

FREQUENTLY ASKED QUESTIONS: POWER TO REQUIRE MEDICAL EXAMINATION

Public Sector Act 2009
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FREQUENTLY ASKED QUESTIONS:

Power to Require Medical Examination – Section 56 of the *Public Sector Act 2009*

The following frequently asked questions should be read in conjunction with the:

- *Public Sector Act 2009* (PS Act)
- *Public Sector Regulations 2010*
- *Commissioner for Public Sector Employment Guideline: Management of Unsatisfactory Performance (Including Misconduct)*
- *Commissioner for Public Sector Employment Guideline: Power to Require Medical Examination – Section 56 of the Public Sector Act 2009*
- *Code of Ethics for the South Australian Public Sector*

Q. What if the employee denies they are performing unsatisfactorily and/or that they are suffering any incapacity?

- A. Section 56 is available where an employee is performing their duties unsatisfactorily (interpreted broadly) and it appears to a Chief Executive or Delegate that such unsatisfactory performance may be caused by a mental or physical incapacity. Unsatisfactory performance is not restricted to whether an employee is performing their technical duties adequately, but an objective assessment of their entire conduct as a public sector employee.

Like any administrative decision, a decision to require an employee to undergo a medical examination under section 56 must be made on reasonable grounds, and based on the individual facts and circumstances. There must then be an objective basis to conclude the employee is performing unsatisfactorily and that such unsatisfactory performance may be caused by a mental or physical incapacity.

From time-to-time, an employee will not agree that their performance is unsatisfactory and/or that they are or may be suffering from an incapacity. Their agreement is not necessary. They are bound to comply with a direction under section 56 and undergo a medical examination unless they have a reasonable excuse not to. This means attending for examination and cooperating with the relevant medical practitioner in being examined. Disagreement with the views of the Chief Executive or Delegate will not amount to a reasonable excuse for failing to comply with a direction to undergo a medical examination. What would amount to a reasonable excuse would be limited to circumstances such as proven inability to attend for examination due to ill health or some other extenuating circumstance.

Q. What if an employee refuses to comply with a direction to undergo a medical examination under section 56?

- A. Employees are required to submit to a medical examination following a direction under section 56. This means that they must attend appointments and cooperate with the relevant medical practitioner so as a proper examination can be performed. If an employee fails to submit to a medical examination without reasonable excuse,

they may be suspended from duty, without remuneration and accrual of leave entitlements until such time as they submit to a medical examination as required.

Q. How is the medical practitioner selected when an employee is directed to undergo a medical examination under section 56?

- A. Employees required to undergo a medical examination under section 56 of the PS Act are to select a medical practitioner from a panel of medical practitioners nominated by the agency. For practical purposes, the panel of practitioners provided to employees need only contain two choices.

The Chief Executive or Delegate will make or facilitate the making of an appointment with the medical practitioner chosen by the employee. Employees should be provided with as much notice as possible of the time of any medical appointment.

Q. Can an agency refer to and utilise medical information from an employee's treating medical practitioner?

- A. Yes. Where available, information from an employee's treating medical practitioner(s) is to be considered and utilised as appropriate.

Where an employee's unsatisfactory performance may be caused by mental or physical incapacity, the Chief Executive or Delegate should consider if the situation can be managed without the necessity of a direction under section 56 of the PS Act.

Whether or not information from an employee's treating medical practitioner is sufficient to manage a particular situation will depend on the facts and circumstances. It is often not sufficient because the medical practitioner is either not sufficiently qualified or, fundamentally, they are relying only on information provided by the employee. Clearly, where opinions of treating medical practitioners are inconsistent with the facts available to the Chief Executive or Delegate, a direction under section 56 may be necessary. Part of the information provided to a medical practitioner chosen by an employee upon a direction under section 56 would include other medical information in an agency's possession.

Q. Can an employee seek a review of a decision to require them to undergo a medical examination?

- A. Yes. An employee who is aggrieved by a decision to require them to undergo an independent medical examination under section 56 of the PS Act, or an employment decision associated with that requirement (i.e. a direction to remain absent from the workplace or an assignment to different duties or a place or places to perform duties) may seek an Internal Review of that decision under section 61 of the PS Act. Where the employee remains aggrieved after Internal Review, they may seek External Review by the Public Sector Grievance Review Commission. An application for Internal or External Review does not act to stay (put a hold on) a direction to undergo a medical examination under section 56. Like any administrative decision that is the subject of a grievance, a decision needs to be taken in the relevant circumstances as to whether it is prudent to put the process on hold awaiting the outcome of a review or whether to insist that it proceed, notwithstanding.