Mental or physical incapacity of employees

Policy Number: E11 (QH-POL-170)

Publication date: June 2020

Purpose: To outline the process to address mental or physical incapacity of employees.

Application: This policy applies to all Queensland Health employees.

This policy does not apply to employees of Queensland Ambulance Service. Instead, Queensland Ambulance Service employees are to refer to their local policy/procedure.

Delegation: The ‘delegate’ is as listed in the relevant Department of Health Human Resource (HR) Delegations Manual, or Hospital and Health Services Human Resource (HR) Delegations Manual, as amended from time to time.

Legislative or other authority:
- Anti-Discrimination Act 1991
- Human Rights Act 2019
- Industrial Relations Act 2016
- Public Service Act 2008
- Public Service Regulation 2018
- Workers’ Compensation and Rehabilitation Act 2003
- PSC Directive 01/18: Managing Employee Health, Safety and Wellbeing – Independent Medical Examinations (IME) under the Public Service Act 2008

Related policy or documents:
- PSC Commission Chief Executive Guideline 03/13: Mental or physical incapacity
- Reasonable adjustment HR Policy G3 (QH-POL-210)

Policy subject:

1. Mental or physical incapacity
2. Communication
3. Use of workers’ compensation documents
4. Requirement for documentation
5. Natural justice must be afforded
6. Right to appeal
7. Key principles

History:

Attachment One Process
1 Mental or physical incapacity

Chapter 5, Part 7 of the Public Service Act 2008 provides for a process to assess and manage an employee where there is a reasonable suspicion an employee’s absence or unsatisfactory performance is caused by a mental or physical illness or disability. The Public Service Regulation 2018 extends the mental or physical incapacity provisions of the Public Service Act to health service employees.

The process under Part 7 of the Public Service Act can only be commenced in circumstances where, under section 174, the delegate is reasonably satisfied that:

- an employee is absent from duty or is not performing their duties satisfactorily; and
- the employee’s absence or unsatisfactory performance is caused by mental or physical illness or disability.

There must be sufficient documented information available to the delegate to support their reasonable suspicion.

Attachment One outlines the recommended process.

2 Communication

Queensland Health is to communicate openly and regularly with employees throughout the process and information should be shared in a respectful, timely and appropriate manner.

3 Use of workers’ compensation documents

Section 572A of the Workers Compensation and Rehabilitation Act 2003 states a person must not, for a purpose relating to an employee’s employment:

- obtain or attempt to obtain a workers’ compensation document about the employee
- use or attempt to use a workers’ compensation document about the employee.

Therefore, a document obtained for the purpose of a workers’ compensation claim cannot be provided to an examining doctor or be relied upon to make decisions about an employee’s employment (including a decision to retire, transfer or redeploy an employee), regardless of whether the employee consents to the use of the report.

4 Requirement for documentation

Throughout the process, the delegate is required to ensure there is sufficient documentation to demonstrate that appropriate consideration has been given to the decisions made, including but not limited to, decisions about:

- reasonable adjustment
- transfer or redeployment
- retirement.

If a delegate considers transfer or redeployment is not reasonably practicable, there must be sufficient documentation to support why this was not reasonably practicable.

Section 179 of the Public Service Act provides that records in relation to the requirement to attend a medical examination and medical examination report are to be kept in a separate confidential file, and not on the employee’s personnel file.
5 **Natural justice must be afforded**

The principles of natural justice must be applied when determining whether an employee should be retired on the basis of physical or mental incapacity.

Natural justice has two rules:

- **Rule against bias**: decision-makers are to be objective, free of bias, and have no personal interest in the matter being decided.
- **Hearing rule**: an individual is to be informed of the decision to be made and have the opportunity to present their case prior to the decision being made.

6 **Right to appeal**

An employee may appeal a decision to require them to submit to a medical examination, where the decision does not satisfy the conditions of section 174 of the Public Service Act. Section 197 of the Public Service Act provides 21 days to appeal. Refer section 1.5 of Attachment One for the appeal process.

