

# NTPS Inability and Unsatisfactory Performance Handbook

Office of the Commissioner for Public Employment

<b>Document title</b>	NTPS Inability and Unsatisfactory Performance Handbook
<b>Contact details</b>	Office of the Commissioner for Public Employment
<b>Approved by</b>	Commissioner for Public Employment
<b>Date approved</b>	17 August 2023
<b>Document review</b>	Every 24 months
<b>TRM number</b>	

Version	Date	Author	Changes made
1.0	August 2023	A/Senior Director, Employee Relations	First edition

Acronyms	Full form
NTPS	Northern Territory Public Sector
DCDD	Department of Corporate and Digital Development
EAP	Employee Assistance Program
ICAC	Independent Commissioner Against Corruption
ICAC Act	<i>Independent Commissioner Against Corruption Act 2017</i>
OCPE	Office of the Commissioner for Public Employment
PSEMA	<i>Public Sector Employment and Management Act 1993</i>
CEO	Chief Executive Officer / delegate / decision maker
Commissioner	Commissioner for Public Employment
ECO	Executive Contract Officer
IME	Independent Medical Evaluation

# Contents

<b>1. Purpose</b> .....	<b>4</b>
<b>2. Inability in the NTPS</b> .....	<b>4</b>
<b>3. What this handbook covers</b> .....	<b>4</b>
<b>4. What this handbook does not cover</b> .....	<b>4</b>
<b>5. Inability Framework</b> .....	<b>4</b>
<b>6. Natural justice</b> .....	<b>5</b>
<b>7. Support person</b> .....	<b>5</b>
<b>8. Identifying inability or unsatisfactory performance</b> .....	<b>6</b>
8.1. Best ways to address absenteeism concerns .....	6
<b>9. Steps leading up to inability or unsatisfactory performance</b> .....	<b>7</b>
9.1. Talk to the employee .....	7
9.2. Document discussions.....	8
9.3. Arrange a follow-up .....	8
9.4. Developing a Performance Improvement Plan (PIP).....	8
<b>10. Preliminary considerations</b> .....	<b>9</b>
10.1. Decision maker.....	9
10.2. Case supervisor .....	9
10.3. Meeting with the employee.....	10
10.4. Timeliness.....	10
<b>11. The inability and unsatisfactory performance process</b> .....	<b>10</b>
11.1. Unsatisfactory performance .....	10
11.1.1. Outline to the employee, in writing, the performance concerns.....	11
11.1.2. Remedial action .....	11
11.2. Inability (Medical).....	11
11.2.1. Seeking Medical Evidence .....	12
11.2.2. Conflict of medical opinions.....	13
11.2.3. Outline to the employee, in writing, the inability concerns.....	13
11.2.4. Decision on alleged inability .....	14
11.2.5. Suspension.....	14
11.2.6. Retirement on the grounds of invalidity .....	15
11.2.7. Remedial action .....	15
11.2.8. Decision and reasons for the decision .....	16
<b>12. Concluding an inability process when an employee resigns their employment</b> .....	<b>16</b>
<b>13. Legislative authority and related information</b> .....	<b>17</b>

## 1. Purpose

The Northern Territory Public Sector (NTPS) Inability Handbook (the handbook) is an aid to understanding inability or unsatisfactory performance processes under the [Public Sector Employment and Management Act 1993](#) (PSEMA).

The purpose of the handbook is to provide general guidance from the Commissioner for Public Employment (the Commissioner) on these two processes for employees and supervisors.

This handbook does not bind, or substitute, decision makers acting in accordance with the PSEMA, nor in response to the unique set of facts of each actual case.

## 2. Inability in the NTPS

Processes relating to inability or unsatisfactory performance in the NTPS are formal, conducted in accordance with legislative requirements set out in the PSEMA, and in accordance with the principles of natural justice. The process can have serious ramifications for employees, including the termination of employment, and accordingly, must be undertaken with proper care.

Inability actions may be subject to review by the Fair Work Commission or the Public Sector Appeals Board.

Workforce Relations, within the Department of Corporate and Digital Development (DCDD), provide specialist assistance and advice in relation to inability processes in the NTPS. Agencies should engage with Workforce Relations for support with inability processes. Requests for services can be made via the [Workforce Services Portal](#) on NTG Central.

