

Policy

Guideline

Management of Non-Work Related Disability or Medical Incapacity

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Summary The Guideline applies to the management of employees with a non-work related (non-compensable) injury; illness; health condition; disability or medical incapacity impacting the performance of their duties. It intends to ensure that SA Health complies with legal and public sector policy requirements when managing such employees; and that safety considerations and operational requirements are appropriately balanced with the interests of impacted employees.

Keywords Disability, medical incapacity, non-work related injury, non-work related illness, equal opportunity, discrimination, inherent requirements, reasonable adjustments, work health and safety, medical examination, policy guideline

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Does this policy replace an existing policy? *N*

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EPAS Compatible *NA*

**Registered with Divisional
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SA Health

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Management of Non-Work Related Disability or Medical Incapacity Guideline

1. Objective

This Guideline intends to ensure that:

- SA Health complies with legal and public sector policy requirements when managing employees with a non-work related disability or incapacity due to an employee's physical or mental health.
- Continued workforce participation of employees with disabilities or medical conditions is facilitated where operationally and financially reasonable.
- Safety considerations and operational requirements are appropriately balanced with the interests of employees with a non-work related medical disability or medical incapacity.
- Employees with a non-work related disability or medical incapacity are managed in a lawful, fair and respectful manner.

The Guideline outlines the underlying principles that require consideration when managing an employee with a non-work related disability or medical incapacity; and provides a framework for best practice which will enable achievement of the above objectives.

This Guideline is to be read / administered in conjunction with:

- The *Equal Opportunity Act 1984*.
- The *Disability Discrimination Act 1992*.
- The *Commissioner for Public Sector Employment's Guideline on the Power to Require Medical Examination*.

2. Scope

This Guideline applies to the management of all SA Health employees with a non-work related (non-compensable) injury; illness; health condition; disability or incapacity impacting the performance of their duties.

Such a disability or incapacity may be the result of a wide range of disorders and conditions - whether permanent, temporary or degenerative - and may include physical; mental or cognitive (e.g. memory) difficulties; or conditions that affect communication, social and behavioural aspects (e.g. interaction with others, managing routine, maintaining energy and drive, managing emotions at work; etc.).

Compensable injuries, illness or medical incapacity relating to WorkCover claims are out of scope.

3. Principles

Principles for managing employees with a non-work related disability or performance incapacity due to a medical condition are derived from legislation, common law and public sector policies applicable to SA Health employees.

3.1. Requirements of disability discrimination legislation

The *Equal Opportunity Act 1984* (EO Act) and the *Disability Discrimination Act 1992 (Cth)* (DD Act) are applicable to SA Health. These Acts intend, among other matters, to provide equal opportunity to employees with disabilities in the workplace and prevent discrimination based on their disability.¹

The definitions of disability are contained in section 5 of the EO Act and section 4 of the DD Act. These definitions are very broad and will capture most medical conditions that would be perceived as “*medical incapacity*” in the workplace; e.g. these include among other matters “*partial loss of bodily functions*” and “*a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour*”. (See section 14 of this Guideline.)

These definitions are different from the definition of disability under the *Disability Services Act 1993* (SA) which provides for services to people with permanent disabilities who need continuing support services.²

SA Health has an obligation in terms of the EO Act and DD Act to accommodate employees with disabilities (e.g. “*medical incapacity*”) by making reasonable adjustments to their role and/or work environment where this will enable them to perform the essential requirements of a position. Reasonable adjustments may include modification of various aspects of the role or the workplace – e.g. hours, work schedules, work practices, etc.

Whether required adjustments would be *reasonable* should be considered in light of its implications and impact, e.g.

- the impact on others in the workplace (including patients/clients and co-workers) e.g. on workload or safety;
- the cost of the modifications;
- its practicality; or
- the impact on the integrity of established rosters.

Adjustments that will cause unjustifiable hardship³ to the employer are not required. The onus of proof is on employers to demonstrate such hardship. The relative size and resources of an organisation and its available strategies to manage adverse impacts will be assessed when consideration is given as to whether adjustments would cause undue hardship.

Only adjustments that will enable performance of the inherent requirements of the position will need to be considered. If an employee with a non-work related disability or limited capacity would still not be able to adequately perform the duties and comply with the essential requirements of the role even with the modifications, other management actions should be considered, e.g. assignment or transfer of the employee to an alternative position, if available.

The health and safety risks of allowing an employee with a disability or medical incapacity to (continue to) work in a position should also be considered. This includes consideration of the possible impact on the wellbeing and safety of the employee themselves, co-workers and others in the workplace (e.g. patients/clients).

If the medical documentation indicates reduced hours and/or work restrictions/limitations are required, part-time work or other flexible work arrangements should be considered in accordance with SA Health and public sector Policies. (“*Restrictions/limitations*” refers to any activities the employee is medically advised not to perform or is only able to partially perform.)

Further detail on the requirements of the DD Act; reasonable adjustments, “*undue hardship*”; “*inherent requirements*” of the position and obligations of employers are contained in the Frequently Asked Questions on the [Australian Human Rights Commission's website](https://www.humanrights.gov.au/employment-and-disability-discrimination-act-part-1#adjustment): (<https://www.humanrights.gov.au/employment-and-disability-discrimination-act-part-1#adjustment>).

¹ Discrimination (i.e. being treated less favourably) based on disability is prohibited by these Acts – either directly or indirectly. Direct discrimination means treating someone less favourably based on their disability. Indirect discrimination in employment means the employer's actions result in outcomes that generally disadvantage people with a disability.

² See section 3 of the DS Act.

³ See in section 11 of the DD Act the definition of unjustifiable hardship.

3.2. Inherent requirements of a position

Inherent requirements are the essential activities of the job- i.e. the core duties that must be carried out in order to fulfil the purpose of a position. They do not refer to all of the requirements of a job, but rather contrast with peripheral or non-essential tasks, which may be negotiable and flexible. Inherent requirements relate to results, or what must be accomplished, rather than means, or how it is accomplished.

The inherent requirements of a position include aspects such as:

- the ability to perform the necessary tasks or functions required of the incumbent;
- the ability to perform these tasks or functions productively and maintain quality requirements;
- the ability to work effectively in the team or other type of work organisation concerned;
- the ability to work safely.

The inherent requirements of the position also include essential aspects of the role besides critical tasks; e.g. meeting the physical and mental demands of the position and work environment; work within the normal shift work arrangements; and the necessary ability to communicate, work within a team and maintain productivity and quality of work.

Information on the essential requirements of a position (such as tasks and duties; the nature of the work environment and the employee's contractual hours) can be obtained from the employment contract of an employee; their Role Description and any correspondence related to their appointment. More detail information about the physical and mental job demands of the position can be identified by a *job analysis* of the role (section 4.1.2).

The safety of the affected employee, and that of their co-workers and patients/clients, are critical considerations when ability to perform the inherent requirements is assessed.

When considering whether an employee with a disability or a medical incapacity would be able to perform the inherent requirements of their role if modifications are made, the relevant position is the inherent requirements of the position that the employee has been contracted in. Normally this would be their substantive position - not duties allocated as an interim measure to the employee to accommodate them in the workplace while a resolution is considered.

3.3. Requirements of the Work Health and Safety Act 2012

The [Work Health and Safety Act 2012](#) (WHS Act) requires that employers take “*reasonably practicable*” steps to protect the health and safety of employees in the workplace⁴.

