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Managing ill and injured employees

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Guiding principles

- Refer to relevant directives, guidelines, policies and procedures
 - s 221 of the *Public Sector Act 2022*
- All management action must be reasonable and taken in a reasonable way.
 - s 32(5) of the *Workers' Compensation and Rehabilitation Act 2003*

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Guiding principles

- Take care not to treat employees less favourably *because of* an impairment
 - s 295 of the *Industrial Relations Act 2016*
 - s 10 of the *Anti-Discrimination Act 1991*
- When imposing requirements consider reasonableness and whether employees with an impairment are able to comply.
 - s 11 of the *Anti-Discrimination Act 1991*

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Guiding principles

- Identify and give proper consideration to relevant human rights when making decisions
 - s 58 of the *Human Rights Act 2019*
- Use documents containing confidential and personal information appropriately.
 - s 572A of the *Workers Compensation and Rehabilitation Act 2003*
 - Sch 3 of the *Information Privacy Act 2009*
 - s 279 of the *Public Sector Act 2022*

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Scenario 1

- John Smith is employed as a Senior Engineer (PO4). Mr Smith's manager is Samantha Jones.
- Shortly after Ms Jones commences in her role, Mr Smith discloses to her that he has a pre-existing (but under control) mental health condition, namely Bipolar Disorder.

What action should Ms Jones take based on this information?

- ✓ Ask Mr Smith if he requires any reasonable adjustments or supports in the workplace due to his condition
- ✓ File note the conversation with Mr Smith
- ✗ Requesting medical evidence/advice in relation to Mr Smith's condition is not necessary or appropriate unless there is a reasonable suspicion that the condition is impacting his workplace conduct or performance

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Reasonable adjustments

- What adjustments are reasonable?
- Is supporting medical advice required?
- Have arrangements been recorded in writing?

continues

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Scenario 1 cont.

- Sometime later:
 - Ms Jones identifies concerns regarding Mr Smith's performance and takes action to manage these concerns; and
 - Ms Jones implements changes in the organisation of the office space, resulting in Mr Smith's desk being moved away from the office window and into the centre of the office space
- Subsequently, Mr Smith commences sick leave advising that he is stressed, not coping and can no longer work with Ms Jones.

What action should be taken following Mr Smith's commencement of sick leave?

Appoint a Return-to-Work (RTW) Coordinator

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Scenario 1 cont.

- A host placement is coordinated for Mr Smith in another area within the Department
- However, due to staffing changes, this host placement comes to an abrupt end after 3 months and Mr Smith resumes sick leave, accessing income protection
- Following the end of the host placement, there is a change in RTW Coordinator and there is no contact with Mr Smith for six months.

What action should be taken following this 6 months of sick leave with no contact?

Contact Mr Smith to obtain a status update and request his consent for the Department to contact his treating doctors in relation to his medical condition and return to work

It is unnecessary to direct Mr Smith to submit to an independent medical examination if the necessary advice can be obtained from his treating doctors

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Medical authority

- Check form is completed appropriately
- In lieu of form, request the employee take a letter to their treating doctor.

Department of Justice and Attorney-General
Medical Authority Form

I, the undersigned, _____
do give permission for my treating medical practitioner and allied health care providers to discuss and exchange details of my current injury or illness, associated risk factors, and diagnosed and undiagnosed conditions, with the Department of Justice and Attorney-General (DoJAG) in relation to my current injury or illness, associated risk factors, and diagnosed and undiagnosed conditions.

I also give permission for my treating medical practitioner and allied health care providers to discuss and exchange details of my current injury or illness, associated risk factors, and diagnosed and undiagnosed conditions with the Department of Justice and Attorney-General (DoJAG) in relation to my current injury or illness, associated risk factors, and diagnosed and undiagnosed conditions.

Current treating medical professionals & Allied Health Care Providers

Name	Address	Phone	Specialist

Additional

Do I consent to the Department of Justice and Attorney-General to receive a complete copy of my medical records for the purpose of my return to work?

Yes No N/A

Do I consent to the Department of Justice and Attorney-General to receive a complete copy of my medical records for the purpose of my return to work?