## 3. What this handbook covers

- Legislative basis for inability and unsatisfactory performance processes.
- Steps in an inability and unsatisfactory performance process.

## 4. What this handbook does not cover

- Managing discipline related matters. See the [NTPS Discipline Handbook](#).
- Appeals relating to inability processes.

## 5. Inability Framework

Employee performance and inability processes in the NTPS are underpinned by a formal legislative framework contained within Part 7 of the PSEMA.

The framework sets out:

- performance by an employee which constitutes inability (section 44 of the PSEMA);
- when a Chief Executive Officer suspects, on reasonable grounds, that a medical examination and report is required (section 45);

- when remedial action is required (section 46);
- suspension of an employee (section 47); and
- retirement on grounds of invalidity (section 48).

The inability framework applies to all NTPS employees, other than employees on a fixed period contract or casual contract, Executive Contract Officers (ECO) or Chief Executive Officers (CEO). These are managed through other mechanisms; contact Workforce Services within DCDD for further details.

## 6. Natural justice

The common law principle of natural justice applies to inability processes under the PSEMA. This principle is also reflected in Employment Instruction 3 – Natural Justice.

Natural justice means that:

- an employee who may be adversely affected by an impending decision must be informed of any adverse information or other relevant information that may be taken into account by the decision maker;
- the employee must be given a reasonable opportunity to respond to that information, including providing any evidence they wish to include in their response;
- the decision maker must impartially consider the employee's submissions prior to making a decision; and
- the decision maker must not have a personal interest in the outcome of a decision, and must make the decision in a fair and considered manner, based on consideration of all relevant information.

## 7. Support person

An employee must be offered the opportunity to bring a support person to all meetings relating to an inability process. A support person can be a friend, relative, work colleague, or another supervisor within the NTPS. A union delegate or union official may attend as a support person. However, if they wish to attend in the capacity as a professional advocate (and not a support person) they must seek permission to attend in that capacity.

A support person is not an advocate for the employee. They provide the employee with support during the meeting, take notes and can adjourn the meeting for a break if required. The employee will be required to do most of the speaking as the support person cannot advocate for the employee during the meeting. However, the support person can ask clarifying questions.

The support person ensures the meeting is procedurally fair for the employee by making sure they are given an opportunity to respond and ask relevant questions. The support person can intervene and stop the meeting if the employee is too upset to continue or needs a break. Support persons may play a more active role during meetings if the employee has a significant disability or English is not their first language.

Further guidelines on the [Role of a Support Person](#) visit the OCPE website.

## 8. Identifying inability or unsatisfactory performance

An employee can expect that performance planning and review will occur and can request for the process to occur. Where an employee has requested that the annual performance planning and review process occurs, unless otherwise agreed, the process should commence within 14 days and be completed within 21 days from commencement.

An employer must take all reasonable steps to ensure that an employee is aware of, understands the purpose of, and participates in, annual performance agreement discussions. Annual performance discussions are not the same as Performance Improvement Plan (PIP) discussions.

All employees should have a performance agreement in place. Agreements should be in place within 2 months of commencing with the agency. NTG Central provides advice for employers and employees on performance discussions [here](#).

Annual performance agreements are a helpful tool when establishing goals and expectations and also changes in performance or conduct.

**Inability** may exist if the employee:

- is not able to perform the duties they are assigned to perform (because of physical, mental illness or disability or any other reason);
- is regularly absent from the workplace. (High rates of absenteeism is often a key indicator that a discussion is required between an employee and employer. Employers are encouraged to meet with employees who are regularly absent from the workplace to discuss impacts on performance.);
- is not licensed, registered or otherwise qualified for the efficient and satisfactory performance of those duties.

**Unsatisfactory performance** may exist if the employee:

- is not completing tasks assigned to them within the time required or to the standard that the person is employed;
- is not suited to perform, or capable of efficiently performing, those duties;
- is not performing those duties efficiently or satisfactorily;
- is not regularly attending the workplace. High rates of absenteeism can be a key indicator of unsatisfactory performance.