Examples of reasonably practicable steps that may be taken, would include requiring a medical examination (if appropriate) or not returning an employee to or allowing an employee to (continue) to work in a workplace or position where there is a high risk to their wellbeing and safety; or that of others.

The WHS Act also requires that employees take “*reasonable care for his or her own health and safety*” and “*take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons*”⁵. This places a responsibility on employees to notify the employer if the employee suffers from a medical condition that impacts on their ability to work safely.

3.4. Requirements of Public Sector Act 2009

Sections 53 to 56 of the *Public Sector Act 2009* (PS Act) include provisions regarding management of public service employees (employed under Part 7 of the PS Act) unable to perform their duties satisfactorily due to physical or mental incapacity - including requiring an independent medical examination (under specific conditions); and possible management actions.

The *Commissioner for Public Sector Employment's Guideline: Power to Require Medical Examination* and associated *Frequently Asked Questions* provide a framework that will enable compliance with legislative and industrial requirements for managing situations where employees are

⁴Refer to Part 2, Division 1-Introductory, section 17 and 18.

⁵Refer to Part 2, Division 4, section 28.

unable to perform their duties satisfactory due to a physical or mental condition. (Refer to <http://publicsector.sa.gov.au/policies-standards/guidelines-and-determinations/> - scroll down to heading *Power to require medical examination*)

3.5. Requirements of *Health Care Act 2008* employees

The *Health Care Act 2008* (HC Act) does not contain provisions similar to section 53 to 56 of the PS Act. However, the [SA Health \(Health Care Act\) Human Resources Manual](#) (HR Manual) issued pursuant to the HC Act, provides that HC Act employees may be requested under certain circumstances to attend an independent medical examination. (Refer to relevant sections 4-1-14 *Medical Examination of Employees*; 4-1-7-7 *Management Guideline 6: Other types of termination*; 7-9-3 *Conditions for the Granting of Sick Leave* and in 7-9-4 see *Medical examination requested by a Chief Executive Officer* and in 10-2-4 see *Persons in Employment - Screening*).

The [Commissioner for Public Sector Employment's Guideline: Power to Require Medical Examination](#) applies only to employees appointed under the PS Act. However, the Commissioner's Guidelines are generally considered the benchmark of acceptable and reasonable practice in the public sector, including for employees appointed under different legislation, e.g. under the HC Act. This *SA Health Non-Work Related Disability or Incapacity Policy Guideline* intends to flow on to HC Act employees in SA Health the principles and practices of the above Commissioner's Guideline, where appropriate.

3.6. Requirements of the *Fair Work Act 1994* (SA)

The [Fair Work Act 1994](#) (FW Act) is particularly relevant where termination of employment based on incapacity to perform due to a disability or medical condition is considered. Termination of employment may be considered "*harsh, unjust or unreasonable*"⁶ if:

- There was not a valid reason for termination (e.g. "*temporary absence from work due to illness or injury is not a valid reason for termination*" in terms of Schedule 7, Article 6 in the FW Act).
- A fair process was not followed (e.g. not providing notification of pending actions; not providing sufficient time and assistance to improve performance or respond to concerns; not complying with procedural fairness requirements, etc.).
- General fairness requirements have not been met (e.g. parties did not comply with applicable policies; placement in an alternative position was not considered where appropriate, and reasonable efforts were not made for a reasonable period to find a suitable alternative position.) Contextual factors will be considered as to whether the employer's actions were generally fair.

The decision maker must be able to demonstrate, if called upon to do so, that the reasoning behind the decision was sound, that all relevant factors were taken into account and that all parties were treated fairly and in a manner consistent with legal obligations and management standards within SA Health.

3.7. Requirements of the Information Privacy Principles (IPPs)

When requesting medical information on an employee's physical or mental health, Cabinet Circular No. 12 or the "*Information Privacy Principles Instruction*" which applies to all State Government agencies, including SA Health, has to be considered. (For more detail on the IPPs refer to http://dpc.sa.gov.au/sites/default/files/pubimages/Circulars/PC012_Privacy_0.pdf.) Among other matters the IPPs require that State Government Agencies:

- Limit information it collects to only that which is necessary for one or more of its legitimate functions or activities. The onus is on the collector to justify why certain personal information is being collected.
- Where reasonable and practicable, personal information must be collected directly from the individual to whom the information relates.
- Personal information must be collected by lawful, fair and non-intrusive means to prevent undue pressure or coercion being placed on individuals when information is collected.

⁶ Refer to section 108 of the FW Act

3.8. Principles of procedural fairness

Throughout the processes to manage employees with a non-work related disability or medical incapacity, the principles of fair process and natural justice must be adhered to. This requires that where an employee's interests may be adversely affected by a management decision, there must be:

- Notification of the decision being considered and reasons for this;
- Opportunity for the employee to be heard – e.g. by written submissions to employer and/or given an opportunity to respond verbally;
- Genuine consideration without bias of any submissions or responses from the employee;
- Provision for the employee to be accompanied by a support person of their choice throughout the process. (Sufficient notice must be provided to allow the employee to arrange this person); and
- Provision for an independent review of the management decision, including advising an employee of review mechanisms available under the PS Act and HC Act. (Refer 4.5.2.)

3.9. Unique circumstances of each case to be considered

As work requirements, personal circumstances and facts relating to a non-work related disability or medical incapacity of an employee are likely to vary greatly, each case must be considered in its unique context with proper consideration being given to all relevant factors, relevant legislation and the principles of procedural fairness.

4. Detail

4.1. Medical assessment of capacity to perform duties

In situations where there is reasonable doubt as to an employee's physical or mental ability to perform his/her duties, or their ability to perform their duties without undue risk to their own or others' health, medical information may be required in order to inform management actions.

4.1.1. Situations requiring medical information on employee ability and safety

Medical information should only be requested/required in situations where:

- There are objective and verifiable indications that an employee is unable to perform his/her duties safely and satisfactorily; and that this is due to a non-work related disability or medical incapacity (i.e. it can be demonstrated by examples, facts and events); *and*
- It can be demonstrated that the safety and/or performance issues are significant and consistent enough to warrant medical information being obtained (to inform management decisions on the employee's ability to continue to work in their contractual role).

Examples of situations where seeking medical information may be required are:

- An employee's performance review reveals that the employee is not performing at the level or standard required, or the employee is not able to perform all duties required of their position, and it appears that the employee's performance issues are due to a non-work related disability or medical incapacity.
- An observation that an employee's health is significantly inhibiting their ability to perform their duties and/or do this safely.
- An employee or their treating practitioner has advised SA Health of their non-work related disability or medical incapacity to perform some or all of their duties to the required standard.
- An employee's health requires that a temporary modification be made to the employee's duties and/or work hours.
- An employee has been absent from work due to a serious non-work related injury; illness or other health condition; or has been absent for a prolonged period for medical reasons; and requests or intends to return, however management is unsure about their fitness to

return to work and requires medical clearance of the employee's ability to safely perform their duties as per their Role Description.

- An employee has been absent from work due to a serious non-work related injury; illness or other health condition; or has been absent for a prolonged period for medical reasons; and requests or intends to return, even though they may not be able to perform their full range of duties (safely) or do this to the expected standard.
- An employee's non-work related disability or medical incapacity is considered to adversely affect their wellbeing and safety and/or that of others at work (e.g. co-workers or patient/clients).