Yes No N/A

Do I consent to the Department of Justice and Attorney-General to receive a complete copy of my medical records for the purpose of my return to work?

Yes No N/A

Do I consent to the Department of Justice and Attorney-General to receive a complete copy of my medical records for the purpose of my return to work?

Yes No N/A

Signed: _____ Date: _____

The Department of Justice and Attorney-General is a Commonwealth Government Department. It is a Commonwealth Government Department and is not a Commonwealth Government Department. It is a Commonwealth Government Department and is not a Commonwealth Government Department.

Fair Statement

I, the undersigned, do hereby certify that the information provided in this form is true and correct to the best of my knowledge and belief. I understand that any false or misleading information provided in this form may constitute an offence under the Criminal Code Act 1985.

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- The RTW Coordinator contacts Mr Smith and obtains his consent to write to his treating psychiatrist to obtain information about his fitness for duty
- The psychiatrist advises that Mr Smith is suffering Adjustment Disorder and is fit to return to his substantive position but cannot work with Ms Jones for the foreseeable future.

What action can be taken based on this medical advice?

- × Public sector entities do not have the power to unilaterally terminate an employee's employment on the basis of the opinion of a treating doctor.
- ✓ If Mr Smith is employed in an entity that participates in the voluntary medical retirement (VMR) scheme administered by Directive 22/16, Mr Smith to may wish to apply for a VMR.
- ✓ Direct Mr Smith to submit to an independent medical assessment (IME) in accordance with Chapter 3, Part 8, Division 5 of the *Public Sector Act 2022* and the relevant IME guideline and directive.

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Independent Medical Examination (IME)

- Ch 3, Pt 8, Div 5 of the *Public Sector Act 2022*
- Directive 10/20: *Independent Medical Examinations*
- A delegate may direct employee to submit to an IME if:
 - employee is absent from duty OR the delegate is reasonably satisfied the employee is not performing their duties satisfactorily; AND
 - the delegate reasonably suspects the employee's absence or unsatisfactory performance is caused by mental or physical illness or disability.

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Scenario 1 cont.

- In light of the medical advice from the treating psychiatrist, the Department directs Mr Smith to attend an independent medical examination
- Mr Smith subsequently lodges a complaint with the Queensland Human Rights Commission in relation to:
 - the actions of Ms Jones (including performance management and desk relocation);
 - the decision to end the host placement; and
 - the delay in the return to work process.

What action should be taken following receipt of the QHRC complaint?

- ✓ Participate the Queensland Human Rights Commission proceedings as directed.
- ✓ Consider whether the IME appointment should be cancelled and/or rescheduled

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Discrimination

- *Anti-Discrimination Act 1991*
- *Disability Discrimination Act 1992*
- Protected attribute – impairment?
- Protected area – work and work-related areas?
- Direct and/or indirect discrimination?
- Does an exemption apply?

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Scenario 2

- Ms Kylie Oliver is employed as an administrative officer
- In 2020, Ms Oliver was involved in a traumatic workplace incident and was subsequently diagnosed with PTSD and has been absent from work ever since. Her claim for workers' compensation was accepted by WorkCover.

What action should the Department take during absence on WorkCover?

- ✓ Maintain regular contact with Ms Oliver throughout her absence, through RTW Coordinator and/or Ms Oliver's manager/supervisor (if appropriate)
- ✓ Maintain up-to-date records of any medical information provided by Ms Oliver or WorkCover, ensuring information provided by Ms Oliver directly is distinguished from any information provided by WorkCover

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Workers' Compensation

- An *injury* is a personal injury arising out of, or in the course of, employment if employment is the significant contributing factor to the injury
 - not an *injury* if it arose out of reasonable management action taken in a reasonable way
- Time limit – within 6 months after the entitlement to compensation for the injury arises
 - entitlement arises on the day the worker's injury is assessed by a doctor.

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'Workers' Compensation Document'

- Prohibition on obtaining or using a *'workers' compensation document'* for a purpose relating to the employment of a worker
 - Section 572A of the *Workers' Compensation and Rehabilitation Act 2003*
- Any document relating to a worker's application for compensation or claim for damages under WCR Act
- 'Employment' means any process for selecting a person for employment or for deciding whether the employment of a person is to continue.

