



Fitness for Duty

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1 Introduction

Waverley Council has a dual role, in ensuring a duty of care for employees and other workers (contractors, volunteers and Councillors) at Council and the protection of rights under anti-discrimination legislation. These two roles may at times be in conflict and as such the decision to develop a Fitness for Duty Policy is intended to provide for fair and equitable treatment of employees and potential employees through the recruitment process and throughout their ongoing employment at Waverley Council.

The Fitness for Duty Policy should be read in conjunction with Waverley's EEO Policy, the OHS Policy, OHS&E Handbook, Return to Work and Rehabilitation procedures and sick leave provisions.

2 Our commitment

Waverley Council has made a commitment to providing a duty of care to its staff through the development of EEO Plans and OHS Systems. This commitment extends to ensuring that employees are fit to undertake the roles and responsibilities they have been employed to do. The duty of care extends not only to the individual employee, but those within the entire work environment. This commitment commences at the selection stage, whereby all employees of Council must undertake a pre-employment medical examination. This ongoing commitment extends to employees whereby fitness for duty may be impinged through:

- Illness or injury
- Long term illness - leading to temporary or permanent incapacity
- Long term (non work related) injury – leading to temporary or permanent incapacity
- Work related injury
- Physical factors – such as age, pregnancy or potential pregnancy
- Social factors – such as alcohol or drug use
- Psychological fatigue –related to excessive work demands

Waverley Council also demonstrates a commitment to duty of care and continued fitness for duty through a range of preventative measures such as Employee Assistance, Return to Work and health and wellbeing programs.

2.1 General principles

This policy document is designed to ensure that Waverley Council meets its employment obligations under the NSW Industrial Relations Act 1996, the Local Government Act 1993 and the Anti-Discrimination Act 1977. More importantly, they are designed to ensure that our fitness for duty procedures and assessments are efficient, fair and equitable.

2.2 Fitness for duty defined

Fitness for duty encompasses all physical, psychological and social factors of employment. Measuring fitness for duty can be task specific or based on the general adequacy of the day-to-day match between an individual and his/her work demands.

2.3 Officer responsibilities

General responsibilities for this policy and process are outlined as:

2.3.1 *General manager*

Has an over arching responsibility to ensure managers and supervisors are equipped to ensure a duty of care is demonstrated fairly to all employees and others within the work place.

2.3.2 *Managers and supervisors*

Have a responsibility to identify employees who may be at risk of injury or illness and intervene where necessary to prevent loss or injury. Managers and supervisors must also demonstrate a duty of care to employees and other workers within the work place. Where reasonable, managers and supervisors should identify alternative duties for employees that are unable to complete their full duties, have been certified as unfit to perform the inherent requirements of their position and require a return to work program to be implemented.

2.3.3 *Employees*

Have a responsibility to report to work well and fit, and where unable to do so, provide a medical certificate to certify that they are unfit for duty as soon as possible. Employees have a duty of care to all workers and others at the work place, and must not place these at risk of injury. Employees are responsible for participating in any alternative duties organised on their behalf, enabling them to return to work following injury or illness.

2.3.4 *Human resources and organisational development division (HR&OD)*

Has a responsibility throughout this process to ensure employees are treated in an equitable manner, and this process is used to protect the safety of employees and others within the work place. HR&OD also has a responsibility for overseeing this process with the Medical Adviser and demonstrating confidentiality with employee's medical records. HR&OD also take a lead role in organising where reasonably practical, alternative duties for employees that have an injury or illness that prevents them from undertaking their full duties.

2.3.5 *Medical adviser*

The responsibilities of the Medical Adviser extend to representing the interest of Council in the assessment of a workers ability to perform the inherent duties of a job. These responsibilities are stated in the service agreement between Council and the Medical Adviser.

2.4 Legal responsibilities

The Commonwealth Disability Discrimination Act 1992 makes it unlawful to discriminate against a person with a disability in the area of employment, except where the person is unable, because of his/her disability, to perform the inherent requirements of the job. Council must also comply with requirements outlined in the Anti- Discrimination Act 1977 (NSW). Details of Council's approach to disability and anti discrimination are outlined in its EEO policy.