4.1.2. Obtaining medical information: General principles

Medical evidence:

- Under circumstances specified in 4.1.1, management action taken will need to be guided by medical evidence of the employee's capacity to (safely) perform the inherent requirements of their position. (This evidence can be provided by the employee's treating practitioner, or, in situations mentioned in section 4.1.4.1, from an independent medical specialist.)
- As medical information is sensitive and private information (refer to Cabinet Circular No. 12 or the "Information Privacy Principles Instruction"), management should not seek unnecessary details, but only require essential information necessary to:
 - Determine to what extent the employee can safely perform the inherent requirements of their position or alternative duties, or
 - Obtain information that will assist the employee to safely (return to) work, e.g. actions required when the employee resumes work or adjustments that may be necessary for safe performance of duty.

Job Analysis

- The SA Health Job Analysis Management System (JAMS) holds information about the psychological and physical demands of jobs in SA Health. This can be used to identify the impact of non-work related disability or medical incapacity on performance of all the tasks involved in a job. A JAMS report for an employee's job should be provided to the treating medical practitioner and/or independent specialist to inform their advice to the employer. To obtain a report contact WorkFit Services.
- *Job and task analysis* is particularly valuable for identifying which of the work tasks that make up the role are suitable and which are not (i.e. which tasks will the employee be able to perform, or will be able to partially perform and which ones not). It also assists in evaluating any proposed adjustments to the role.
- An assessment of the physical capacity of the worker can also be conducted (to supplement observations that the employee's health is significantly inhibiting their ability to perform their duties safely). Options include:
 - Clinical assessment conducted by a consultant of WorkFit Services.
 - Conducting a *Functional Capacity Evaluation* (i.e. a standardised testing protocol used to match the actual performance of the employee against the physical demands of the role derived from the job and task analysis). A Functional Capacity Evaluation may be conducted by WorkFit Services⁷.

⁷ Contact workfitservices@health.sa.gov.au for consultation with WorkFit staff.

Clearance for full duties:

- Where an employee is considered able to perform the full range of their duties, a medical certificate from the employee's treating medical practitioner (clearing the employee for full duties as per their Role Description) should be all that is required.

Consult with employee and treating practitioner:

- Should further information be required, management must work collaboratively with the employee and the employee's treating practitioner (where possible) in order to make an informed decision (e.g. regarding the safety of the employee, co-workers and patients/clients) if the employee would be allowed to (continue to) work. Refer to 4.2.1 for possible actions which management may take in response to a medical report.

Costs:

- The employing Health Network is responsible for medical fees associated with the medical reports and/or case conference (if required and agreed to by the employee) where the employee is still at work and management is taking the initiative to obtain medical information from their treating practitioner.
- If an employee seeks adjustment to his/her role or contractual arrangements based on medical reasons; or intends to return to work after a (prolonged) absence due to a non-work related disability of medical incapacity, the employee is responsible for any cost associated with obtaining clearance from their treating practitioner for full duties or for providing his/her employer with medical information necessary to ensure their safe return to work.

4.1.3. Obtaining advice from a treating medical practitioner

Medical information required by management to understand an employee's ability to safely perform his/her duties or safely return to work may be obtained by:

- a. Requesting, (with consent of the employee) that their treating medical practitioner provides the required information in relation to the employee's non-work related disability or physical incapacity.
- b. Requesting (with consent of the employee) that a case conference with the treating medical practitioner takes place. (Cost arrangements as discussed under section 4.1.2 apply.)
 - Note that a case conference may be appropriate or necessary where the information provided by the employee's treating practitioner is not considered sufficient for management to make an informed decision with regards to managing the employee; or the information provided by the treating practitioner is inconsistent with (management's) observations.
 - Prior to the case conference, information that will be discussed is to be provided to the employee and their treating medical practitioner to facilitate discussion. The discussion should not include details of the employee's condition which are not necessary to determine an employee's ability to (safely) perform their duties; and/or any adjustments/modifications required to enable this.
- c. Requiring an independent medical examination (refer 4.1.4) - if adequate information cannot be obtained from the employee's treating practitioner.
- d. In relation to a. and c. - providing attachments to the request for advice from the treating medical practitioner, including:
 - A summary of circumstances– i.e. relevant facts, examples and events (refer to section 4.1.1).
 - Any evidence in the workplace that the employee may suffer from a physical/mental condition that impacts/may impact on his/her ability to safely and/or adequately perform the duties of their contracted position, e.g.:
 - A summary of the history of the perceived/known physical or mental condition.

- Medical reports and certificates provided by the employee's treating medical practitioner/s (if any).
- Witnessed evidence – a summary of observations by management and co-workers.
- A history of absences due to the employee's non-work related disability or medical incapacity.
- A short chronology of the history and management of the employee's situation at work.
- The possible impact of the employee's disability or medical incapacity on others in the workplace (including colleagues and patients/clients) – e.g. workload and safety.
- The inherent requirements of their role; main duties, tasks and activities (Role Description and Job Analysis,) of the employee's contracted position - i.e. his/her position prior to any interim adjustments having been made to accommodate the employee's disability or medical incapacity.
- The Person Specification requirements of the employee, i.e. the abilities and personal characteristics required of the employee to perform the essential components of the role satisfactorily. This may include, among other aspects, requirements regarding communication; team work; levels of productivity; etc. These requirements should be substantiated with relevant examples.
- Functional Capacity Evaluation (if available).

All documents provided to the treating practitioner must be provided to the employee when sent to the treating practitioner. Statements contained in the documents provided to the treating practitioner should be a true, fair and reasonable reflection of relevant facts and be presented in a tactful and sensitive manner.

4.1.4. Requirement to undertake an independent medical examination

4.1.4.1 Appropriate under exceptional circumstances

A decision to require an independent medical examination should not be taken lightly as it may be perceived as invading an employee's privacy. An independent medical examination is considered appropriate where:

- It can be demonstrated that safety and performance issues are significant and consistent enough to warrant medical information being obtained in order to advise the manager of the employee's ability to safely (continue to) work in their current contractual role.
- The employee does not consent to their treating medical practitioner providing the information required by the manager (to make an informed decision regarding the employee's ability to safely continue to work in his/her contractual position or whilst undertaking alternative duties); or
- Where sufficient information to manage the employee's situation cannot be obtained from the employee's treating practitioner, or
- Where the information provided by the employee's treating practitioner is inconsistent to observations in the workplace.

4.1.4.2 Approval by the Executive Director, People and Culture for an independent medical examination

The Executive Director, People and Culture (ED, People and Culture) has been nominated by the Chief Executive to consider submissions for approval of a direction to an employee to attend an independent medical examination by a medical specialist. (Refer to the HR Manual, in 7-9-4, *Medical examination requested by a Chief Executive Officer* and section 56 of the PS Act and *Commissioner for Public Sector Employment's Guideline: Power to Require a Medical Examination*) for further information.

The briefing to the ED, People and Culture requesting approval must include:

- Reference to SA Health's authority to direct an employee to attend an independent medical examination (refer 3.4 and 3.5).
- How the situation complies with the requirements of this Guideline.
- Evidence of circumstances specified in section 4.1.1– including relevant facts, examples and events.
- Evidence that the employee's non-work related disability or medical incapacity is impacting on the employee's ability to perform the full range of their duties safely; (i.e. considering the safety of the employee, colleagues or patients/clients); or, if the employee is not at work, evidence that the employee's disability or medical incapacity may impact on their safe return to the workplace.
- A brief chronology of the history and management of the employee's non-work related disability or medical incapacity.
- Management actions that may be considered in response to results of medical assessment of an employee's disability or medical incapacity (refer 4.2.1).

