Commission Chief Executive Guideline 03/13: Mental or physical incapacity

1. **Purpose:**
   To provide guidance on the implementation of Chapter 5, Part 7 (mental or physical incapacity) of the Public Service Act 2008.

2. **Effective date:** 27 June 2013

3. **Supersedes:**
   Mental or physical incapacity – Part 7 of the Public Service Act 2008 (issued November 2006)

4. **Legislative Authority:**
   Sections 25(1)(a), (d) and (e), 25(2)(a) and (b)(i), 46(1)(a) – (b), 47, 53(a) and Chapter 5, Part 7 of the Public Service Act 2008.

5. **Application:**
   This guideline applies to public service employees and their chief executives (and delegates) in relation to actions and decisions made under Chapter 5, Part 7 of the Public Service Act 2008.
   The guideline is for guidance and does not bind, those to whom it applies.

6. **Related Information:**
   - Anti-Discrimination Act 1991
   - Workers Compensation and Rehabilitation Act 2003
   - Work Health and Safety Act 2011
   - Directive relating to voluntary medical retirement

**GUIDELINE:**

7. **Addressing concerns of mental and physical incapacity**
   7.1. A belief that an employee is experiencing mental or physical incapacity can arise in a number of ways, such as through direct observation by a manager or self-reports by an employee. Irrespective of how the belief arises, communications regarding an employee’s mental and physical status must be undertaken with sensitivity and respect.
   7.2. Employees are not required to disclose details about any mental or physical health conditions, however, where it appears that such a condition is impacting on the employee’s ability to undertake their role satisfactorily, it is appropriate for a manager / supervisor to address this with the employee. Managers / supervisors are encouraged seek support / guidance from their human resources area on how to approach such conversations.
   7.3. Where possible, concerns regarding an employee’s mental or physical incapacity should be addressed informally in the first instance. Managers / supervisors should be prepared to discuss how the suspected mental or physical incapacity is impacting on the employee’s ability to do their role and
explore options for reasonable adjustment. It is reasonable to seek medical information from employees as part of this process. Managers / supervisors should also take into consideration their obligations under other legislation, such as the Anti-Discrimination Act 1991, the Workers’ Compensation and Rehabilitation Act 2003 and the Work Health and Safety Act 2011.

7.4. Where informal efforts to manage the impact of suspected mental or physical incapacity on an employee’s duties are unsuccessful or where an employee declines to provide medical information to enable appropriate management strategies / adjustments to be put in place, a decision maker may consider requiring the employee to participate in a medical examination in accordance with Chapter 5, Part 7 of the Public Service Act 2008 (PSA).

8. Purpose and scope of a medical examination

8.1. The purpose of a medical examination under Chapter 5, Part 7 of the PSA is to provide the decision maker with medical information that will assist the decision maker in:

(a) confirming whether the employee has a mental or physical incapacity that is adversely affecting the employee’s performance of their role

(b) determining what impacts (if any) the mental or physical incapacity has on the employee’s ability to undertake their role, now and into the future

(c) determining what actions (if any) are appropriate to resolve any impacts of the employee’s mental or physical incapacity on their role.

8.2. A medical examination is not directed towards the medical retirement of the employee, but rather to obtaining sufficient relevant information to enable an appropriate decision to be made, focusing on continued employment, where reasonable.

9. Referral process

9.1. Where a decision maker is considering requiring an employee to participate in a medical examination in accordance with Chapter 5, Part 7 of the PSA they must be reasonably satisfied that both aspects of the referral criteria specified in section 174 are met (i.e. the requirements of both section 174(1)(a) and section 174(1)(b) must be met).

9.2. Should the decision maker be satisfied that the criteria are met, they may appoint a doctor in accordance with section 175 of the PSA. The Act does not define ‘doctor’ therefore the provisions of the Acts Interpretation Act 1954 apply, meaning that a doctor is defined as a ‘medical practitioner’; a person registered under the Health Practitioner Regulation National Law to practise in the medical profession, other than as a student1. It does not include other health professionals.

9.3. It is the decision maker’s responsibility to determine an appropriate doctor to conduct the medical examination. The decision maker may, but is not required to, seek input from the employee on the doctor to be appointed.

9.4. When appointing a doctor, the decision maker should provide the doctor with a brief outlining the reasons for the medical examination, as well as requesting responses to the matters identified in section 177 of the PSA. The brief and request for information should only include matters that are relevant to the suspected mental or physical incapacity and any impact the incapacity may have on the employee’s ability to undertake their role. A copy of the brief should generally be provided to the

1 Health Practitioner Regulation National Law Act 2009, Schedule, Section 5
employee at the time they are advised of the time and date of the medical examination. The employee may wish to provide additional information to the appointed doctor.

