

# Inherent Requirements

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## Authority and Application

Clause 57 of the *Victorian Public Service Enterprise Agreement 2024* (the Agreement) applies to Victorian Public Service (VPS) Departments and Agencies (Employers) and their Employees covered by the Agreement.

## Overview

Clause 57 of the Agreement sets out how VPS Employers may address genuine concerns about an Employee's capacity to perform the inherent requirements of their substantive position. The policy provides guidance to Employers and Employees on how the clause should be applied, including when an Employer may require an Employee to provide a medical report from an independent medical practitioner from a relevant specialisation or if agreed, the Employee's treating Registered Practitioner.

This policy is not an injury management guide and does not deal directly with all obligations and requirements arising under workers' compensation legislation and/or managing return to work for an Employee with an active worker's compensation claim.

## Relevant provisions of the Agreement

### Clause 57 - Inherent Requirements

## Supplementary Guidance Information

### 1. General

- 1.1. VPS Employers should utilise this policy to address and manage concerns regarding an Employee's incapacity to perform the inherent requirements of their role. Such concerns about Employee incapacity must be genuine and reasonable. There is no requirement for Employers to follow the inherent requirements pathway set out in this policy if they consider that another more suitable, lawful process is available.
- 1.2. Circumstances where this policy may apply include (but are not limited to):
  - 1.2.1. Where an Employee demonstrates excessive or repeated absenteeism (without explanation).
  - 1.2.2. Where an Employee sustains a non-work-related illness or injury, and as a result of that injury/illness, the Employer has a genuine concern regarding the Employee's capacity to fulfil the inherent requirements of their position.
  - 1.2.3. Where an Employee resumes or intends to resume duty following an absence due to illness or injury and there are reasonable concerns that the Employee may not have the capacity to return to duty and fulfil the inherent requirements of their position safely.
  - 1.2.4. Following the 52-week obligation period of a worker's compensation claim, **or where an employee does not have an active workers compensation claim** and the Employer holds a genuine concern about the Employee's capacity to fulfil the inherent requirements of their position.
  - 1.2.5. Where a workers compensation claim has been declined or where workers compensation entitlements have terminated, and the Employer has a genuine concern regarding the Employee's capacity to fulfil the inherent requirements of their position.
- 1.3. This policy, and clause 57 of the Agreement, are not intended to be utilised in all circumstances where an Employer becomes aware an Employee has a medical condition, particularly where the Employer otherwise does not have genuine concerns regarding the Employee's ability to perform the inherent requirements of their role. For instance, Employees making medical disclosures in the context of making requests for Flexible Working

Arrangements or other minor workplace adjustments, will not enliven this clause where there are otherwise no genuine concerns regarding the Employee's ability to perform their role.

- 1.4. Prior to commencing processes under this policy and clause 57 of the Agreement, the Employer should consider whether there are more reasonable and appropriate ways of dealing with their concerns. This may include:
  - 1.4.1. Addressing performance concerns in accordance with the unsatisfactory work processes under clause 26 of the Agreement.
  - 1.4.2. Addressing conduct concerns in accordance with the management of misconduct processes under clause 27 of the Agreement (where relevant).
  - 1.4.3. Making reasonable adjustments to assist an Employee to perform the inherent requirements of their role when dealing with temporary illness or injury.
  - 1.4.4. Considering flexible working arrangements and flexible ways of working in accordance with arrangements outlined at clause 8 of the Agreement.
- 1.5. For the avoidance of doubt, this policy does not require an Employer to create an alternative role for an Employee to resolve concerns regarding the Employee's ability to perform their duties.

## **2. Occupational health and safety**

- 2.1. Employers must, so far as is reasonably practicable, provide and maintain a working environment that is safe and without risks to health. This obligation may prompt management action in relation to concerns about Employee capacity in order to assist the Employer in maintaining a working environment that is safe and without risks to health under the *Occupational Health and Safety Act 2004* (Vic). This includes proactive management of risks in the workplace, as well as acting to minimise the impact of risks once they are known.