4.1.4.3 Advising the employee to attend an independent medical examination

Once approval has been obtained from the ED, People and Culture that the employee may be required to attend an independent medical examination (IME), management must advise the employee verbally (if practically possible), and then in writing, that he/she is required to attend the IME. This communication should be conducted with sensitivity, tact and discretion considering the impact it may have on the employee.

Correspondence to the employee advising him/her that they are required to attend an IME should:

- Advise the employee of the authority of SA Health to require an IME. (Refer to 3.4 and 3.5) The reasons for the requirement to attend an independent medical examination must be stated in a sensitive and tactful manner. (Refer to 4.1.1)
- Refer (if relevant) to unsuccessful attempts to obtain necessary information from the employee's treating practitioner.
- Provide the employee with a panel of at least two medical specialists for the employee to choose from. (The WorkCover List of Contracted Independent Medical Examiners provides a list of specialists in relevant medical fields.)
- Advise the employee that he/she will be provided with a copy of all documents forwarded to the independent medical specialist prior to attending the appointment and that the employee may provide comments and/or additional information (such as reports from their treating practitioner) to the independent specialist for their consideration.
- Advise the employee that they may be accompanied by a support person of their choice throughout the process.
- Refer the employee to SA Health Employee Assistance Program (EAP) providers for support if required.
- Where the employee has been appointed under the PS Act, advise the employee (tactfully) that failure to attend the independent medical examination may result in suspension without remuneration and without accrual of leave entitlements until such time as the employee has attended the examination. Alternatively the employee may be required to take leave until an independent medical examination has occurred.
- Where the employee is a HC Act employee, advise the employee (tactfully) that failure to attend may result in disciplinary action.
- Advise the employee that they have a right to seek review of the decision to require an IME (refer to 4.5.2).

Any valid reason provided by the employee as to why they cannot attend the IME should be considered and the principles of procedural fairness (refer to 3.8) must be followed. Should an employee not present at work and fails to respond, the possibility that the employee is unable to communicate should be considered prior to any action being taken.

4.1.4.4 Letter to the nominated medical specialist

Correspondence to the nominated medical specialist must include:

- a. A statement of SA Health's authority to require that the employee undergo an independent medical examination.
- b. SA Health's obligation in terms of *Work Health and Safety Act 2012*; i.e. to take reasonably practicable steps to keep employees safe at work; including not to return or allow an employee to work in a role where they could injure themselves or others because of lack of capacity to fulfil the job demands. In this context a summary of perceived risks to the employee in his/her current work environment could be included.
- c. Request the specialist's opinion on:
 - Whether the employee suffers from a physical or mental condition that may impact their work performance.
 - Whether the employee is medically able to safely perform the essential requirements of his/her role without limitation of his/her ability to do this (details of the essential requirements of the role is to be provided).
 - If the employee has a physical or mental condition that impacts his/her ability to satisfactorily and safely perform the essential requirements of his/her role, an opinion on:
 - How the employee's physical or mental condition will impact his/her ability to perform all the essential requirements of their position.
 - How medication or treatment may impact on work performance (if any impact).
 - The aspects of the role that the employee has/will/may have difficulties with.
 - What the risks are to the employee or others should the employee continue to work in his/her role and/or in the work environment.
 - If adjustments to duties, hours and/or the work environment are required over the short and/or longer term to enable the employee to perform all the inherent requirements of their role without undue risk to self or others, what are these?
 - What is the prognosis regarding possible degeneration or the employee's recovery over the short, medium and long term?
- d. Material to be provided to medical specialist:

See 4.1.3 (d) above for attachments that should be provided to the medical specialist.

All documents provided to the independent medical specialist must be provided to the employee prior to attending the appointment. Statements contained in the documents provided to the independent medical specialist should be a true, fair and reasonable reflection of relevant facts and be presented in a tactful and sensitive manner.

4.1.4.5 Appointment with the nominated medical specialist

The employee should be provided at least five (5) days' notice of their appointment with the nominated specialist in order to allow sufficient time for the employee to arrange a support person of their choice.

4.1.4.6 Consideration of the adequacy and consistency of medical reports/documentation

When the medical report and other information is received from the treating practitioner or independent specialist, managers and Workforce staff should consider whether the medical information is sufficiently clear and comprehensive enough to make an informed, defensible and sound decision. If this is not the case, more information or clarification should be requested.

Where there are inconsistencies in the opinions of the treating medical practitioner and the independent medical specialist, then the independent medical specialist's comments on those inconsistencies should be requested.

Particular consideration must be given to information provided by the employee's treating practitioner as the treating practitioner's opinion may be granted priority by a tribunal or other external party reviewing a management decision should there be conflicting medical evidence.

4.1.4.7 Provision of a copy of the medical report to the employee

A copy of all reports received from a treating practitioner or independent specialist must be provided to the employee. Before taking any action on the basis of a report from an independent specialist, the employee must be allowed a period of not less than 14 days from the date of the employee's receipt of the report to furnish SA Health with any medical reports obtained by the employee on his or her mental or physical condition. This is a legal obligation for employees appointed under the *Public Sector Act 2009*.

4.2. Consideration of medical evidence and management actions

4.2.1. Management actions in response to medical reports

Any management action in response to an employee's disability or medical incapacity should be reasonable, proportionate and fair in the context of the medical information obtained from the employee's treating practitioner and/or the independent medical specialist.

After consideration of all relevant information pertaining to

- an employee's performance of their role;
- the employee's and others safety at work; and
- any mental or physical incapacity revealed by medical evidence,

management could consider appropriate action, e.g. as follows:

- a. If the employee is deemed fit for full duties, return the employee to his/her contractual position.
- b. If the employee is deemed temporarily unfit for work, utilise paid and unpaid leave up to a period of 12 months (or longer if approved by the CEO/CE).
- c. If the employee is able to perform all normal duties with modifications, consider reasonable adjustments to their role and/or workplace.
- d. If the employee is temporarily unfit for normal duties, but is able to return to work, consider suitable safe alternative duties (if available) for an interim period. This may require agreement on new terms and conditions of employment including remuneration suitable to the alternative duties performed. If suitable and safe alternative duties are not available, the employee has to utilise paid and/or unpaid leave up to a period of 12 months (or longer period if approved by the CEO/CE).
- e. If the employee is ongoing unable to return to normal duties (even with adjustments), consider in the first instance assigning or transferring the employee to an alternative suitable position on the employee's substantive remuneration level within the employee's substantive area; and if not able, endeavour to place/assign the employee to a suitable position in the broader employing health organisation, or to a lower remuneration level by agreement. If this cannot be achieved within a reasonable period, termination of employment may be considered.
- f. If the employee is not able to return to work, their employment should be terminated. (Refer to 4.2.7 below.)

4.2.2. Return to contractual position if deemed fit to return to full duties

If the medical report confirms that the employee does not suffer from a condition that prevents performance of his/her contractual duties and is deemed fit to return to full duties without limitation of their abilities, or adjustments required, the employee is to be returned to their normal duties and hours.

If there are performance concerns and the medical report shows it is not caused by a disability or medical incapacity, management may initiate action to manage the employee's poor performance as specified by the Commissioner for Public Sector Employment's Guideline *Management of Unsatisfactory Performance (Including Misconduct)* or the 4-1-7 *Managing Unsatisfactory Performance, Discipline and Termination* in the [HR Manual](#).