### 8.1. Best ways to address absenteeism concerns

- Encourage open dialogue to ascertain if the employee is ok, enquire if assistance can be provided to better manage the absenteeism.
- Outline leave entitlements available and explain what happens if an employee exceeds their entitlement (leave without pay).
- Discuss reasonable adjustments, if appropriate.
- If a medical condition is disclosed, ask the employee to outline how they will manage the condition to reduce absences from the workplace.

- Advise that their attendance will be monitored to ensure satisfactory work performance and if attendance does not improve, next step is the introduction of a PIP or if a medical condition is suspected, they may be directed to attend an Independent Medical Evaluation (IME).

---

Note: employees are entitled to 15 days paid personal leave each calendar year.

---

## 9. Steps leading up to inability or unsatisfactory performance

### 9.1. Talk to the employee

Arrange a time to meet with the employee and discuss the performance concerns. Remind them they may bring a support person. Clearly set out expectations of the role and the employee's performance including:

- Confirm they have a clear understanding of their job, and provide clear examples of the decline in performance.
- Discuss relevant external factors that may be contributing to poor performance such as high absenteeism, (provide leave records as an example), outside employment activities, personal responsibilities (ongoing carer).
- The supervisor should identify supports available to assist the employee in remediating the performance issues.
- Set clear expectations – for example informal check-ins/meetings to ensure employee is working towards addressing performance issues.
- The supervisor must set clear and achievable standards of expected behaviour/performance and a timeframe on which these can be reasonably reached. For example; 4-6 weeks.
- Meet with the employee weekly or fortnightly. Provide feedback in writing, via email, outlining what was discussed and/or agreed to including any ongoing performance issues not yet being addressed.
- After each check-in, the supervisor should indicate whether they are satisfied that the employee has made reasonable attempts to remediate the performance issues / is demonstrating a commitment to addressing the issues.
- If the supervisor is reasonably satisfied that the employee is actively addressing the performance issues then commencing a formal PIP at this point is not required.
- If the supervisor is not satisfied, then the supervisor should arrange a further meeting to discuss the requirement to proceed to a PIP to formally address the performance issues.
- Discuss and agree on actions and a follow-up time in 2 to 4 weeks to review the agreed actions. You can offer [support or counselling](#) to an employee if you feel they may benefit from it.

The supervisor must have discussions with the employee to raise the performance concerns and provide tangible examples of the performance issues.

---

Note: When a supervisor decides to commence a Performance Improvement Plan (PIP) they are encouraged to do this in conjunction with Workforce Services.

---

## 9.2. Document discussions

Once you have met with the employee, you must document the:

- discussions;
- agreed actions; and
- review timeframes.

Remember to include the dates the meetings took place and the name of the attendees (including the support person). Save the documents in TRIM (confidential locks applied).

It is strongly recommended that both the employee and employer sign and date these documents at the earliest possible time. This may prevent a disagreement at a later date about what was said and agreed to. Each party should retain copies of the signed documents.

## 9.3. Arrange a follow-up

Arrange a follow-up meeting with the employee to review the agreed actions. Continue to talk to the employee about their performance and provide feedback.

Supervisors should document the discussions and actions as detailed above.

Clearly identify the issue; performance, attendance, medical condition (it may be a combination).

If after two follow-up meetings, performance has not improved, you may choose one of the following options:

- Develop a PIP to support the professional development of the employee.
- Request the employee provide medical evidence which addresses the management of an identified medical condition. This evidence should (ideally) include how the medical condition is being managed, any reasonable adjustments that may assist and a timeframe for treatment.
- Request the employee attend an Independent Medical Evaluation (IME) to assess their capability to continue to perform their role and to better understand what adjustments may be required in the workplace.

## 9.4. Developing a Performance Improvement Plan (PIP)

Workforce Relations can support supervisors developing a PIP. PIPs are appropriate for ongoing employees including unattached officers. PIPs should be informed by the job description and the [Capability Framework](#).

A PIP is designed to provide an employee with the tools and opportunities to succeed. It should be used as the framework to review and improve employee performance. The PIP should include:

- agreed actions to be assessed; and
- timeframes for review.