3 Identification of unfit employees

Waverley Council has in place a service agreement with a local Medical Adviser. All offers of employment are preceded by a pre-employment medical check with that service provider (or other provider where Council's contracted service is not available). It is the objective of that medical check to determine if the potential successful applicant has any impediments to performing the inherent duties of the position that they have applied for. Should the medical check suggest otherwise, Council has several options:

- not to proceed with the appointment, should it be determined that the person would put themselves at risk, or others within the workplace
- assess whether reasonable modifications may be made to the work site or work duties
- make reasonable modifications to the work site or work duties

Council may **direct** an employee to undertake a medical examination where there is an actual or perceived danger to the employee, other workers or non-workers within the work place. Council may also direct an employee to undertake a medical examination where the employee's or the employee's working group performance is significantly impacted by the employee's fitness (or lack thereof) to undertake their duties.

The purpose of this medical examination is to gain independent advice as to the continued fitness for duty of the relevant employee, and to take advice on what actions or activities Council may take to prevent further loss, injury or poor performance. The medical advice may also include measures for making modifications to the working environment. The Medical Adviser may refer the employee to other medical services for further assistance where warranted.

3.1 Illnesses or injury

Council may refer an employee to its Medical Adviser where the employee has a non-work related injury or illness that is / has been deemed to significantly impact on the employee's work performance. Further, where the employee's ability to undertake the core tasks of their position is restricted or where employees or others (including members of the public) may be put at risk, managers have an obligation to assess the fitness for duty of that employee.

Council may require the employee to take leave until such time as the illness or injury no longer impacts on the safety or performance of the worker. Council may obtain medical advice as to the length of such periods of leave either through its Medical Adviser or the employee's Nominated Treating Doctor. Should the leave period exceed 3 months, Council will seek the advice of its Medical Adviser.

3.2 Long term illness or injury

Council may seek independent medical advice from its Medical Adviser where an employee has been diagnosed with a long-term illness or suffers a serious (non-work related) injury that impacts on that employee's ability to undertake core duties on a long term (greater than 3 months) or permanent basis. This is to assist in the determination of:

- Any constraints on future employment or modifications that should be made to working arrangements or the working environment.
- The expected duration and the likelihood of the employee returning to full duties.
- The development of a return to work plan where alternative duties are required. Council may seek the services of an occupational rehabilitation provider in this instance.
- A view on retirement due to ill health.

3.3 Work related injury

Should an employee suffer an injury whilst at work, which requires time off work for rehabilitation, a return to work plan will be devised in consultation with the employee's nominated treating doctor and Council's Medical Adviser. Council's Rehabilitation / Return to Work policy and procedures should be utilised in this regard.

3.4 Physical factors

Physical factors that may impact on the ability of an employee (or other worker) to undertake their full responsibilities include:

- Age - in relation to the physical principles placed on the employee to perform their normal tasks.
- Gender – in relation to pregnancy or potential pregnancy and the physical constraints placed on the person whilst at work
- Physical disability – in relation to the physical principles placed on the employee to perform their normal tasks.
- Mental disability – in relation to being “placed at risk” in certain working environments.

Council must make an assessment of the likelihood and consequences of an employee’s health, safety and wellness being put at risk where the physical nature of the employment begins to over-ride the capacity of the employee. Whilst no specific guidance can be applied to all individuals, an assessment of an employee’s ability to continually perform physical tasks must be done on a case by case basis. Council must also consider the work processes / systems employees undertake especially in relation to pregnancy and the use of hazardous substances.

Generally, Council has a duty of care obligation to employees and others at work and therefore must provide some guidance to managers who have situations where the physical nature of employment may place the employee at risk of injury. Such guidance may consist of:

- Considering the role / responsibility / physical nature of the employment in relation to the age of the employee and the frequency of injuries recorded by employees undertaking those roles.
- The current health and fitness status of the employee in undertaking a physically demanding role, to be assessed by the Council’s Medical Adviser.
- The skills and experience of the employee, in relation to the job function and Council’s ability to utilise those skills and experiences in other (low risk) work areas.

Council may engage the services of an Occupational Physician to undertake a functional assessment of the physical hazards of specific positions with regards to impacts, exposure (including to substances), likelihood and severity (risk) of injury.