4.2.3. Employee deemed temporarily not fit to return to work

Should the employee be deemed unfit to return to work in the near future, but able to return to their normal duties within a reasonable time, sick leave, paid leave (if available) or unpaid leave up to a period of 12 months (or longer period if approved by the CEO/CE) may be granted. Refer to 4.3 for resources available to support employee.

4.2.4. Modification of employee's role and/or workplace

In circumstances where

- an employee returns to work prior to he/she having fully recovered from a non-work related disability or medical incapacity; or
- an employee suffers from a health condition or disability that limits their capacity to perform the essential requirements of their role; and
- an employee's medical reports recommend certain modifications to their role, hours or workplace on a temporary or ongoing basis; or
- modifications are indicated by an analysis of the health and safety risks to the employee or others should the employee return to/continue to perform their normal duties without adjustments;

SA Health is required by the *Equal Opportunity Act 1984* and the *Disability Discrimination Act 1992 (Cth)* to consider making reasonable adjustments to the employee's role and/or workplace should this enable the employee to perform the inherent requirements of their role. (More detail on reasonable adjustments and inherent requirements are available on the [Human Rights Commission's website](#).)

The employee can contact [Job in Jeopardy Assistance](#) and [JobAccess](#) to assist with identifying appropriate adjustments and implementation.⁸

The impact and safety of the employee, their co-workers and patients/clients must be fully considered prior to the employee being accommodated in their substantive or alternative position.

4.2.5. Consideration of suitable and safe *interim duties*

4.2.5.1 Employee deemed fit to work, but not in their substantive role

If the medical prognosis is that the employee:

⁸ **Job in Jeopardy Assistance** Provides assistance for people at risk of losing their job because of illness, injury or disability. This assistance is free and available through direct registration with a Disability Employment Provider. Through a Disability Employment Provider, Job in Jeopardy Assistance may include:

- advice about redesigning the person's work so he/she can keep working
- having the person's workplace assessed to see how it can be changed to make it easier for them to work
- having their workplace changed so they can continue to work
- specialised equipment to help the person do their work

Eligibility for Job in Jeopardy Assistance

To be eligible for Job in Jeopardy Assistance, the person must have been employed for at least eight hours a week on average over the last 13 weeks, and not receiving assistance from a Disability Employment Services Provider.

People who meet these requirements can approach a Disability Employment Services Provider directly for assistance.

Resources

JobAccess^[1] - A free information and advice service about the employment of people with disability, including information about the **Employment Assistance Fund** which provides funds to help people with disability to improve their access to work, e.g. assistance with the costs of installing accessible doors, ramps, adjusting heights of switches, assistive technology,

- is able to return to or continue to work, but
- is temporarily unable to return to his/her normal duties,
- and will be able to return to their substantive position within a reasonable period,

management may consider the following options:

- The employee remains on paid or unpaid leave until deemed fit to perform without limitation the essential requirements of their role, and do this without undue health and safety risk to themselves or others in the workplace.
- If suitable safe alternative duties are available (within budget and operational requirements within the employee's substantive work area), duties may be allocated to the employee on an interim basis.
- If a suitable alternative position is available, the employee may be temporarily assigned or transferred to this position for the estimated duration of their inability, before returning to their substantive position (refer to 4.2.6).
- The employee may be temporarily assigned or transferred to a lower remuneration level (following agreement of the employee) for the estimated duration of their incapacity, before returning to their substantive position.

4.2.5.2 Safety considerations

If suitable duties can be provided to the employee within budget and operational requirements; management must consider:

- whether these duties can be safely performed without undue risk of aggravation of the employee's disability or medical incapacity; and
- whether it can be provided without causing unacceptable hardship or undue risk to the health and safety of others in the workplace.

Where the employee's medical ability or limitations are not clear, medical clearance may be required before allowing the employee to perform the interim duties.

4.2.5.3 Agreement on terms and conditions of the interim arrangement

Prior to allowing an employee to commence suitable interim duties, the terms and conditions for such work require agreement by both parties. An employee should be provided with the opportunity to have a support person present when the terms and conditions are being discussed and he/she should be provided a sufficient period of notice in order to consider and seek advice on the terms and conditions proposed by management. The agreement should specify that:

- a. The alternative contractual arrangement will be for a pre-determined period only (unless renewed in writing), e.g. for a stated number of months (depending on the prognosis for full recovery).
- b. There will be no right to ongoing employment in a role undertaking the interim duties.
- c. The interim arrangement does not prejudice the employee's right of return to his/her substantive role following expiry of interim arrangements, should the employee be cleared for full duties during the period whilst performing interim duties.
- d. The employee will meet regularly with their manager in order to:
 - Discuss any issues and measures to address any concerns.
 - Review the employee's ability to perform their interim duties.
 - Review the employee's progress and capacity to return to full duties of their substantive role.
 - Ensure that the employee adheres to any medical recommendations whilst performing interim duties.
- e. Management has the discretion to terminate the agreement for interim duties at any time during the period specified, particularly where:

- There are reasonable grounds for concern regarding the employee's fitness to undertake the interim duties.
- The interim arrangement places the health and safety of the employee or others in the workplace at risk.

(Refer to section 3.8 regarding fair process required before terminating the agreement.)

- f. The work hours agreed to (full time or part-time) and the timing of the review of work hours.
- g. The appropriate remuneration for the interim duties should the interim duties not be considered at the same remuneration level as the employee's substantive position.
- h. A return to work plan based on the employee's unique requirements and prognosis.

4.2.5.4 Suitable safe duties not available or cannot be accommodated:

If suitable safe alternative duties are not available or cannot be accommodated at the time, management should contact the employee and, if possible, meet with them (and their support person, if required) to:

- Advise the employee that they cannot return to work until they are medically cleared to return to their substantive position; or there is significant improvement in their capacity to return to work which is supported by a medical certificate; and safe and suitable duties can be provided at that time.
- Discuss the options and resources available to the employee; e.g. available sick/annual/long service leave or unpaid leave and possible disability benefits from their private insurer, income protection fund or superannuation fund (e.g. Super SA); or contact Centrelink.
- Remind the employee of their obligation to maintain regular contact with management and to provide medical certificates for the period of their incapacity.

Management have an obligation to continue to consider whether suitable duties can be provided within budget and operational requirements as the employee's capacity to return to work improves over time.

4.2.6. Assignment or transfer to an *alternative position*

Where an employee's prognosis indicates that it is unlikely they will be able to safely return to their substantive duties, or will be unable to continue to work in their substantive position, reasonable efforts must be made for a reasonable period to source an alternative suitable safe position at their substantive remuneration level to assign the employee to - either within the employee's substantive area or across SA Health. Where this is not achievable, suitable positions at a lower remuneration level may be considered in agreement with the employee.

If possible, the employee's manager must meet with the employee in order to discuss the employee's options and available resources prior to seeking an alternative position; or interim arrangements until such time as a suitable safe position is sourced. The employee must be allowed sufficient time to arrange to have a support person present during these discussions and be provided sufficient time to consider and seek advice on arrangements proposed by management.

If placement of the employee into a suitable alternative and safe position at the employee's substantive remuneration level is not available within a reasonable period, and following consultation and agreement by the employee, the employee may be assigned or transferred to a suitable safe position at a lower remuneration level, if available.

Suitable duties may be provided as an interim arrangement whilst seeking an alternative position into which to assign or transfer the employee. (Refer 4.2.5.4 if suitable alternative duties are not available.)

4.2.7. Termination of employment

Termination of employment must be considered as a last option and should only be considered once all reasonable attempts have been made to source a suitable and safe alternative position into which the employee may be assigned or transferred.