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Scenario 2 cont.

- Whilst absent from work, Ms Oliver writes to various people within the Department making complaints about her role and the Department's management
- Ms Oliver's correspondence uses inappropriate and derogatory language and is threatening towards staff.

What action can the Department take during Ms Oliver's absence?

- Take appropriate action to address the substance of Ms Oliver's complaints, which may include enquiries/investigation
- Advise Ms Oliver that the language and tone of her communications are inappropriate and remind her to ensure her communications with staff are appropriate and in accordance with the Code of Conduct (which apply when making complaints and whilst on leave)
- If conduct continues, direct Ms Oliver to ensure her communications with staff are appropriate and in accordance with the Code of Conduct

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Scenario 2 cont.

- After being absent for over 12 months, Ms Oliver requests to return to work and provides information from her treating doctor which indicates that:
 - she is fit to commence a graduated return to work (with reduced hours but usual duties)
 - her PTSD is in full remission and her condition should not impact Ms Oliver's ability to attend work or perform her substantive role.

What action should the Department take in relation to Ms Oliver's return to work?

- Consider if medical information from treating doctor is sufficient to satisfy Department's WHS obligations to Ms Oliver and other staff
- If not addressed in medical information provided, consider requesting specific medical information from Ms Oliver's treating practitioner regarding her ability to comply with Code of Conduct, including in respect of her communications

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WHS obligations

- Primary duty of care
 - to ensure, so far as reasonably practicable, the health and safety of workers engaged by it
- Duty to manage psychosocial risks
- Workers must also take reasonable care for their own health and safety and to ensure their actions do not adversely affect the health and safety of others.

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WHS obligations

- *Managing the risk of psychosocial hazards at work Code of Practice 2022*
 - identify psychosocial hazards
 - risk assessment / consultation
 - control the risk of psychosocial hazards
- Issues resolution – sections 80 to 82 WHS Act
 - worker may ask WHS regulator to appoint an inspector
 - if not resolved, may lodge WHS dispute with QIRC.

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Scenario 2 – what next?

1. Obtain further medical information from treating doctor
2. Subject to further medical information, consideration may be given to:
 - directing Ms Oliver to submit to an IME – absence or performance
 - commencing a graduated return to work (as per medical advice)
 - commencing a discipline process in relation to Ms Oliver’s inappropriate communications with departmental staff.

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Adverse action

- Ch 8, Pt 1 of the *Industrial Relations Act 2016* (IR Act)
- A person must not take adverse action against an employee because the employee has a workplace right
- Ms Oliver could have the following 'workplace rights':
 - the right to make/participate in workers' compensation claim
 - the right to start/participate in WHS dispute process with employer/WHS Regulator/QIRC
 - make a complaint/inquiry in relation to her employment.

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Other protections

- Discrimination – section 295 IR Act
 - an employer must not take adverse action against an employee because of, inter alia, the person's impairment
- Temporary absence – section 297 IR Act
 - an employer must not dismiss an employee because the employee is temporarily absent from work because of a prescribed illness or injury
 - does not apply where total absences in a 12-month period is more than 3 months and employee is not on paid sick leave.

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Ill health retirement

- Section 107 *Public Sector Act 2022*
- If, after considering the IME report, the delegate is reasonably satisfied the employee's absence or unsatisfactory performance is caused by a mental or physical illness or disability, they may
 1. transfer or redeploy the employee; or
 2. if not reasonably practicable to transfer or redeploy
 - retire the employee from the public service.

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Dismissal after WorkCover

- Section 232B WCR Act
 - within 12 months after a worker sustains an injury, the employer must not dismiss the worker solely or mainly because the worker is not fit for employment in a position because of the injury
 - applies only to compensable injuries (accepted claims).

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Tips

- Be aware of legal obligations, including relevant policies/directives/guidelines
- Keep communication lines open
- Be proactive and stay alert to signs or indicators of hazards or risks to the health, safety and wellbeing of staff
- Document everything.

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Questions?

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