# GUIDELINES FOR MENTAL OR PHYSICAL INCAPACITY – TEACHING SERVICE

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*Guidelines for Mental or Physical Incapacity – Teaching Service*
OVERVIEW

The Department of Education and Training (the Department) has an obligation to support the maintenance of proper standards of performance and conduct for staff of the Department, and to protect and provide for the welfare and safety of students and other employees.

These guidelines set out the Department’s procedure on managing mental or physical incapacity for employees in the Teaching Service. The guidelines explain what mental or physical incapacity is, the legal basis to commence an inquiry, and the process required to complete an inquiry.

In these guidelines a reference to the Department includes a reference to a school council established under Part 2.3 of the Education and Training Reform Act 2006 (ETR Act) and a reference to an employee includes a reference to a person employed under Part 2.3 or Part 2.4 of the ETR Act or section 20 of the Public Administration Act 2004 (the PA Act).

WHAT IS MENTAL OR PHYSICAL INCAPACITY?

If an employee in the teaching service is incapable of performing the duties of his or her position on account of physical or mental incapacity, the Secretary may commence an inquiry under Division 8, Part 2.4.56 of the ETR Act.

The mental or physical incapacity procedures do not apply in circumstances where an employee retires or resigns from his or her employment on the ground of physical or mental incapacity. Advice must be obtained from the Conduct & Ethics Branch prior to the commencement of an inquiry into the physical or mental capacity of an employee in the teaching service.

An inquiry under the incapacity provisions of the ETR Act is only to be used for teaching service employees with a mental or physical condition that causes them to be incapable of performing the inherent requirements of their particular position. Inappropriate termination on the ground of physical or mental incapacity can, in certain circumstances, be unlawful under the Fair Work Act 2009, the Disability Discrimination Act 1992 (Cth) or the Equal Opportunity Act 2010 (Vic). State and Federal anti-discrimination laws must be complied with in using these procedures.

The Secretary may delegate his or her powers for the purposes of Part 2.4.56 of the ETR Act to a nominated person or, in exceptional circumstances, a Board of Review. Accordingly, in these procedures, a reference to the Secretary may include a reference to the Secretary’s delegate.
MENTAL OR PHYSICAL INCAPACITY PROCEDURES

These procedures are established under Division 8, Part 2.4.56 of the ETR Act.

If it is alleged that an employee of the teaching service (the employee) is incapable of performing the duties of his or her employment on account of physical or mental incapacity, there may be grounds for action under Part 2.4.56 of the ETR Act.

In some cases, the principal (or, in matters where the employee concerned is a principal, the regional director) will have formed a preliminary view after referring the employee to a medical practitioner approved by the Secretary for an assessment on the employee’s physical or mental incapacity.

Alternatively, long term certification by the treating medical practitioner that an employee is unfit for their duties will lead to a preliminary view that the employee is incapable of performing the duties of his or her employment on account of physical or mental incapacity.

Step 1 – Notify the Secretary of Grounds for Action

To commence the procedures, the principal/regional director will, in consultation with the Conduct & Ethics Branch, write to the Secretary to advise that there may be grounds for action under Part 2.4.56 and to recommend the commencement of an inquiry under Part 2.4.56 of the ETR Act. The principal/regional director will not provide to the Secretary any details of the particular matter at this stage.

Step 2 – Nominate an Investigator

The Secretary will then nominate an investigator to investigate and report to the Secretary in connection with an inquiry under Part 2.4.56. The role of the investigator is to prepare a Notice to be given to the employee, seek a response from the employee and send a report to the Secretary for the Secretary’s consideration and action. In most cases, this will be the principal. In matters where the principal is the subject of the inquiry, the investigator will usually be the regional director.