To enable termination of the employee's employment; management must be able to demonstrate:

4.2.7.1 A valid reason for termination: e.g.

a) Medical assessments indicate:

- that the employee is not able to return to work in the long term, or
- is not able to return to work within a reasonable period; or
- is not able to perform the requirements of their substantive position, even with reasonable adjustments; or adjustments are not deemed feasible; and

b) Reasonable efforts have been made without success to source an alternative suitable and safe position (even at a lower remuneration level) to assign or transfer the employee into; *and/or*

c) The likelihood of sourcing an alternative suitable and safe position (even at a lower remuneration level) within a reasonable period is considered small.

d) The employee is absent from work without contacting management for a prolonged period and/or has not provided medical certificates or is accessing paid or unpaid leave without the prior approval of management.

4.2.7.2 Procedural fairness

a) Management have complied with the requirements of procedural fairness (refer to 3.8).

b) Procedures applicable to abandonment of employment have been followed where an employee has failed to maintain regular contact with management and/or failed to provide medical certificates for the duration of their absence from work; e.g. management has attempted to contact the employee without success; management has forwarded correspondence to the employee advising of consequences for the employee should they not make contact or fail to respond.

c) Note that the employment of employees appointed under the *Public Sector Act 2009* (PS Act), may only be terminated after the agency has complied with section 54(3) of the PS Act.⁹

4.3. Employee responsibilities, obligations and resources

- Employees have an ethical and common law duty of care and obligation under the *Work Health and Safety Act 2012* to disclose relevant information about their health status where this may impact on their capacity to safely perform their substantive duties, or place patients or other employees at risk.
- If an employee is diagnosed with a significant non-work related disability or medical incapacity that may impact on their ability to perform their duties safely, management should be advised at the earliest opportunity regarding the impact of their disability or medical incapacity on their ability to undertake the essential requirements of their role.
- If the employee is unable to work, they must:
 - provide a medical certificate/s to cover their absence from work;
 - apply for sick/annual/long/retention service leave as required; and

⁹ I.e. "has informed the Commissioner of the grounds on which it is proposed to terminate the employment of the employee and the processes leading up to the proposal to terminate; and ...has considered any advice given by the Commissioner within 14 days about the adequacy of the processes".

- maintain regular contact with management in order to advise of their progress towards recovery and their anticipated return to work.
- When the employee has been absent from work due to a serious non-work related injury; illness or other health condition; or has been absent for a prolonged period for medical reasons; and requests or intends to return; the employee should provide (and the employing health entity should require) medical documentation prior to their return to work:
 - which clears the employee to return to their full duties as per their Role Description without limitation of his/her ability to perform the essential requirements of their role; or
 - if their ability remains limited, provide details of such limitations and adjustments to the employee's duties, hours and/or workplace that may be required for their return.
- If requested by their line manager, the employee must provide their treating practitioner with a copy of the Job Demand Analysis (JDA) of their substantive position -if available- and their Role Description for consideration prior to completing the medical documentation. (The JDA and Role Description may be obtained from management or from Human Resources.)
- The employee is responsible for the cost of obtaining the medical reports and certificates.
- Employees must adhere to any medical recommendations applicable to their return to work.
- The employee is responsible for seeking financial advice and assistance to cover any periods of unpaid leave and to mitigate any loss of income during such periods; e.g. if they have no paid leave available, they may contact their private insurer, income protection fund or superannuation fund (e.g. Super SA); or contact Centrelink to determine their eligibility for disability benefits.

4.4. Exhaustion of sick leave

If an employee has no available sick leave, management have the discretion to permit employees under Part 7 of the PS Act to take sick leave in anticipation of the leave accruing to the employee, provided that, if such employee for any reason ceases to be an employee, a sum equal to the sum paid to the employee in respect of that leave is payable and may be deducted from any amount payable to the employee on the cessation of their employment.

Alternatively, employees without available sick leave may be granted annual leave, long service or retention leave for an absence caused by their disability or medical incapacity, subject to such being available and the provision of an appropriate medical certificate or other approved certification required by the Chief Executive or Chief Executive Officer.

An employee may also be granted leave without pay for absences caused by a physical or mental condition up to a maximum period of 12 months, subject to medical certification (or a longer period if approved by the Chief Executive or Chief Executive Officer). Prior to granting a period of leave without pay to cover absence as a result of a disability or medical incapacity, the Chief Executive or Chief Executive Officer must be satisfied that the employee will be able to resume duty in the foreseeable future.

4.5. Procedural fairness, grievances and discrimination

4.5.1. Procedural fairness

Refer to section 3.8 regarding general procedural fairness (applicable to all situations where a management decision may adversely impact an employee's interests) and section 4.2.7 regarding termination of employment where the employee is incapacitated by a non-work related disability or medical incapacity.

4.5.2. Grievances

Public Sector Act 2009 employees who are affected by a management decision based on their non-work related disability or medical incapacity, may apply for review of the decision in accordance with sections 59 to 63 of the *PS Act* and sections 26 to 28 of the *Public Sector Regulations 2010*. In this regard, PS Act employees have access to internal and external review processes of all management decisions relating to their disability or medical incapacity, e.g. regarding a direction not to attend the workplace; a direction to take sick or

other type of leave; a direction to attend an independent medical examination or a review of any management decision arising from the report of the medical examination. (sections 58 to 64 of the PS Act).

Health Care Act 2008 (HC Act) employees may request (in writing to the Chief Executive Officer or Chief Executive), a review of any management decision, within seven days of being notified of the decision. The Chief Executive Officer or Chief Executive must review the decision and advise the employee of the outcome in writing. If the matter is not resolved at the local level, HC Act employees may lodge an application to have their grievance reviewed by the Grievance and Reclassification Appeal Panel within the Department for Health and Ageing. Refer to Part 3 *Grievances and Disputes* in the *SA Health (Health Care Act) Human Resources Manual*.

4.5.3. Discrimination based on disability

If a person considers they have been discriminated against based on their disability regarding any employment decision, they may make a complaint of discrimination to the [Commissioner for Equal Opportunity](#) pursuant to the *Equal Opportunity Act 1984 (SA)* (EO Act). If the matter is not resolved through conciliation in the Commission, the matter may be referred to the Equal Opportunity Tribunal for hearing and determination. The Tribunal may order compensation to be paid for loss or damage arising from a contravention of the EO Act or may make an order “*requiring the respondent ...to perform specified acts with a view to redressing loss or damage arising from the contravention*”..

Alternatively, employees may lodge a complaint with the [Australian Human Rights Commission](#). Under the *Australian Human Rights Commission Act 1986*, the Australian Human Rights Commission has the power to inquire into discrimination in employment on the ground of a disability.

5. Roles and Responsibilities

5.1 Chief Executive/Chief Executive Officers

Ensure that all staff in Local Health Networks or Health Services are aware of and appropriately consider the provisions of the Guideline.

5.2 Executives, Directors, Senior Managers and Managers

Ensure that all staff under their management are aware of and appropriately consider the provisions of the Guideline.

5.3 Directors of Workforce

Ensure due consideration of the Guideline and implementation of procedures consistent with the provisions of the Guideline.