Once the draft PIP has been completed the supervisor should arrange a time to meet with the employee to discuss the proposed PIP. The employee should be notified that the intention of the meeting is to discuss the implementation of a PIP and the employee should be afforded the opportunity to bring a support



person. The supervisor may also wish to have a Workforce Services professional in attendance at the meeting.

The PIP should include:

- clearly identified gaps in performance;
- clearly indemnified expectations and standards;
- identified areas of performance that need to be addressed and how they relate to the role;
- how the employee's performance will be assessed against that identified area of performance;
- a reasonable timeframe for which the PIP will be in place (4-8 weeks); and
- regularity of check-in meetings to monitor the employees compliance with the PIP (weekly or fortnightly)

An employer should meet with the employee to discuss the proposed PIP. The employee should be given reasonable time to review and sign the PIP.

Before a supervisor considers an inability / unsatisfactory performance process, they must be able to reasonably demonstrate that all performance management strategies have been exhausted and there is no reasonable prospect of rectifying the perceived deficiencies within a reasonable timeframe.

If all reasonable steps to address employee performance have made no improvement, this may trigger the commencement of an inability/unsatisfactory performance process. See clause 11.

## 10. Preliminary considerations

A number of preliminary considerations will take place prior to the commencement of an inability process. These are discussed below.

### 10.1. Decision maker

The CEO of an agency is the primary decision maker in inability matters under the PSEMA. A CEO can delegate their powers or functions to another person.

An agency will need to determine who the decision maker will be in an inability process. It may be helpful for a copy of the relevant part of the instrument of delegation to be retained on file by the decision maker.

The decision maker should be clear about what decisions they are making at all stages and what authority they have to make the relevant decision.

The decision maker must be impartial and bring an open (not pre-determined) mind to the inability matter.

### 10.2. Case supervisor

A case supervisor is generally appointed to provide support to the employee, supervisor and the decision maker, by providing advice and assistance with the inability process. For example, in drafting correspondence, arranging meetings with the supervisor and employee and, if required, securing medical advice.

The case supervisor may provide options, recommendations and assist with facilitating outcomes. Case supervisors would typically be an employee of Workforce Relations.

### 10.3. Meeting with the employee

A face-to-face meeting with the employee who is subject to the inability / unsatisfactory performance proceedings should be arranged as early as possible. Remind the employee that they are welcome to bring a support person if they wish.

The performance concerns should be discussed with the employee and the employee is to be provided with copies of relevant material (for example, a report or letter detailing the concerns). More than one meeting may be needed, depending on the process adopted. An employee must be offered the opportunity to bring a support person to all meetings.

Choose an appropriate location for the meeting (i.e. not in view of other employees). Remember to document the meeting discussion and any agreed outcomes.

### 10.4. Timeliness

It is in the interests of all parties that inability processes are finalised in a timely manner. Delays in both decision making and obtaining responses may occur, but should be minimised wherever possible. When a delay is due to the employee being absent due to illness, a medical certificate may be required.

If an employee is unwell and requires additional time to submit a response, they must seek an extension from the delegate.

## 11. The inability and unsatisfactory performance process

The steps taken in an inability process may differ slightly than those undertaken in an unsatisfactory performance process.

Irrespective of which process you are undertaking, both can be highly stressful and challenging for the employee therefore all correspondence should include reference to the [NTPS Employee Assistance Program \(EAP\)](#).



The purpose of the EAP is to help employees and managers deal with issues that may impact them at work. Employees and their families may access up to three sessions of professional and confidential counselling services for each issue, which may be conducted remotely. Further sessions may be granted by the CEO.

### 11.1. Unsatisfactory performance

If the implementation of the PIP has not resulted in improved work performance the employee must be made aware at the earliest possible time.

### 11.1.1. Outline to the employee, in writing, the performance concerns

An employee must be provided with an opportunity to respond to the concerns as part of the inability / unsatisfactory performance process. (Previously, the supervisor will have set clear and achievable standards of expected behaviour / performance and a timeframe in which these were to be reasonably achieved; and explain how these were not met.)

The employee should be provided with written details of the concerns and the evidence being relied on to determine inability, noting that a PIP process should already have been undertaken.

