Frequently asked questions
Independent medical examinations (Directive 04/24)

1. How long does an employee have to be absent before they can be required to submit to a medical examination?

The *Public Sector Act 2022* (the Act) does not prescribe a timeframe for absence before a medical examination can occur, only that an employee is absent from duty (which means currently absent) and the decision maker reasonably suspects that the current absence is caused by mental or physical illness or disability.

Additionally, the Independent medical examinations (Directive 04/24) (the directive) requires consideration of whether there is a more appropriate option in the circumstances to attempt to resolve the employee's unsatisfactory performance or absence when deciding if a medical examination is required. The length of the current absence, as well as previous periods of absence, may form part of this consideration. Refer to the Supporting employees affected by illness and disability: a practical guide to independent medical examinations for the Queensland public sector (PDF, 580 KB) for further information.

2. Is suspension considered 'absent from duty' for a medical examination?

Absent from duty for section 103 of the Act is not limited to voluntary absence such as sick leave. It may include involuntary absence such as suspension in the context of a genuine workplace health or safety concern. Consideration must be given to whether the suspension is current at the time of a direction to a medical examination, and if the reason for the suspension gives rise to reasonable suspicion that the employee's absence is caused by a mental or physical illness or disability. This interpretation is supported by Queensland Industrial Relations Commission (QIRC) case law.

When suspension may not be considered 'absent from duty':

- Prior (not current) suspension.
- Suspension unrelated to illness or disability.
- Where an employee is suspended and required to submit to a medical examination in order to obtain further medical information about the employee's safe return to work. QIRC case law indicates that in this situation the absence is not caused by illness or disability, and that it is not the purpose of a medical examination to obtain information about an employee's safe return to work.
- A contrived absence—a chief executive cannot direct an employee not to attend the workplace for the purpose of requiring an employee to submit to a medical examination.

Note: Alternatively, where an employee is absent due to suspension in the context of a genuine workplace health or safety concern related to suspected illness or disability, there may be grounds to require the employee to submit to a medical examination based on unsatisfactory performance (rather than absence) under section 103 of the Act. This option may be more appropriate if an

entity has concerns about whether section 103(b) of the Act is met when relying on the absence limb of section 103(a). That is, whether there is reasonable suspicion that the employee's absence is caused by mental or physical illness or disability (as opposed to the actions of the entity to suspend the employee).

3. What happens if an employee is performing the technical aspect of their role satisfactorily, but their conduct is below the required standard?

Sections 103 to 108 of the Act may be applied where a decision maker reasonably suspects that an employee's absence or unsatisfactory performance is caused by a mental or physical illness or disability.

Unsatisfactory performance means conduct or work performance that does not meet the standard required of the position. Technical skills, attendance, participation in rosters, safety performance, workplace behaviour and conduct, including participation as part of a team and respectful communication, are all examples of components of an employee's overall performance of their role. Failure to meet any one of the role requirements may give rise to the conditions in section 103 of the Act being met, where there is reasonable suspicion that this is due to mental or physical illness or disability.

4. How can public sector entities manage the impact of a medical examination process?

It is important that the process be implemented in a reasonable, respectful and sensitive manner. A key feature of this is to ensure appropriate communication between the parties. Clear information about steps to be taken and reasons for them should be provided to the employee, including the purpose of the examination (e.g. the starting point is making informed decisions to support continued safe and productive employment where possible, with ill health retirement as a last resort). The employee should also be informed of how privacy of their medical information will be ensured, so that only employees with a legitimate reason will have access to the medical examination report and related documents (e.g. those involved in or advising on the decision making).

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

5. Can a medical report from the employee's treating practitioner be used to take action under section 107 of the Act?

Action under section 107 of the Act (e.g. transfer, redeployment or ill health retirement) can only be taken where the chief executive has required an employee to submit to a medical examination in accordance with the directive under section 104 of the Act. An existing medical report cannot be used as a substitute for a report obtained under section 104 of the Act, to authorise action to be taken under section 107 of the Act.

When requiring a medical examination under section 104 of the Act the chief executive must choose an examining doctor who is independent, except where it is determined that a more

informed decision can be made by seeking an opinion from an examining doctor who has knowledge of the employee's medical history and specialises in the area of the suspected mental or physical illness or disability e.g. the employee's treating specialist. This may only occur with the agreement of the employee. The process must meet all requirements of the Act and the directive.

6. What happens if an employee refuses or fails to submit to the medical examination?

Employees are required to comply with reasonable and lawful directions, including a direction requiring an employee to submit to a medical examination under section 104 of the Act.

As part of a lawful direction to submit to a medical examination, the entity should advise the employee in writing that failure to submit to the medical examination as required may result in disciplinary action. This notice has been included in the Template letter – to an employee required to submit to a medical examination (docx, 58 KB). Where an employee refuses or fails to submit to a medical examination, the entity should seek to understand whether the employee has a valid reason to determine the appropriate next steps.

Under section 105 of the Act, an employee must not be given sick leave for any period that the employee fails to comply with the requirement, unless the employee has requested an internal review or appealed the decision and is awaiting the outcome.

7. What happens if the medical examination opinion is different from an opinion or medical information provided by the employee's treating doctor?

Differences in opinion may be due to a number of different factors, including the time when the opinion was given (the employee's condition may have subsequently improved or deteriorated) and the information available to the doctor in giving their opinion. Determining the most supportive approach for the employee will involve an exercise of judgement based on all the available facts. A useful step in this process is to ask both doctors to explain or clarify the basis for their opinion and why the opinions differ. Failure to make reasonable enquiries and efforts to resolve differences of medical opinion may prove problematic if the employee is later retired for medical reasons.

8. How long should an entity search for a suitable role for transfer or redeployment after receiving a medical examination report?

There is no mandatory timeframe required when searching for alternative roles to transfer or redeploy an employee to as a decision under section 107(1)(a) of the Act. A chief executive needs to be satisfied that all reasonably practicable options for continuing employment have been considered and retirement of an employee should be considered as a last resort. Entities should make reasonable attempts to search for suitable alternative roles in line with the medical advice.

What is considered to be a reasonable period to search for a suitable alternative role will depend on the individual circumstances (for example, the employee's skills and competencies, the medical information, and the type, level and location of position required).

Early and open communication is a key part of the transfer and redeployment process, as it can provide an avenue for the entity to:

- understand the types of roles that may be suitable for the employee (for example, the employee's skills, experience and ability to re-locate)
- discuss opportunities and actions taken with the employee
- seek further guidance if required from the employee's treating doctor (with the employee's consent) regarding strategies for transfer or redeployment.

Entities should ensure they keep a record of the actions taken throughout the process to seek alternative suitable roles and communicate this to the employee when proposing action to be taken under section 107 of the Act.