7 **Key principles**

The following key principles apply in all mental or physical incapacity processes:

- Compliance with the Human Rights Act 2019.
- Compliance with relevant legislation and/or applicable policy.
- Reasonable adjustment must be considered.
- Employees are to be kept informed throughout the process.
- Decisions must be supported by evidence which has taken into account all relevant material.
- Decisions are to be made in a timely manner.
- The process in Attachment One is managed in a way that is mindful of the potential adverse impact it may have on an employee’s health and well-being.
- Information in relation to this process is to be kept confidential, except to the extent that disclosure is required or permitted by law.
- Natural justice is to be provided.

**History:**

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<td>- amended to include compliance with Human Rights Act as a key principle (section 7)</td>
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<td>- application amended as a result of changes outlined in the Hospital and Health Boards (Changes to Prescribed Services) Amendment Regulation 2019.</td>
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<td>October 2018</td>
<td>- Policy amended to:</td>
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<td>- reflect provisions of the PSC Directive 01/18 Managing Employee Health, Safety and Wellbeing – Independent Medical Examinations (IME) under the Public Service Act 2008</td>
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<td>− application excludes employees of Queensland Ambulance Service.</td>
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<td>January 2014</td>
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<td>− change title from ‘Medical Examination of Employees’ to ‘Mental or Physical Incapacity of Employees’ to better reflect the scope of the policy</td>
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<td>− provide more comprehensive information outlining the process to address mental or physical incapacity of employees.</td>
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<td>April 2009</td>
<td>• Amended to include section 7.2 to include referral by an occupational health and safety practitioner in accordance with OHSMS 3-3#21 Managing Ill Health Work Practice Directive.</td>
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<tr>
<td>August 2008</td>
<td>• Amended section 8.1 to reflect all Queensland Health employees may be retired, not only those employees from the public service.</td>
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<td>August 2008</td>
<td>• Extracted from the Separation of Employment HR Policy as the outcome of a medical examination may or may not be separation of employment.</td>
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<td>Previous</td>
<td>• Separation of Employment HR Policy H1 Part C (April 2008)</td>
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Attachment One – Process

The following information is provided as the minimum mandatory standard practice, procedure or process to enable satisfactory compliance with this Queensland Health HR policy.

Local guidelines/procedures may be developed to facilitate implementation of this policy. Any local guidelines/procedures must be consistent with this policy and standard practice and ensure employee entitlements continue to be met.

1 Key Principles

Where an employee discloses a medical condition or there is a reasonable suspicion the employee has a mental or physical illness or disability that may be affecting their attendance or ability to perform their duties satisfactorily, the following actions should occur:

- Informal and timely discussions between the employer and employee which may resolve concerns about the employee’s attendance or performance and/or
- Consultation with the employee’s treating doctor (with the employee’s signed authorisation) who may provide information to enable the effective management of the employee’s attendance or performance.

In these situations, formal intervention under Part 7 of the Public Service Act 2008 may not be required.

Where consideration is being given to a medical examination under the Public Service Act, the local human resources unit must be consulted prior to taking any action.

Throughout the process, open and regular communication should be maintained with the employee and information should be shared in a respectful, timely and appropriate manner. Employee Assistance should be offered.

1.1 Determine grounds for direction exist

When a delegate has considered the information, and is reasonably satisfied the employee is absent or is not performing their duties satisfactorily, and this is caused by mental or physical illness or disability, they can commence a process under Part 7 of the Public Service Act.

1.2 Appoint a doctor to examine the employee

A specialist in the area relevant to the employee’s suspected mental or physical illness or disability should be appointed to conduct the medical examination.

In situations where it is unclear the type of doctor to whom an employee should be referred, consideration should be given to sending the employee to a general physician or occupational physician.

A letter must be provided to the examining doctor:

- appointing them under the Public Service Act and identifying the provisions of the Public Service Act under which the appointment is being made
- with sufficient background information about:
  - the employee’s absence or how the employee is not performing their duties satisfactorily
  - their illness or injury (which may include a role description and/or detailed statement of duties or medical information obtained from the employee’s treating doctor)
• advising them to exclude from the report information which is not directly or indirectly related to the effect and management of the employee’s medical condition on their workplace performance or current absence
• advising them that the information they provide could be used to determine whether the employee should be:
  - transferred or redeployed; or
  - retired
• requesting them to respond to the questions in section 177 of the Public Service Act.