6. Reporting

N/A

7. EPAS Considerations

N/A

8. Associated Policy Directives / Policy Guidelines

Related policies are:

- *Commissioner for Public Sector Employment's Guideline: Power to Require Medical Examination*
- *Circular No. 12 or the "Information Privacy Principles Instruction" which applies to all State Government agencies, including SA Health, has to be considered. A guide for long term absence discussions (not for WorkCover)*
- *Attendance Management Guideline for SA Health*
- *Information Session Presentation - Attendance Management*
- *Absence Management Tools - Attendance Management*
- *Absence Management Tools - Example letters and templates*
- *Transition to Retirement Information for Managers*
- *Directive - Transition to Retirement*

9. References, Resources and Related Documents

The Policy should be read in conjunction with:

- *Equal Opportunity Act 1984*
- *Disability Discrimination Act 1992*
- *Work Health and Safety Act 2012*
- *Australian Human Rights Commission Act 1986*
- *Public Sector Act 2009*
- *Fair Work Act 1994*
- *SA Health (Health Care Act) Human Resources Manual*
- *Circular No. 12 or the "Information Privacy Principles Instruction*
- *Code of Ethics for the South Australian Public Sector*
- *Workers with Mental Illness: A practical guide for managers* (Publication of the Humans Rights Commission)
- *Complaints*: Making a complaint under the Disability Discrimination Act (Publication of the Humans Rights Commission)

10. National Safety and Quality Health Service Standards

N/A

11. Other – N/A

N/A

12. Evaluation

Compliance with this Guideline is not mandatory, but is strongly encouraged as it is considered reasonable practice for managing SA Health employees with non-work related medical incapacity. Directors have to evaluate related management decisions and actions in light of this Guideline.

13. Attachments

Attachment 1: Process map for management of non-work related disability or medical incapacity. <http://inside.sahealth.sa.gov.au/wps/wcm/connect/Non-public+Content/SA+Health+Intranet/Resources/Non-work+related+disability+or+medical+incapacity+process+map+for+Management>

Supporting model letters and tools to assist with management of the process can also be found on the [Workforce Information](#) intranet page, listed under “N”: Non-Work Related Disability – Medical Incapacity.

Full intranet page address:

<http://inside.sahealth.sa.gov.au/wps/wcm/connect/non-public+content/sa+health+intranet/business+units/workforce/workforce+information/workforce+information+a-z#N>

These documents may be amended over time as the tools and resources are further developed.

Please note that the model letters provided are NOT to be viewed as templates and that the author turns their mind to the individual facts and circumstances of the matter when drafting documents.

14. Definitions

In the context of this document:

capacity:

means the employee’s ability to perform duties in terms of their medical fitness for work.

contracted position/role:

means a position that an employee has been employed/appointed in – regardless whether the employee currently works in the position or not; or whether the employee is currently performing all the duties of the position.

disability:

is as defined in the *Equal Opportunity Act 1984* (EO Act) and the *Disability Discrimination Act 1992 (Cth)* (DD Act). The definition of disability is broad, however transitory or minor illnesses (such as colds and flus) are not normally considered to be physical disabilities. A perceived disability is protected. This is where a person is seen as having a disability and, as a result, treated in a discriminatory way.

In terms of section 4 of the DD Act “**disability**, in relation to a person, means:

- (a) total or partial loss of the person’s bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person’s body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that:
 - (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future (including because of a genetic predisposition to that disability); or
 - (k) is imputed to a person.

To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.”

In terms of section 5 of the EO Act, “**disability**, in relation to a person, means—

- (a) total or partial loss of the person’s bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or

- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;”

discrimination (direct – or indirect-):

has the meaning stated in the DD Act, sections 5 and 6:

“5 Direct disability discrimination

- (1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.
- (2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
 - (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
 - (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.”

“6 Indirect disability discrimination

- (1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
 - a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
 - (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
 - (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.
- (2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
 - (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
 - (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
 - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.
- (3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.
- (4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.”

Functional Capacity Evaluation:

means an assessment of an individual's capacity to undertake the critical physical demands of a role. The test is constructed with reference to a *job demand analysis* for the role and is conducted using a formal testing protocol.

independent specialist:

means a specialist chosen by an employee from a panel of medical specialists provided to the employee (by the employing organisation) for the assessment of the physical or mental status of the employee and for providing a medical report to the employing organisation.

inherent requirements (of the position):

are as discussed on the [Human Rights Commission](#) webpage as follows:

“The DDA uses the concept of “the inherent requirements of the job” in defining discrimination and in defining some of the exceptions to the obligation not to discriminate. The term inherent requirements is not

defined in the DDA. In the Commission's view, inherent requirements need to be determined in the **circumstances of each job**. They may include:

- the ability to perform the tasks or functions which are a necessary part of the job productivity and quality requirements
- the ability to work effectively in the team or other type of work organisation concerned
- the ability to work safely.

(On ability to work in the team or work organisation, see the Commission's decision in Y v Australia Post.

On **ability to work safely as an inherent requirement**, see the decision of the High Court in X v Commonwealth of Australia and HREOC (2 December 1999) and the decision of the Commission in Woodhouse v Wood Coffill Funerals, and the decision of the NSW Administrative Decisions Tribunal in Laycock v Commissioner of Police. See also the decision of the High Court in Qantas Airways v Christie on inherent requirements generally.) If a complaint is made, the complaint handling authority (the Commission, State or Territory equal opportunity authorities, or the Federal Court) may need to decide two questions of fact:

- what is the job concerned?
- what are the inherent requirements of that job?

As indicated by the Commission's decision in Woodhouse v Wood Coffill Funerals, **relevant factors** may include

- the work required in practice by the employer to be performed by employees in the position concerned and comparable positions - a requirement in a duty statement which does not apply in practice may be found not to be part of the inherent requirements of the **job as it really exists**
- evidence regarding any need for duties which are additional to those currently performed but which may require performance **in an emergency or at periods of high workload** - for example, ability to assist passengers in an emergency would clearly be an inherent requirement for airline cabin crews even if staff of the airline concerned have never yet had to perform this function in an accident
- the extent to which a particular requirement concerns a **result to be achieved** rather than a means for achieving a result - results required are more likely to be found to constitute part of the job, and an ability to achieve these results to be an inherent requirement, whereas an ability to use a particular method of achieving a result is less likely to be found to be an inherent requirement, and more likely to be subject accordingly to a requirement for reasonable adjustment where this is possible without unjustifiable hardship
- the circumstances in which the work is performed or to be performed - what are inherent requirements in the circumstances of one particular job will not necessarily be inherent requirements for a job which involves the same tasks but different **circumstances**
- the terms of applicable awards or agreements including applicable competency standards - this does not mean that awards and agreements will necessarily be accepted as conclusively prescribing inherent requirements, but "the job" and hence its inherent requirements **may be defined in part by awards or industrial agreements** rather than only by an **implicit or explicit contract of employment** or by **custom and practice**
- the terms of any applicable duty statement - although the DDA does not require employers to have written **duty statements** and where a duty statement does exist it will not necessarily be conclusive. A requirement contained in a duty statement might not be found to be an inherent requirement. The Commission and the courts have emphasised that a requirement is not inherent simply because it is stipulated in a duty statement or contract of employment. Equally, a requirement might not appear on a duty statement but still be found to be an inherent requirement
- any **mandatory requirements** which apply because of the provisions of **another law**, including in relation to **health and safety** - employers should note however that any discriminatory provisions in State or Territory laws or in Federal laws earlier than the DDA do not prevail over the DDA except where they have been prescribed for this purpose under DDA section 47(2). At present no laws in this area have been so prescribed."

interim alternative duties

means different duties provided to an employee for a limited period of time in accordance with the terms of an interim or temporary duty agreement (as attached) until the employee is medically cleared to resume his/her substantive duties.