Where a functional assessment demonstrates an employee may be at risk of illness or injury, Council may refer an employee to its Medical Adviser to obtain advice regarding the physical ability of an employee to continue to perform physically demanding duties.

Examples where roles and physical factors may be in conflict might include:

- Parking Patrol Officers and Gardens staff and pregnancy – where a medical assessment is required to assess when the employee should cease duties for less physically demanding duties. Similarly if the employee is exposed to hazardous substances.
- Mature aged workers facing physically demanding roles, such as garbage collection and construction work where the physical demands of the job begin to outweigh the probability of injury.

3.5 Social factors

Social factors that may impact on the ability of an employee (or others at work) to under take their full responsibilities include:

- Alcohol use – both during work hours and excess use out of work hours

- Illegal drug use – both during work hours and excess use out of work hours
- Prescription drug use – impacting on the ability to safely use plant and equipment
- Absenteeism – affecting team based roles

Council may refer an employee to its Medical Adviser where drug and alcohol use becomes an issue of safety to the employee, other workers and members of the public. This is to obtain advice regarding the ability of the employee to continue to perform their duties without affecting the safety of others within the work place. Council's Drug and Alcohol policy must be referred to in this instance.

Where an employee is taking prescription drugs, which have the potential to impact on that employee's performance, that employee must advise their immediate supervisor of any constraints placed on them through the use of that medication. Council may request its Medical Adviser discuss with the employee's Nominated Treating Doctor whether alternative treatments are available. Should no alternative be available Council may arrange alternative duties if reasonably practicable and if not, request the employee take a period of sick leave until certified fit for duty by the Medical Adviser.

Absenteeism is an issue that needs to be dealt with through disciplinary arrangements. Employees should be offered access to Council's Employee Assistance Program where identified as appropriate.

3.6 Psychological factors

Psychological factors that may impact on the ability of an employee (or others at work) to undertake their full responsibilities include:

- Non work related stress – issues from outside the workplace dominating work time and seriously impacting performance and safety
- Work related stress – inability to cope with the demands of the position, impacting on decision making, performance and safety.
- Heavy work loads – employee health being placed at risk due to excessive work loads
- Psychological Fatigue – working long hours, "out of daylight hours", or irregular shifts leading to excessive tiredness or fatigue and thereby placing the employee's health and others at risk.

Where psychological factors impact on the ability of an employee to undertake their duties, or place themselves or others at risk of injury, Council may refer the employee to its Medical Adviser. This is to obtain advice regarding the ability of the employee to continue to perform their duties without affecting the safety of others within the work place. Council may also refer the employee to the Employee Assistance Program for treatment.

4 Assessment of fitness for duty

Council, in seeking medical advice, is attempting to determine if the employee is fit to undertake the required tasks of the position the employee is employed to do - and where not fit – what work restrictions or alterations can be made to accommodate ongoing employment. Advice from the Medical Adviser generally includes a recommendation and duration of incapacity, similar to:

- Temporary Modified Duties (for a specific period / review period)
- Permanent Modified Duties
- Temporary Inability (totally unfit for work for a specified period)

- Permanent Inability (totally unfit for work and unlikely to return within a reasonably foreseeable period)

4.1 Temporary modified duties

Council may offer alternative duties where it is reasonably practical to do so, and it is in the interests of both parties, where the Medical Adviser has assessed an employee as being unable to perform their full duties for a reasonable time period (less than **3** months). Where this is not reasonably practical, meaningful or in the interest of both parties the employee is entitled to utilise sick and other forms of available leave until fully fit for duty. Temporary Modified Duties should not go beyond **3** months period without referral and reassessment by Council's Medical Adviser.

4.2 Permanent modified duties

Where Council's Medical Adviser has assessed an employee as having a permanent incapacity or illness that effects their ability to perform their full duties the following options are present:

- If it is in the interest of the employee to gain some meaningful employment, Council may where reasonably practical offer alternative duties. This process must not disadvantage or unfairly treat the employee.
- Council may take a view that the employee should be offered retirement on the grounds of ill health.
- Allow the employee to take leave until such time alternative duties can be arranged.

4.2.1 *Alternative duties – temporary or permanent*

Further consultation with Council's Medical Adviser is required where consideration will be given to the use of alternative duties. The criteria for consideration for alternative duties may include, among other things:

- has the employee had a satisfactory employment record in their current position
- will the employee be able to take up alternate duties within **1** month of the alternate duties being identified
- is the employee expected to be able to undertake full duties of the new position within **6** months.