In exceptional circumstances, the Secretary may constitute a Board of Review instead of nominating an investigator. In these procedures, a reference to the investigator includes a reference to a Board of Review, where the Secretary has decided to constitute a Board of Review.
If a Board of Review is nominated instead of an investigator, it is recommended that it comprises of:

- an independent medical practitioner nominated by the Secretary;
- an independent medical practitioner nominated by the employee under investigation; and
- a person nominated by the Secretary who will act as the chairperson/convener of the Board.

No member of the Board should have had any previous involvement in the matter.

**Step 3 – Investigator to prepare a Notice**

Once nominated, the investigator will prepare a Notice to be given to the employee, seek a response from the employee and send a report to the Secretary. The Notice to the employee must contain:

- the matters to be considered as part of the inquiry under Part 2.4.56 of the ETR Act; and
- the documentary evidence on which it is proposed to rely, such as:
  - copies of any medical, occupational or worksite reports;
  - details of the employee’s leave history;
  - copies of any performance and development assessments;
  - details and descriptions of the duties of the employee’s position;
  - details of the support, assistance and services or facilities provided to the employee to assist him or her to perform the duties of their position;
  - copies of relevant correspondence between the principal and the employee (or for inquiries regarding the fitness of a principal, between the principal and regional director);
  - any relevant written records of meetings with the employee; and
  - any other supporting documentation (including copies of any statements prepared in connection with this inquiry).

The investigator will request the employee to provide a written response to the Notice within a suitable time frame (being not less than 14 calendar days). As part of his or her response, the employee may submit medical or occupational reports from the employee’s treating doctor or other practitioner.
Step 4 – Investigator to prepare report

The investigator will consider the employee’s response, should one be provided, and provide a report to the Secretary. The report will include:

- the matters considered by the investigator and the investigator’s findings in respect of the same;
- any response by the employee to the Notice;
- all relevant supporting documentary evidence; and
- a recommendation either that:
  - the employee is incapable of performing his or her duties on account of physical or mental incapacity; or
  - the employee is capable of performing his or her duties.

Where a report is provided to the Secretary, the investigator must inform the employee in writing that a report has been provided to the Secretary (a copy of which is to be attached to the notification) and advised a written response to the report may be provided directly to the Secretary within 7 days of receiving the report.

Step 5 - Secretary to form preliminary view

The Secretary will consider the report provided by the investigator, and any response from the employee, and will assess the material. Based on the material provided, the Secretary will form a preliminary view as to the facts of the matter. If the Secretary forms the preliminary view that action under Part 2.4.56 is justified, the Secretary will write to the employee to advise that, on the basis of the Secretary’s preliminary findings of fact (which will be set out in the letter), it would be open to the Secretary:

- to find that the employee is incapable of performing his or her duties on account of physical or mental incapacity; and
- to find that termination of employment should occur and invite the employee to make a submission in writing to the Secretary within 14 calendar days addressing one or more of these matters. The Secretary should set out clearly his or her preliminary view on the grounds and proposed action.

In making a determination under Part 2.4.56 the Secretary is under no obligation to hold an oral hearing. However, the Secretary may hold an oral hearing or take evidence orally or permit cross-examination of all or any witness if the Secretary considers it appropriate to do so.
Step 6 – Secretary’s Decision

After receiving and considering any response from the employee, the Secretary will, by notice in writing, advise the employee of the determination and, if the Secretary takes action, the right to appeal to a Merit Protection Board.

Rights of Review and Appeal

Merit Protection Boards
The Merit Protection Boards hear reviews of action taken under Part 2.4.56 of the ETR Act.

Anti-Discrimination Complaints
The employee may make a complaint of discrimination to an external agency, such as the Australian Human Rights Commission, the Victorian Equal Opportunity and Human Rights Commission or the Fair Work Commission.

Dismissal and Fair Work Commission
In relation to dismissal, the Fair Work Commission deals with two main types of applications:

- unfair dismissal; and
- dismissal where there has been a breach of the general protections provisions of the Fair Work Act 2009.
**FURTHER ASSISTANCE**

Further information may be obtained by contacting the Conduct and Ethics Branch on 9637 2594 or 9637 2595.