A copy of the letter to the examining doctor should also be provided to the employee.

1.3 Issue a ‘direction to attend’ letter

If a delegate requires an employee to submit to a medical examination under the Public Service Act, the employee is to be provided with a letter:

• directing them to attend and participate in an appointment under section 175 of the Public Service Act
• advising the details of the appointment
• advising the grounds on which the direction is made under the Public Service Act (Section 174 of the Public Service Act outlines that this part of the Act applies if the delegate is reasonably satisfied the employee is absent or is not performing their duties satisfactorily, and reasonably suspects the absence or unsatisfactory performance is caused by a mental or physical illness or disability)
• outlining the type of information sought from the specialist
• outlining the employee’s right to appeal the decision to direct the employee to a medical examination (refer section 1.5 of Attachment One)
• outlining the action that may be taken on receipt of the medical report.

The employee is to be given at least two weeks’ notice of the appointment, unless the employee agrees to a shorter notice period.

In line with section 176 of the Public Service Act, the employee must not be granted sick leave for any period during which the employee fails to comply with the requirement to attend the medical examination.

1.4 Assistance to attend appointment

The medical appointment will be paid for by the Hospital and Health Service/Department of Health Division/Agency and employees should be provided with reasonable travel assistance to attend the appointment. This may include taxi vouchers and/or airfares.

1.5 Right to Appeal

The decision to direct an employee to submit to a medical examination is appealable under section 194(1) of the Public Service Act. The notice of appeal must be received at the Queensland Industrial Relations Commission (QIRC) by the 21st day after the day on which the employee received written notice of the decision directing them to submit to a medical examination.

1.6 On receipt of the medical report

On receipt of the medical examination report, the delegate must provide a copy of the report to the employee, or to the employee’s nominated treating doctor (depending on the advice of the examining doctor) as soon as reasonably practicable.

If the report is being provided to the employee’s treating doctor, the employee must be advised that the report has been provided, and asked to make an appointment with their doctor to have the report explained to them.
No further action should be taken to progress a decision about the employee’s ongoing employment until this has occurred, however an employee must not cause any unnecessary or unreasonable delay.

The independent medical examination report is an important piece of information for the delegate to consider when deciding how best to support an employee, with a focus on continuing employment. The delegate must consider the information contained in the report and determine the appropriate course of action to take. This may include, but is not limited to:

- management of issues by way of normal performance management processes
- continued return to work attempts
- consideration of reasonable adjustment (refer to Reasonable adjustment HR Policy G3), including options in the employee’s substantive position
- consideration of transfer or redeployment
- consideration of retirement.

The employee must be advised of the delegate’s decision, and the reasons for the decision, in writing.

1.7 Consideration of transfer or redeployment

If the medical advice indicates the employee is unable to perform the duties of their substantive position, but could perform other work, consideration must be given to whether it is reasonably practicable to transfer or redeploy the employee.

Transfer or redeployment options should be based on:

- information provided by the specialist
- advice from the employee about alternative roles/locations/levels they would consider
- available vacancies.

Employees should be involved in this process and regularly informed of the options being considered.

If a delegate determines transfer or redeployment is not reasonably practicable, documentation must support any decision, including why those options are not suitable.

1.8 Consideration of retirement

Where a delegate determines it is not reasonably practicable to transfer or redeploy an employee, under section 178 of the Public Service Act, a delegate may determine to retire the employee.

Before a decision is made to retire an employee, the delegate is to write to the employee affording them an opportunity to show cause why they should not be retired pursuant to the Public Service Act. This includes an opportunity to provide medical advice or other information.

The employee should be provided with a reasonable period to provide their response, usually 14 days.

1.9 Decision on retirement

Upon reviewing all material, including any response to the proposed retirement, the delegate is required to make a decision about whether the employee should be retired.

The employee must be advised of the delegate’s decision, and the reasons for the decision, in writing.
1.10 Notice of retirement to employee

If the employee is to be retired, the prescribed period of notice in the relevant industrial instrument is to be provided to the employee or payment in lieu of notice.

1.11 Notification to registering authorities

If a registered health professional is retired due to a mental or physical illness or disability, the appropriate registering authority is to be notified immediately.