The employee should be provided a reasonable opportunity to respond to the concerns. This should include reasonable time to seek advice and prepare a response. Consideration should also be given to any health issues affecting the employee's ability to respond, the complexity of the matter or the seriousness of the inability process.

Generally an employee will be provided 14 days to respond to the initial letter.

---

Note: where the performance issues relate to ongoing absenteeism the supervisor must identify if the absenteeism relates to an ongoing medical condition that is supported by medical evidence or if it is just sporadic absenteeism. Sporadic absenteeism that is unrelated to a medical condition should be managed as a performance related matter but ongoing absenteeism that is related to an ongoing medical condition should be managed as a medical inability process.

---

### 11.1.2. Remedial action

Once a CEO has carefully considered the employees response to the concerns relating to their performance, a CEO must make a decision on how to proceed. As set out in section 46 of the PSEMA, a CEO may decide to take no further action; or do one or more of the following:

- order the employee to undertake training, counselling or other remedial activities the CEO considers appropriate in the circumstances; or
- reduce the employee's salary within the range applicable to the employee's designation; or
- transfer the employee to perform other duties in the Agency; or
- transfer, or request the Commissioner to transfer, the employee to perform duties in another Agency or
- terminate the employee's employment.

An alternative to termination of employment is transferring an employee to a lower designation position that is commensurate with their skill-set.

The merit principle does not apply if the CEO chooses to transfer the employee.

It is recommended that correspondence to the employee should show that the CEO considered alternative remedial actions and indicate why the foreshadowed remodel action is the preferred action.

## 11.2. Inability (Medical)

Prior to a medical inability process, the supervisor should be able to reasonably demonstrate that:

- they have met with the employee to discuss the health and wellbeing of the employee;
- the employee has been given the opportunity to disclose their medical condition and any ongoing work restrictions and necessary reasonable adjustments;
- they have discussed leave options, if necessary including carers leave, personal leave, leave without pay and flexible work arrangements;
- they have considered how the medical condition or leave affects the employee's capacity to perform their duties.

All conversations should be documented. It is recommended that a supervisor emails the employee at the end of the meeting confirming what was discussed and agreed.

Before considering an Independent Medical Evaluation (IME), the supervisor should invite the employee to submit a letter from their treating medical practitioner outlining:

- the nature of their condition;
- how the condition (or the treatment for the condition) affects their ability to perform their duties;
- how long the condition is expected to continue affecting the employees capacity to perform their duties; and
- what recommendations and adjustments are required to support the employee in the workplace.

Alternatively, seek the employee's authority to contact their treating medical practitioner directly.

The supervisor should provide the employee with their job description for the appointment.

---

Other factors that may prompt inability proceedings:

- **Lapse or expiration of licensing, registrations, qualifications, accreditations or police checks**
  - **Inability to obtain or renew a Working with Children card (Ochre card)**
- 

If qualifications/registrations have lapsed, the CEO should consider whether a temporary transfer to another role is reasonable until the above factors are reinstated. If reinstatement of registration, qualifications, licence is not easily resolved, the employee will be unable to perform duties and termination of employment may be warranted.

### 11.2.1. Seeking Medical Evidence

If a CEO suspects, on reasonable grounds, that inability or performance grounds are caused or contributed to by a physical or mental illness or disability, the employee may, as stated above, be invited to submit a medical report from their treating health practitioner for the delegate's consideration.

Any medical report provided by an employee from their treating health practitioner would be at the employees own expense and should be submitted within a reasonable timeframe from request (generally 2 weeks).

If the employee is unwilling to disclose the nature of their medical condition or if the medical condition cannot be reasonably supported in the workplace, the CEO may engage a health practitioner, approved by the Commissioner, to determine whether the employee has a physical or mental illness or disability that may adversely affect the employee's performance of the duties they are assigned to perform.