job analysis:

means the analysis of the physical and psychological demands of both the role as a whole and the component tasks. The SA Health Job Analysis Management System (JAMS) holds information about the psychological and physical demands of jobs in SA Health. The analysis is constructed as a list demands for each of the component tasks required to perform the duties required in the role. The physical and

psychological demands of each task are described and quantified to enable matching of each task against the non-work related disability or medical incapacity. This includes detail about the frequency and duration of performance for each task which together give the exposure to the task. A range of different reports are available depending upon the requirement.

job demand analysis:

means a summary of the demands for the whole role taking all component tasks into account.

limitations:

means limited ability to perform a task - the patient may perform the activity but will only be able to do this in a reduced capacity. E.g., the employee is not able to perform the job with the usual speed, strength or number of repetitions, or for the usual duration.

medical evidence/documentation/information:

means information coming from a medical practitioner/ professional.

medical incapacity:

means the employee is, due to a medical (physical or mental) condition, not able to comply with his/her position requirements, including performing full duties on the required standard, and/or maintain the hours contractually expected.

non work related disability or medical incapacity:

means a physical, mental or psychological condition which did not arise out of the course of employment. and

- Has the potential to adversely affect the employee's health and safety and that of any other person in the workplace;
- Requires temporary modification to the employee's substantive duties and/or hours;
- Requires prolonged absence (s) from work;
- Has the potential to inhibit the employee's ability to fulfil their substantive or other contracted role.
- Have been identified as the possible cause of poor work performance.

reasonable adjustments:

relates to adjustments required to the work environment or role of a person who is not able to safely perform all the inherent requirements of the position due to a mental or physical disability.

The *Equal Opportunity Act 1984* and the *Disability Discrimination Act 1992* (Cth) require that reasonable adjustments of the employee's role and/or the workplace must be considered if this would enable them to perform the inherent requirements of their position. Adjustments may include modification of various aspects of the role or workplace – e.g. hours, work schedules, work practices, etc.

Whether the required adjustments would be reasonable should be considered in light of its implications and impact, e.g. the cost of the modifications; its practicality; the impact on the integrity of established rosters; or impact on the workload and/or safety of others in the workplace.

Whether adjustments would cause undue hardship to the employing organisation will be assessed in context of the relative size and resources of the organisation and its available strategies to manage adverse impacts.

The health and safety risks of allowing the employee with a disability or limited capacity to (continue) to work in a position, and the effect of this on the wellbeing and safety of other employees, should also be considered and reasonable adjustments made to provide a safe work.

Examples of reasonable adjustments are:

- adjustments to workplace or work related premises, equipment or facilities, including provision of additional equipment or facilities
- adjustments to work related communications or information provision, including the form or format in which information is available
- adjustments to work methods
- adjustments to work arrangements, including in relation to hours of work and use of leave entitlements
- adjustments to methods used for testing, assessment or selection
- adjustments to work related rules or other adjustments to enable a person to comply with rules as they exist
- access to training, transfer, acting, trial or higher duties positions, traineeships, or other forms of opportunity to demonstrate or develop capacity in a position
- provision of interpreters, readers, attendants or other work related assistance
- permitting or facilitating a person to use equipment or assistance provided by the person with a disability or by another person or organisation
- providing training to co-workers or supervisors

restrictions/limitations:

means that the employee is medically advised not to perform this activity or is only able to partially perform this activity.

substantive position/role:

means the duties and hours of work as per the employee's appointed position, and/or the position the employee has a right to return to if the employee is not currently working in the position, e.g. the position of an employee on leave or who is temporarily working elsewhere.

suitable duties/position:

means commensurate with the employee's substantive remuneration level, qualifications, experience, skills, as well as within the employee's capacity to perform safely considering his/her medical limitations or restrictions and without aggravating his/her medical condition.

task:

means 'a discrete unit of work performed by an individual which comprises a logical and necessary step in the performance of the entire job'

treating medical practitioner:

means a person registered under the Medical Practice Act 2004 including a legally qualified medical practitioner, registered chiropractor, registered dentist, registered optician, registered occupational therapist, registered physiotherapist, registered podiatrist, registered psychologist or registered speech pathologist.

unjustifiable hardship:

has the same meaning as in section 11 of the DD Act:

*"(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the **first person**) would be an **unjustifiable hardship**, all relevant circumstances of the particular case must be taken into account, including the following:*

- a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;*
- (b) the effect of the disability of any person concerned;*
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;*
- (d) the availability of financial and other assistance to the first person;*
- (e) any relevant action plans given to the Commission under section 64.*

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

(2) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship."

Process Map for Management of Non-Work Related Disability or Medical Incapacity

Indications of possible medical cause for performance incapacity (examples in section 4.1.1 of the Policy Guidelines)

Is there objective and verifiable evidence of significant and consistent inability to perform the inherent requirements of the position & of this probably due to a medical cause? (Section 4.1.1)

Can medical information be obtained from treating practitioner? (Sections 4.1.2 & 3)

If no, seek approval from GDW for an independent medical assessment. (4.1.4.1&2)

If no = normal performance management.

- If yes, request medical information form treating practitioner. (See tools on HR website:)
- Letter to employee requesting authority
 - Form-Authority to obtain medical information
 - Letter to treating practitioner (as 4.1.4.4)
 - Briefing materials (similar to 4.1.4.5.(d))
 - Letter to treating practitioner re case conference
 - Letter to employee re case conference
 - Agenda for case conference

- Briefing treating practitioner or specialist:** (4.1.4.4. (d))
- Summary of perceived indications /observations of a medical condition & its impact on work, operations, workload and safety.
 - Chronology history of developments & management
 - Medical reports/certificates provided to date
 - History of absences
 - Inherent requirements, main duties, activities and work/shift arrangements
 - Person specification requirements
 - Medical Ability to Work Form; Job & Task Analysis;
 - Job Demand Assessment;
 - Functional Capacity Evaluation

Write to to employee to attend IMA & to nominate a specialist from panel. (Section 4.1.4.3)

Make appointment with specialist and advise employee of date and time. (Sections 4.1.4.4 & 5)

Write to specialist and provide briefings. (4.1.4.4)

Obtain medical report & consider 6 options below. (Sections: 4.1.4.6; & Options 4.2.1 to 4.2.7))

If report is inadequate or inconsistent with evidence, seek further particulars.

1. Fit to return to full duties & hours. (4.2.2)

2. Fit for substantive role - with adjustments, (4.2.4)

3 Temporarily unfit for any work. (4.2.3)

4. Temporarily unfit for substantive role (even with adjustments, or adjustments are not viable) but able to do other duties. (4.2.5)

5. Permanently unfit for substantive position (even with adjustments or adjustments are not reasonable) but able to do other duties (4.2.6)

6. Totally ongoing unfit for any work. (4.2.7)

Return to substantive position (& performance manage if appropriate).

Are adjustments reasonable – operationally, financially & industrially viable?

If yes, return to substantive position with adjustments.

Employee remains on sick leave until fit for substantive duties; (also: • -if alternative interim duties cannot be provided for an interim period; or • if required adjustments are not reasonable.

Could alternative duties be provided for an interim period?

If yes, place in alternative role after safety assessment & interim duties agreement

Could an alternative role be found within a reasonable period with reasonable endeavours?

If yes, seek & place in alternative role with agreement of hiring manager & after safety check.

Contact Workforce Relations re termination of employment on grounds of frustration of contract.

If alternative role cannot be found within a reasonable period, contact WR as above.

