restrictive means be employed for achieving the stated objectives. A key concern that was raised with regard to the *Certificate of Capacity for Work* was that it may encourage medical practitioners to disclose a broader range of

¹ ACT public sector employers that utilise the Comcare scheme are nevertheless subject to conduct obligations under s 40B of the HR Act, which requires public authorities to act consistently with human rights and to give proper consideration to human rights when making decisions, unless the law requires the public authority to act in a particular way or the law cannot be interpreted to be consistent with human rights.

² Letter from Mr Mick Gentleman MLA, Minister for Workplace Safety and Industrial Relations, 26 October 2015.

medical information than was necessary for an insurer or employer to determine the types of work that a worker is fit to perform.

We have examined the updated *Certificate* and related guidance material, and consider that these concerns have been mostly addressed. In particular, we note that the amended guidance material provides useful signposts to ensure that medical practitioners using the form are aware of the types of information that would be relevant to include in the form. These improvements go some way towards reducing the risk that information extraneous to the claim and rehabilitation needs of the worker will be disclosed.

Some aspects of the *Certificate*, however, would benefit from more detailed guidance. For example, the sections asking for comments about the person's physical and mental capacity appear to be overly broad as they are not tied to any particular outcome. Without further clarification and appropriate guidance, medical practitioners may inadvertently provide information that could be detrimental to the injured worker. We recommend that these sections should be revised to focus on the person's compensable injury, their capacity for work and the types of supports that they need to assist their recovery and rehabilitation.

Informed consent: In general terms, human rights standards require that personal medical information should only be disclosed and/or shared with the consent of the individual concerned. We also note that the *Health Records (Privacy and Access) Act 1997* sets out a legislative framework for the use and disclosure of confidential health information. We recommend that the *Certificate* should include a reminder to medical practitioners to familiarise themselves with the Act's requirements.

For both the schemes in operation in the ACT, workers are required to sign a privacy waiver when making a workers' compensation claim to allow access to their medical records for the purposes of managing their claim and assisting with return to work services. However, ensuring that workers are given the opportunity to receive the information they need in the particular circumstances and that they expressly consent to the disclosure of specific information in the *Certificate*, is an important safeguard for guaranteeing the effective protection of the right to privacy. This is especially important as the disclosure of medical information has the potential to affect a person's private and family life, as well as their social and employment situation. Therefore, ensuring that the individual has a meaningful opportunity to consent to a particular disclosure is important not only for the protection of the worker's privacy but also ensures that those in need of medical assistance will not be deterred from seeking appropriate treatment.

We therefore welcome that the updated *Certificate* now specifies that the medical practitioner must certify that s/he discussed the information contained in the form with the worker, and the worker must agree to that information being provided to their employer or insurer. We also welcome that the *Certificate* has been updated to clarify that any case conference that takes place between the medical practitioner and the employer must also include the worker. In our view, conducting such meetings without the worker being present and/or their consent would erode the individual's right to private medical consultation and treatment, contrary to the right to privacy.

We are aware that the Commonwealth Government is seeking to make a range of amendments to the *Safety, Rehabilitation and Compensation Act 1988* (Cth), which regulates the Comcare workers' compensation scheme covering APS and ACT public employees. The Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015, which is currently before the

Senate, includes proposals to expand the power to request information from a claimant and third parties.³ Various stakeholders have expressed concerns that these new powers would compel the worker and third parties to provide private and sensitive documents to Comcare irrespective of the relevance of the claim, and that the worker could be sanctioned by loss of compensation rights if they fail to comply with a document request.⁴ The Australian Lawyers Alliance noted that ‘the proposal to compel workers to provide all medical information from treating medical providers is highly inappropriate. No other workers’ compensation scheme provides for such a broad and unrestrictive provision of private medical information.’⁵

The precise human rights implication of these proposals is beyond the scope of this advice. However, we note that should these amendments pass, they could raise fresh concerns with regard to the use of the *Certificate of Capacity for Work* for ACT public sector employees who access the Comcare scheme, in so far that they reduce the options available to the worker for selecting the uses and disclosures to which he or she agrees.

Protection of information: Consistency with the right to privacy requires that effective measures be in place to ensure that unauthorised persons are not able to access personal information. The *Health Records (Privacy and Access) Act 1997* regulates the handling and security of personal health information in the ACT and provides an important safeguard in this regard.

The Health Records Act covers health records held in the public sector in the ACT and also applies to acts or practices in the private sector that are not covered by the *Privacy Act 1988* (Cth). The definition of a ‘health record’ under the Act is very broad and includes any record containing personal health information, whether held by a health service provider or otherwise.⁶ Accordingly, employers who hold health information, including in an employee record, must ensure compliance with the Privacy Principles and associated legislative requirements under the Health Records Act.⁷

³ See, Item 6 of Schedule 3 to the bill, which repeals section 58 and inserts proposed sections 58 and 58A into the *Safety, Rehabilitation and Compensation Act 1988*.

⁴ See, for example, Australian Lawyers Alliance, Submission to the Senate Standing Committee on Education and Employment, Inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015, p 14; and Slater and Gordon Lawyers, Submission to the Senate Standing Committee on Education and Employment, Inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015, p. 8; and ACTU, Submission to the Senate Standing Committee on Education and Employment, Inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015, p. 28.

⁵ Australian Lawyers Alliance, Submission to the Senate Standing Committee on Education and Employment, Inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015, p 14

⁶ See, *Health Records (Privacy and Access) Act 1997*, Dictionary.

⁷ For completeness, we note that the Commonwealth *Privacy Act 1988* deals with employee records of public sector and private sector employees differently. A private sector employer does not need to comply with the Australian Privacy Principles (APPs) in the Privacy Act when it handles current and past employee records for something that is directly related to the employment relationship. However, the Commonwealth Privacy Act covers public sector employee records.

Conclusion

We consider that the appropriate use of the new *Certificate* can be a valuable tool for assisting in the recovery and rehabilitation of an injured worker. However, as outlined above, various aspects can be improved, and it will be important to monitor the implementation of these measures. We recommend that the government foreshadow that it will review the new arrangements after a period of 12 months to determine the actual impact of the changes. If it is found that the impacts have been disproportionately detrimental, or have inadvertent consequences, reasonable adjustments must be made.

Yours sincerely



Dr Helen Watchirs OAM
Human Rights and Discrimination
Commissioner



Mary Durkin
Health Services Commissioner
Disability and Community Services
Commissioner

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