Refer [Approved Medical Practitioners Guidelines.doc \(live.com\)](#)

In this circumstance the employee will be directed to attend a medical examination. A written report is provided to the CEO following the examination which should set out the health practitioner's opinion as to the following:

- whether the employee has a physical or mental illness or disability that may adversely affect the employee's performance of their duties. If so:
  - the likely direct or indirect effect of the illness or disability on the employee's performance of their duties; and
  - how long the illness or disability or its effects are likely to last;
- whether disclosure of the information in the report to the employee by the CEO might be prejudicial to the employee's health or wellbeing.
  - If prejudicial concern is raised, the supervisor should only provide a copy of the report to the employees treating health practitioner and advise the employee that they must contact their doctor to receive a copy.

The CEO must give a copy of the report to the employee (and their treating health practitioner) as soon as practicable unless the disclosure might be prejudicial to the employee's health or wellbeing.

If a CEO engages a health practitioner and directs an employee to submit to examination, the health practitioner must be provided with:

- a copy of the employee's job description;
- relevant information regarding the employee's work performance or behaviour; and
- any other relevant information to ensure the assessment is useful to determine the employees ability to perform duties.

### 11.2.2. Conflict of medical opinions

Unfortunately, there have been times where an IME may inhibit the process, particularly if the medical practitioner is non-committal in providing a diagnosis. This can cause challenges to the employer in terms of managing an employee who may be underperforming.

Also, it may confirm a conflict of medical opinion between the employee's registered health practitioner and the findings of the medical examiner appointed by the employer. When this occurs, the matter should be referred to the Northern Territory Medical Advisor for consultation and resolution with the Chief Health Officer. The Northern Territory Medical Advisor or the Chief Health Officer has the discretion to arrange a further examination by another approved health practitioner and any associated costs must be borne by the referring Agency.

Alternatively, if the delegate is satisfied that there is grounds to progress, formal inability processes commence.

### 11.2.3. Outline to the employee, in writing, the inability concerns

The supervisor, with the support of Workforce Services, should meet with the employee to discuss the outcome of the IME. The employee should be included in any discussions regarding any restrictions or limitations which have been recommended by the treating doctor.

The delegate must consider the health issues affecting the employee's ability to respond and the complexity of the matter. Where the medical condition has a poor prognosis or a reasonable judgment

cannot be made, the employee may be entitled to invalidity. (Seek advice from Workforce Health Management Team to proceed with an invalidity process if appropriate.)

The employee should be provided with written details of the concerns and the evidence being relied on to determine inability. The employee must be provided with a reasonable opportunity to respond to the contents of the IME as part of the inability process. This should include a reasonable time to seek advice and prepare a response. Generally an employee will be provided 14 days to respond to the initial letter.

If this occurs, a CEO may consider inviting the employee to submit a report (from a health practitioner of their choice) for the delegate's consideration. Noting that any report submitted by the employee would be at the employees own expense and would need to be submitted within 2 weeks of the report the employer has obtained in accordance with the inability process.

#### 11.2.4. Decision on alleged inability

The decision maker will need to determine whether a finding of inability can be substantiated.

The decision maker should consider all information available to them and make their decision on the balance of probabilities (i.e. it is more probable than not). The strength of evidence necessary to establish a finding on the balance of probabilities may vary according to the duties required in the role.

The employee should be advised in writing of the findings made. The advice should clearly explain why the CEO made the decision they did. If a CEO is satisfied that the evidence considered does not support an inability finding then the employee should be advised accordingly.

If the decision maker is satisfied, on reasonable grounds, that the employee is unable to perform their role, they must then consider the appropriate remedial action outlined in section 46 of the PSEMA.

#### 11.2.5. Suspension

A decision to suspend an employee can be made at any stage of an inability or unsatisfactory performance process. If a CEO believes there is a genuine concern that the employee remaining in the workplace is problematic they may consider suspension, with or without remuneration.

A CEO may suspend an employee if they consider it appropriate, pending a decision to take remedial action under section 46 of the PSEMA. The CEO must foreshadow in writing that they are considering suspending the employee, and include:

- the reason for considering suspension;
- the period of the suspension; and
- whether the suspension is with or without remuneration.

The employee must be given a reasonable opportunity to make submissions in relation to a foreshadowed suspension.

Where a CEO is contemplating changing a suspension with remuneration to without remuneration, they must foreshadow this in writing. The employee must be given a reasonable opportunity, within the timeframe specified in writing, to make submissions in relation to the foreshadowed change.