9.5. The employee should be provided with reasonable notice of the medical examination, having regard to their circumstances. Generally, the employee should be advised of the medical examination in person or via phone, to provide the employee with the opportunity to ask questions, with the details about the examination and subsequent steps confirmed in writing. The employee may wish to have a support person present during this discussion.

10. Action following the medical examination

10.1. On receipt of the medical report, the decision maker must consider what action (if any) to take in accordance with section 178 of the PSA. The decision maker may take into account other relevant information (e.g. information submitted by the employee or their manager/supervisor) when making a decision. The decision maker should also continue to take into account their obligations under other legislation (such as the Anti-Discrimination Act 1991 – see in particular sections 7, 15, 25, 34 and 35).

10.2. A copy of the report is to be provided to the employee in accordance with sections 177(3) – (5) of the PSA. The decision maker may, but is not required to, discuss the report with the employee before proposing any action.

10.3. Where the doctor considers that the employee has a mental or physical incapacity that is impacting on their ability to undertake their role, reasonable adjustments to enable the employee to continue in their current role should be made where possible (e.g. having regard to obligations under the Anti-Discrimination Act 1991). Decision makers may consider whether rehabilitation / return to work support would assist the employee. Where reasonable adjustment is not possible, transfer and redeployment must be considered. This can include liaison with other agencies to determine whether a cross agency transfer or redeployment is reasonably practicable. The decision maker should document their decisions and reasons, including why (if applicable) transfer and/or redeployment is not reasonably practicable.

10.4. Where action under Chapter 5, Part 7 is proposed, the employee should be advised, preferably in person or via phone, to provide the employee with the opportunity to ask questions, with the details (including reasons) confirmed in writing. The employee may wish to have a support person present during this discussion.

10.5. The employee should be provided with an opportunity to respond to the proposed action. The timeframe for response should be reasonable, having regard to the employee’s circumstances, but generally seven (7) calendar days would be appropriate.

10.6. The decision maker should consider any information provided by the employee in response to the proposed action before either confirming or amending the proposed action. The decision maker should document their consideration of the employee’s response and reasons why it did or did not alter the proposed action.

10.7. The employee should generally be advised of the decision maker’s final decision under Chapter 5, Part 7 of the PSA in person or via phone, with the details (including reasons) confirmed in writing. The decision should be communicated in a timely way.

10.8. The decision maker should ensure appropriate steps are taken to implement their decision, including provision of advice to external bodies, such as QSuper or relevant registration bodies.

10.9. In the event that the doctor considers that either the employee does not have a mental or physical incapacity or any mental or physical incapacity is not impacting on their attendance or ability to
undertake their role satisfactorily, the decision maker should consider what actions (if any) are necessary to address the absence or unsatisfactory performance that contributed to the direction for the medical examination. This may include, but is not limited to management actions (such as performance development), performance or attendance improvement processes or discipline processes. Managers / supervisors should refer to agency policies on management of attendance and performance and are encouraged to consult with their human resources area about any appropriate actions.

11. Miscellaneous

11.1. The department is responsible for the costs of the medical examination and any travel expenses incurred for attendance.
SCHEDULE ONE – FREQUENTLY ASKED QUESTIONS

1. Does an employee with a medical or physical incapacity have to attend a medical examination for reasonable adjustment to occur?

   No, an employee can elect to provide their employer with relevant medical information to allow them to consider what adjustments may be reasonable. The employer may, however, decide that further information is required and refer the employee for a medical examination in accordance with the provisions of the PSA.

2. How long does an employee have to be absent for before they can be referred for a medical examination?

   The PSA does not prescribe a timeframe for absence before a medical examination can occur, only that the decision maker reasonably suspects that the absence is caused by mental or physical incapacity. Agencies may wish to consider the frequency and pattern of absence as well as the duration in determining whether an absence warrants consideration of a medical examination.

   Consideration of the employee’s sick leave entitlement and any information provided in relation to the absences may also be relevant, however the fact that the employee has not utilised all of their sick leave accrual does not preclude a medical examination from occurring.

3. What happens if an employee is performing the technical aspects of their role satisfactorily but their conduct is unsatisfactory?

   Chapter 5, Part 7 of the PSA applies where a decision maker reasonably suspects that an employee’s absence or unsatisfactory performance is caused by a mental or physical incapacity. In assessing performance a broad interpretation should be applied; technical skills and conduct are both components of an employee’s overall performance of their role.

4. What happens if an employee advises of a medical or physical incapacity when a manager / supervisor raises performance or attendance concerns?