Issues to be considered in possible redeployment are:

- Vacant positions for which the employee is qualified and would be fit to undertake
- Vacant positions for which the employee could become qualified within a reasonable period of time, and would be fit to undertake
- Capacity of the work area with the vacancy to support and re-train the employee
- The need to assess the employee's capacity to undertake the alternate duties (this may require an assessment by a qualified Rehabilitation Provider)

If Council's Medical Adviser advises that the staff member becomes temporarily unfit for duty the staff member will again be placed on sick leave until their condition resolves sufficiently to return to alternative duties.

4.3 Temporary inability

Should an employee be deemed totally unfit for work for a specific period of time (less than **3** months), Council has an obligation to allow the use of sick leave until exhausted. Council may approve the use of other forms of leave, including leave without pay, until such time as the employee is again fit for duty.

If the employee's Nominated Treating Doctor suggests that the employee is totally unfit for duty for a period of greater than **3** months, Council should seek advice from its Medical Adviser regarding the potential / likely return within a reasonable period, not beyond six months.

For an illness that leads to temporary inability beyond **6** months, Council must take into consideration the:

- Roles, objectives and responsibilities of the position the employee holds
- Ability of Council to fill that role with experienced candidates for a short period of time
- Impact the vacancy will have on Council's objectives

in determining whether to fill that vacancy on a permanent basis, and offering the employee alternative (but equally responsible) duties should they return to duty.

If the range of suitable duties the employee can undertake is severely restricted and would be beyond the capacity of the Council to sustain for more than **12** months consideration will be given to the termination of their employment at the expiration of paid sick leave.

4.4 Permanent inability

Where an employee's Doctor has assessed an employee as having a permanent incapacity or illness and Council's Medical Adviser supports this, Council may take the view that early retirement on the grounds of ill health is warranted. A period of temporary inability that extends beyond **12** months may be construed as permanent inability.

5 Procedures

5.1 Termination of employment

The final decision on termination of employment on medical grounds will be made by the General Manager (in accordance with Section 335 of the Local Government Act 1993) based on advice from the relevant officers where appropriate, namely:

- The Divisional Director.
- The Manager Human Resources and Organisation Development.
- The Safety Manager.

The decision to terminate employment must be based on:

- Medical advice provided by Council's Medical Adviser and the employee's Nominated Treating Doctor
- Information from the Risk Unit regarding the roles and responsibilities the officer has including the likelihood and severity of injury or illness (the risk) that officer faces.
- Information and / or advice regarding any functional assessment or fitness requirements outlined for the position.

The staff member may initiate termination on medical grounds at any stage of the process providing there is supporting medical evidence.

5.2 Filling subsequent vacancies

It is a requirement under Section 98 of the Industrial Relations Act 1996 for an employer to inform a person who is taking the place of an employee who has been dismissed for medical

reasons. The medically unfit employee maybe entitled to be reinstated to carry out the work for which such a person is to be employed.

5.3 Dispute resolution

Where there is disagreement between medical reports in the likely level of inability Council will request a further opinion from its Medical Adviser to review the findings of the employees Doctor, before looking for an additional (third) independent medical opinion.

Should an employee feel aggrieved by the process undertaken, they should seek to address this through Council's grievance procedure.

5.4 Information provided to medical adviser

5.4.1 Employee to provide

When referring an employee to Council's Medical Adviser, the staff member should be:

- Advised that they should take any medical reports or medical certificate they have from their treating practitioner regarding their medical condition
- Requested to complete a 'release of medical information' form, to allow Council's Medical Adviser to request medical information from their treating practitioner(s)

5.4.2 Employer to provide

Council must provide the Medical Adviser with:

- A job description and summary of main duties, including details of any manual handling involved and estimates of any weights to be shifted
- Details of any function assessment of the position or tasks involved
- Any details of required "fitness conditions" that apply to the position
- A statement regarding the reason for referral
- Summaries of sick leave use and reasons for absence (where appropriate).

6 Review

This policy and procedure is to be reviewed at every two years through consultation with Divisional Managers.