## **3. Discrimination**

- 3.1. Employers have obligations under State and Federal anti-discrimination legislation. The *Disability Discrimination Act 1992* (Cth), the *Fair Work Act 2009* (Cth) (FW Act), and the *Equal Opportunity Act 2010* (Vic) contain prohibitions on discriminating against a person on the basis of an apparent or known disability. There are also provisions in the Agreement that complement these laws. Employers must ensure that management action in addressing concerns with respect to Employee incapacity does not constitute discrimination.
- 3.2. Provisions under anti-discrimination legislation require that Employers make reasonable adjustments for Employees with a disability to assist them to perform the inherent requirements of their position. Where an Employee cannot perform the inherent requirements of their position, despite the provision of reasonable adjustments, termination may be lawful. Termination may also be lawful in circumstances where the required adjustments are not reasonable or would cause unjustifiable hardship to the Employer in all the relevant circumstances.

## **4. Temporary absences due to illness or injury**

- 4.1. When assessing an Employee's ability to perform the inherent requirements of their position and/or managing Employee incapacity, Employers must be aware that the FW Act imposes a prohibition against terminating the employment of any Employee due to a temporary absence from work in certain circumstances. This prohibition arises where an Employee is terminated because of illness or injury, where the Employee has been accessing their paid personal leave entitlements.

- 4.2. This prohibition does not apply if the Employee has been absent from the workplace for more than three months in a twelve-month period (including non-consecutive absences) and has not been on paid personal leave for the duration of their absence. An Employee's absence from work due to illness or injury will also not be included in the protected three-month period where the Employee does not comply with notice and evidence requirements for personal leave under the Agreement, as the Employee will not be entitled to paid personal leave in those instances.
- 4.3. Notwithstanding the above, where an Employee is on paid personal leave for longer than the three-month period outlined in the FW Act the Employee's employment may be lawfully terminated where there is a reasonable basis to do so under the *Agreement* or *Public Administration Act 2004* (Vic).
- 4.4. The limitation on terminating an Employee's employment because of their temporary absence due to illness or injury, does not preclude the Employer from seeking to terminate the Employee's employment for other genuine reasons, including because the illness or injury would mean the Employee cannot perform the inherent requirements of their role.

## **5. Initial identification of potential Employee incapacity**

- 5.1. Where initial concerns about an Employee's capacity to undertake their duties have been identified, the Employer must consult the Employee about these concerns, consider the workplace impacts of the capacity issue, document the concerns and consider options for managing their concerns. In order to afford appropriate procedural fairness, the Employer, when consulting with the Employee, must provide the Employee with the initial identified concerns regarding the Employee's potential incapacity to perform their role and with an opportunity for the Employee to respond to those concerns. The Employer will have regard to health and safety of both the individual and other employees in the workplace in considering when or how to consult with the Employee.
- 5.2. Employers must not act on assumptions about what an Employee may or not be able to do in the workplace, or how any incapacity may affect their ability to work. To do so may contravene anti-discrimination laws.
- 5.3. Instances where Employers may reasonably have a concern that a capacity issue may exist include where:
- 5.3.1. the Employee is having trouble completing required tasks or meeting required standards of work, or
  - 5.3.2. the Employee indicates that they are unable to complete work due to incapacity, or a reported illness or injury, or
  - 5.3.3. there is a reasonable perception that Employee incapacity is affecting Employee performance or conduct, including the ability for the Employee to safely undertake the inherent requirements of their role, or
  - 5.3.4. there are reasonable concerns that previous injuries sustained by the Employee predispose the Employee to being injured in the performance or conduct of their work or otherwise reasonable grounds to believe that the Employee is not fit to safely resume duty, or
  - 5.3.5. the Employee has been absent from work for a prolonged period of time (or for more than the 52-week workers compensation obligation period, in the case of Employees who have been absent from work on worker's compensation) due to illness or injury, and there are reasonable concerns that the Employee has either total or partial incapacity to perform the inherent requirements of their position