   A medical examination is not a substitute for performance or attendance management. A manager / supervisor should, however, consider any information provided by the employee to assist them in forming a reasonable view about whether the mental or physical incapacity is impacting on the employee’s performance or attendance. Where applicable, the manager / supervisor should consider what adjustments are reasonable and appropriate to support the employee in achieving the expected levels of performance and attendance. This may involve seeking additional information from the employee’s treating medical practitioner, with the cooperation of the employee, or referring the employee for a medical examination under Chapter 5, Part 7 of the PSA.

   Managers / supervisors may wish to consult with their human resource or workplace health and safety units about identifying and implementing reasonable adjustments.

5. What happens if an employee denies having a mental or physical incapacity?

   Employees may not be aware of an incapacity or its perceived impact on their attendance or performance, so any discussions should be handled with tact and sensitivity.

   A manager / supervisor should have reasonable grounds for suspecting an employee has a mental or physical incapacity and that it is adversely impacting on the employee’s attendance or performance. The manager / supervisor should be able to explain the basis of this belief, including examples of observed instances / behaviours.
If this belief remains after discussion with the employee, the manager / supervisor may wish to consult with their human resources area about appropriate actions, including referring the employee for a medical examination under Chapter 5, Part 7 of the PSA.

6. **How can agencies manage the impact of a medical examination process?**

Ill health (whether mental or physical) can cause an employee and those around them stress or distress. The commencement of a medical examination process can exacerbate this, so it is particularly important that the process be implemented in a reasonable manner.

A key feature of this is to ensure appropriate communication between the parties. Clear information about steps to be taken and reasons for them should be provided to the employee. It is also important that clear information about the purpose of the examination is provided to the employee, i.e., it is focused on making informed decisions to support continued employment where possible and **is not** focused on medical retirement.

Managers / supervisors also need to consider what impact the employee’s condition and the process is having on other employees in the work area and ensure appropriate steps are put in place to support these employees also (e.g., workload management).

7. **Can the employee’s treating doctor be appointed to conduct the medical examination?**

The agency is responsible for determining the appropriate doctor to appoint for the medical examination. While the PSA does not prevent the appointment of the employee’s treating medical practitioner, the agency should consider whether it is appropriate in the circumstances, having regard to the treating practitioner’s expertise (e.g., consider whether a specialist should be appointed). The employee’s treating medical practitioner, with the consent of the employee, could provide input about the employee’s health to the assessing medical practitioner.

If the agency elects to appoint the employee’s treating medical practitioner, they must still ensure that the doctor is appropriately briefed by the agency and understands the questions required to be answered under the PSA.

8. **Can the agency use an existing medical report to inform its decisions?**

Where an employee provides a medical report or consents to the agency being provided with a medical report from a third party (e.g., QSuper) the agency can consider the information provided in determining what actions (if any) are required to manage the impact of the employee’s incapacity in the workplace. The report should contain the information set out in section 177 to be used as the basis for taking action under section 178 of the PSA and clear written consent for the use of the report should be obtained from the employee.

9. **What happens if an employee lodges a complaint about the medical examination process?**

Lodging a complaint does not automatically stop the decision being complained about – it is the decision-maker’s responsibility to determine whether this should occur. Early resolution of any complaint is in the interests of all parties, so agencies should seek to address the complaint as soon as practicable and in accordance with the relevant complaints process.

Employees may also lodge complaints with external bodies, such as the Anti-Discrimination Commission of Queensland, in relation to proposed action under section 178. If a complaint is lodged, managers / supervisors should notify their human resources and/or legal services area to discuss appropriate actions, including the continued provision of support to all parties.
The Queensland Court of Appeal has determined that the referral of an employee for an independent medical examination under section 175 cannot result in an injunction to delay or stop the process on the grounds of discrimination.2

10. What happens if an employee refuses / fails to attend the medical examination?

Employees are required to comply with reasonable and lawful directions, so agencies should ensure that the direction to attend the medical examination is clear.

Failure to comply with a direction without reasonable excuse can result in the commencement of a disciplinary process under Chapter 6 of the PSA.

11. Can an employee who has a mental or physical incapacity be asked to resign or retire?

No – it is appropriate to discuss with an employee their incapacity and the impact it is having on their performance or attendance and the options available to the employee, which may include resigning or retiring. These options are, however, completely voluntary and an employee cannot be asked to do so because of a medical condition.

An employee who is considering resigning or retiring because of mental or physical incapacity should be provided with information about their entitlements (including under the directive relating to voluntary medical retirement3) and may wish to seek information from QSuper and/or WorkCover (as relevant) about the implications of doing so.

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2 *State of Queensland v Attrill* [2012] QCA 299

3 As at June 2013 this directive was issued as a pilot applicable only to the Department of Communities, Child Safety and Disability Services for an indefinite period.