- 5.4.** If there is a reasonable belief that the Employee's performance in their position or their conduct is, or may be, affected by incapacity, the Employer must obtain sufficient medical evidence to establish that there is a valid reason to be concerned.
- 5.5.** When concerns are initially identified by the Employer, the Employee should be asked to access their accrued personal leave. The Employee should also be asked to obtain a relevant medical certificate regarding capacity within a reasonable timeframe. If the Employee does not agree to this request, there is a dispute about capacity, or a medical certificate confirms full capacity, but the Employer remains reasonably and genuinely concerned, the Employer should consider directing the Employee to remain absent from the workplace (on pay) until clarification can be obtained, including seeking further medical information. Where the Employer requests further medical information, the Employee must respond to the request within a reasonable timeframe, in order to continue to be absent from the workplace with pay

**6. Prescription medications and potential Employee incapacity**

- 6.1.** An Employer's knowledge or belief regarding an Employee's legitimate use of prescription medication, including prescription cannabis, will not, in itself, justify an Employer taking action under clause 57 of the Agreement or in accordance with this Policy.
- 6.2.** An Employer may take steps under clause 57 of the Agreement where the Employer has a genuine concern about the Employee's capacity to undertake their duties. This may include circumstances where an Employee is prescribed medication and/or takes prescription medication to address a medical condition, illness or injury, and there are reasonable concerns that this is impacting an Employee's ability to safely undertake their duties.

**7. Inherent requirements and the duty to consider reasonable adjustments**

- 7.1.** Inherent requirements are the characteristic, essential or indispensable requirements of the Employee's position as determined by the Employer, including the ability to undertake those requirements safely.
- 7.2.** To identify inherent requirements of an Employee's substantive position, it is recommended that consideration be given to the following:
- 7.2.1.** the Employee's job or position description, classification Level or Grade and contract of employment; and
  - 7.2.2.** the function the Employee performs, all the duties and tasks performed in the position, focussing on which duties and tasks are essential or indispensable to the performance of their substantive position; and
  - 7.2.3.** the circumstances under which the essential duties of the work must be performed, including the need to work with others, including clients and other staff members; and
  - 7.2.4.** the need to work safely in the specific circumstances of their substantive position.
- 7.3.** Inherent requirements need to be identified and described in a manner that allows a medical practitioner to provide a medical opinion on the Employee's capacity to perform their substantive position. Per section 7.2 above, this may require further identification and description beyond provision of an Employee's position description.
- 7.4.** Employers require Employees to be able to carry out all the inherent requirements of their substantive position. An inability to carry out one inherent requirement is an inability to perform that position.
- 7.5.** Employers have an obligation to make reasonable adjustments or accommodations for Employees who are not able to perform the full duties of their substantive position to assist

them to fulfil the inherent requirements. However, this does not extend to an obligation on the Employer to create a new position for the Employee, or fundamentally or significantly change the nature of the Employee's substantive position.

## **8. Acting on medical evidence**

- 8.1. Employers are obliged to follow current, relevant and applicable medical evidence regarding an Employee's fitness for work, rather than assumptions about an Employee's capacity. What constitutes as sufficient medical evidence will vary on a case-by-case basis.
- 8.2. Medical reports obtained and disclosed to the Employer for the purpose of any workers compensation claim cannot be used for any purpose outside of that claim, even if the Employee consents to such use. This means that, when briefing a medical practitioner in relation to an Employee's ability to carry out the inherent requirements of their substantive position, information obtained under workers compensation processes cannot be disclosed to the practitioner. Instead, information is to be provided about known absences due to illness and/or injury and any other information that the Employee has disclosed to the Employer outside of any workers compensation process.
- 8.3. Current, relevant and comprehensive medical information must be obtained to assess whether the Employee can perform the inherent requirements of their position and, if not, how the Employer may assist the Employee to perform the inherent requirements of their position, including what reasonable adjustments should be considered.
- 8.4. Medical information sought must relate to the Employer's genuine and reasonable concern regarding the Employee's ability to perform the inherent requirements of their role. Seeking medical advice about the Employee's capacity to perform the inherent requirements of their role, is not an opportunity to delve into an Employee's medical history where that information is not otherwise relevant to the Employee's ability to perform their role.

## **9. Working with the Employee's treating practitioner**

- 9.1. Where an assessment of the Employee's capacity to undertake the inherent requirements of their position is required, the preferred approach is to work with the Employee and their treating practitioner. This will enable the manager to gain a more accurate and informed understanding of the capacity issue and how the Employer may be able to successfully manage the matter.
- 9.2. Where an Employer has concerns about an Employee's capacity, a discussion with the Employee as to why medical information is being sought is required. If there is an occupational health and safety risk associated with doing this, or the Employee refuses to participate, the Employer may elect not to hold a discussion. The Employer must communicate with the Employee the purposes for which the information is being sought (that is, in order for the Employer to understand the Employee's capacity to undertake the requirements of their position safely in the context of the Employer's genuine concerns regarding the Employee's capacity.) This must align with the questions that the Employer intends to ask the treating practitioner.
- 9.3. After informed and written consent has been received from the Employee for the Employer to contact their treating practitioner, relevant information from the treating practitioner can be sought. In the event that the medical information received from the Employee's treating practitioner is unclear or does not adequately address the Employer's concerns, the Employer should seek clarification or further information from the Employee's treating practitioner in the first instance. If the Employer continues to have legitimate concerns regarding the accuracy or robustness of the information provided, it may seek a report from an alternate source, including an independent medical examination.
- 9.4. The medical information sought from the Employee's treating practitioner must relate to the Employer's genuine and reasonable concern regarding the Employee's ability to perform the

inherent requirements of their role. It is not an opportunity to delve into an Employee's medical history where that information is not otherwise relevant to the Employee's ability to perform their role.

- 9.5.** If the Employee does not provide written consent to contact their treating practitioner, the Employer may issue a lawful and reasonable direction for the Employee to attend an independent medical examination.

## **10. Independent medical examination**

- 10.1.** In addition to liaising with the Employee's treating practitioner, where the Employer believes it is reasonable to do so, the Employer may also require an Employee to provide a medical report from an independent medical examination and/or direct the Employee to attend an independent medical examination. This may occur in circumstances where the information provided by the treating practitioner is insufficient or inconsistent or where the treating practitioner is not from a relevant specialisation (in accordance with advice from the Employee's treating practitioner.)
- 10.2.** An Employer may also require an Employee to attend an independent medical examination where the Employee has not provided medical information from their treating practitioner and where a reasonable concern exists in relation to the Employee's capacity to perform the requirements of their position, or where other reasonable grounds exist that warrant a direction to attend an independent medical examination (see section 11 below).
- 10.3.** In accordance with clause 57 of the Agreement, where an Employer elects to require an Employee to provide a medical report from an independent registered practitioner, the Employee will select a registered practitioner from a list of at least three practitioners nominated by the Employer. An Employer will not nominate a practitioner that is employed by the Employer. In circumstances where it is not possible for the Employer to nominate a list of three appropriately specialised practitioners, the Employer may provide fewer than three practitioners for the Employee to select from.

## **11. Lawful and reasonable direction to attend an independent medical examination**

- 11.1.** Some instances that may justify a direction to an Employee to attend an independent medical examination include (but not limited to):
- 11.1.1.** a persistent pattern of unexplained absences from work (such as circumstances where no notice and/or evidence is provided regarding the Employee's absences),
  - 11.1.2.** inconsistent and/or inadequate information available to the Employer in relation to the impact of a medical condition on the Employee's capacity,
  - 11.1.3.** a reasonable concern regarding an Employee's capacity exists, and
  - 11.1.4.** the Employee has not provided consent for the Employer to liaise with their treating practitioner/s and/or fails or refuses to attend an independent medical examination.
- 11.2.** A direction to attend an independent medical examination, when issued on reasonable grounds, will constitute a lawful and reasonable direction.

## **12. Information to be provided to the Registered Practitioner**

- 12.1.** Regardless of whether the Employee consents to attend their treating practitioner or is directed to undergo an independent medical examination, it is recommended that the correspondence to the relevant medical practitioner includes:



- 12.1.1. the purpose of the medical report request (that is, to inform the Employer about the Employee's capacity to perform the inherent requirements of their position) and that the Employer intends to share medical information received with the Employee (subject to any explicit concerns the medical practitioner may have),
    - 12.1.2. the inherent requirements of the Employee's substantive position,
    - 12.1.3. details of any observed behaviours or conduct of concern that have informed the Employer's genuine and reasonable concern regarding the Employee's capacity to perform their position,
    - 12.1.4. a copy of the current job or position description,
    - 12.1.5. the Employee's length of service,
    - 12.1.6. the Employee's employment status (full-time, part-time, casual),
    - 12.1.7. if relevant, any periods of absence from work due to illness or injury,
    - 12.1.8. if relevant, the date the Employee's incapacity became known,
    - 12.1.9. any known periods of total or partial incapacity to work.
  - 12.2. The Employer should request the following information from the relevant medical practitioner:
    - 12.2.1. Whether the Employee has a medical condition which could affect their ability to perform the inherent requirement of their position.
    - 12.2.2. Where the Employee has a medical condition, what effect the medical condition has on the Employee's capacity to attend the workplace and to safely perform their duties according to their usual work pattern.
    - 12.2.3. Whether the Employee is medically fit to fulfil the inherent requirements of their position safely and without risk of harm to the Employee or others.
    - 12.2.4. Whether the Employee is not medically fit to perform the inherent requirements of their position, what particular requirements they are not able to perform and whether they are likely to be able to perform these requirements in the foreseeable future.
    - 12.2.5. Whether there are any adjustments or accommodations that may assist the Employee to perform the inherent requirements of their position and the timeframe that these are expected to be required.
    - 12.2.6. Where the Employee has a medical condition, whether there is any treatment in place for the medical condition and, if so, what effect the treatment may have on the Employee's capacity to attend the workplace and safely perform the inherent requirements of their substantive position.
    - 12.2.7. Whether referral to another medical professional/practitioner is required.
- 12.3. It is recommended that the correspondence to the relevant medical practitioner is provided to the Employee.
- 12.4. The medical information sought from the relevant medical practitioner must relate to the Employer's genuine and reasonable concern regarding the Employee's ability to perform the inherent requirements of their role. It is not an opportunity to delve into an Employee's medical history where that information is not otherwise relevant to the Employee's ability to perform their role.



### **13. Possible outcomes following a review of medical advice**

**13.1.** Following receipt of the medical report and requested information, the Employer will assess the evidence and recommendations, consider the operational requirements, consult with the Employee, and then make decisions based on the particular circumstances.

**13.2.** As soon as practicable after receipt of the medical report and/or information requested, the Employer will provide this to the Employee, subject to any explicit concerns the medical practitioner may have in relation to this, and give the Employee an opportunity to respond, provide other information or clarification in relation to the medical information.

#### **13.3. Where medical evidence is insufficient or conflicts with other medical information**

**13.3.1.** In the event that the medical information received is unclear or does not adequately address the Employer's concerns or questions, the Employer may seek clarification or further information. Similarly, occasionally medical information may conflict with the Employer's understanding of the incapacity or other medical information available to the Employer regarding the Employee's capacity. The preference is that clarification is sought from the issuer of the medical information, in the first instance, rather than seeking the opinion of another medical practitioner.

**13.3.2.** In cases where the Employer has legitimate concerns regarding the accuracy or robustness of the report received, the Employer may seek a report from an alternative source, including through an independent medical examination, or by directing an Employee to attend an independent medical examination.

#### **13.4. Where the medical evidence confirms no capacity issues**

**13.4.1.** If the medical evidence confirms that there are no capacity issues, then any concerns about the Employee's performance or conduct may be more appropriately managed in accordance with the Management of Misconduct and/or Management of Unsatisfactory Performance Policies.

#### **13.5. Where the medical evidence confirms incapacity**

**13.5.1.** Should the medical information provide that the Employee is fit to work but workplace adjustments are required for the Employee to safely undertake the inherent requirements of their substantive position, the Employer must consider the required adjustments and determine if these adjustments can reasonably be accommodated.

**13.5.2.** Following receipt of medical information, the Employer is obliged to make its own assessment about the Employee's capacity and determine whether there are any adjustments that can reasonably be provided to assist the Employee to fulfil the inherent requirements of their position.

**13.5.3.** In the event that adjustments cannot reasonably be accommodated in the Employee's substantive position, or a suitable alternative position does not exist that can accommodate the Employee's adjustments and to which the Employee is reasonably suited based on their skills and experience, the Employer may consider termination of the Employee's employment. The Employer is not required to offer or create an alternative role for the Employee.

### **14. Considerations for termination of employment**

**14.1.** To ensure procedural fairness is afforded to the Employee, prior to any decision to terminate employment, the Employer should provide the Employee:

- 14.1.1. All the information considered to date, including medical information relating to capacity.
- 14.1.2. An explanation as to why termination is being considered and what would be required for termination of employment not to occur (relating to the medical advice about the Employee's incapacity to perform the inherent requirements of their role).
- 14.1.3. An explanation that all options for continuing the Employee's employment appear to be exhausted, based on the information available and after consideration of what reasonable adjustments could be provided.
- 14.1.4. A reasonable timeframe for the Employee to consider the information relied upon, seek advice if they wish, and respond either in writing or face-to-face.
- 14.1.5. An explanation of the Employee's right to have a representative and/or support person assist them in their response and to attend any meetings in relation to the matter.

## **15. Confidentiality and privacy**

- 15.1. In relation to personal and health information gathered pursuant to clause 57 of the Agreement, Employers must comply with applicable legislation, including obligations under the *Privacy and Data Protection Act 2014* (Vic), the *Equal Opportunity Act 2010* (Vic), the *Health Records Act 2001* (Vic), and the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).
- 15.2. All personal and health information must be treated in a confidential manner in accordance with the Information Privacy Principles and the Health Privacy Principles.

## **16. Doctor-patient confidentiality and consent**

- 16.1. An Employee's treating medical practitioner should not be contacted without consent. Consent sought from an Employee should be limited to the purpose for which it is required under this policy, namely, to determine the Employee's current and/or future capacity to perform the inherent requirements of their role.
- 16.2. Obtaining consent from an Employee to communicate with their nominated treating practitioner or an independent medical examiner is always preferred. However, consent will not be required in circumstances where it is reasonable for the Employer to direct an Employee to attend an independent medical examination. In these circumstances, and because the practitioner has been engaged by the Employer, the practitioner may disclose information to the Employer without breaching the Employee's privacy or inviting the practitioner to breach confidentiality.

## **Making decisions under this policy**

Under s.20(1) of the *Public Administration Act 2004*, the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to staff within their Department or Agency. Employers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so. Each Department and Agency should give effect to this policy in accordance with its own delegations.

## **Dispute resolution**

An Employee who is directly affected by a decision made or action taken pursuant to clause 57 of the Agreement may apply for a review of actions under the Employer's review of actions policy or seek to resolve a dispute through the Resolution of Disputes procedure at clause 13 of the Agreement.

## Further Information

Employees should refer to their Department or Agency's intranet for information on procedural requirements, systems and approval delegations.

For further information and advice please contact your local Human Resources or People and Culture Unit (or equivalent).

## Related policies or documents

### Common Policies

- Personal/Carer's Leave
- Occupational Health and Safety and Rehabilitation
- Management of Misconduct
- Management of Unsatisfactory Work Performance
- Flexible Working Arrangements – Specific Circumstances

All policies can be found at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.

### Other Whole of Victorian Government Policies:

- Flexible Work and Working Remotely (<https://vpsc.vic.gov.au/workforce-capability-leadership-and-management/flexible-work/>).

Authorised by Industrial Relations Victoria:

Key Details	Date
Version	Final for PSAC Approval
Date	May 2025

If you print and store this document, you may be looking at an obsolete version. Always check the latest version of this document at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.