An employee must make themselves available to assist with any investigation or inquiry relating to the matter at any time during the period of suspension, if directed by a CEO.

Suspension can be a challenging time for an employee. Please ensure they are reminded of the [NTPS Employee Assistance Program \(EAP\)](#).



### 11.2.6. Retirement on the grounds of invalidity

An employee is totally and permanently incapacitated if, because of a physical or mental condition, it is unlikely the employee will ever be able to work in any employment or hold any office for which they are reasonably qualified by education, training or experience or could become reasonably qualified after retraining.

When a CEO is satisfied, on reasonable grounds, that an employee is totally and permanently incapacitated the CEO may retire the employee on the grounds of invalidity.

Before taking this option, a CEO must first satisfy themselves that they have:

- obtained a medical report under section 45 or 49B of the PSEMA;
- complied with section 50 of the *Superannuation Act 1986* if applicable; and consider any relevant legislation relating to superannuation;
- taken action that is appropriate and reasonable in the circumstances;
- given written notice of the proposed action and the grounds for taking it; and
- given a reasonable opportunity to show why the action should not be taken.

### 11.2.7. Remedial action

Once a CEO has carefully considered the employee response to the concerns relating to their performance, a CEO must make a decision on how to proceed. As set out in section 46 of the PSEMA, a CEO may decide to take no further action; or do one or more of the following:

- order the employee to undertake training, counselling or other remedial activities the CEO considers appropriate in the circumstances; or
- reduce the employee's salary within the range applicable for the employee's designation; or
- transfer the employee to perform other duties in the Agency; or
- transfer, or request the Commissioner to transfer, the employee to perform duties in another Agency; or
- terminate the employee's employment.

The merit principle does not apply if the CEO chooses to transfer the employee.

It is recommended that correspondence to the employee should show that the CEO considered alternative remedial actions and indicate why the foreshadowed remodel action is the preferred action.

### 11.2.8. Decision and reasons for the decision

After an employee has been provided with an opportunity to respond to proposed inability action, and a final decision on the action to be taken has been made, the employee will be advised of this final decision, the reasons for the decision, and the decision maker's consideration of any information provided by the employee.

If it is decided to impose an action that is different to that initially proposed, the employee may be given a further opportunity to comment on the appropriateness of the new proposed action. However, a further opportunity to comment may not be required if the revised action is objectively less onerous than the original action proposed.

Employees should be provided with information regarding their appeal rights, including information regarding the Fair Work Commission and the Public Sector Appeals Board available on the [Office of the Commissioner for Public Employment](#) (OCPE) website.

The employee will be advised in writing that the action is being implemented, including all relevant details attached to and arising from the action.

It is preferable that such advice is provided in a face to face meeting with the employee. The employee should have the option to bring a Support Person and be reminded of their ability to access the EAP.

A decision to take action takes effect on the day the notice is given to the employee or a later day specified in the notice.

All records associated with the inability process should be managed in accordance with departmental record and information management requirements, and [Employment Instruction 9 – Employee Records](#).

## 12. Concluding an inability process when an employee resigns their employment

The PSEMA does not prevent the conclusion of an inability process. This is a decision for the agency CEO. In some cases there may be a public interest in completing the review after an employee has resigned, because the employee may seek re-employment with the NTPS at a later stage.

If an employee notifies their agency of their resignation, and the agency intends to complete the inability process and make findings, the employee should be advised. The agency must ensure it has up to date contact details for the employee, including a forwarding home address, mobile number and personal email address. The employee should be provided with an opportunity to respond and make submissions prior to the finalisation of that process.

No action can be taken against someone who is not an NTPS employee. However a copy of the findings and any response received from the employee should be placed on the employee's employment record, as this would then be available for consideration in the event of the employee subsequently seeking re-employment in the NTPS.



## 13. Legislative authority and related information

Part 7 – Employee Performance and inability, *Public Sector Employment and Management Act 1993*

Part 1A - Section 5F – Performance and Conduct Principle, *Public Sector Employment and Management Act 1993*

Employment Instruction 3 – Natural Justice

Commissioner’s Guideline – Natural Justice

Employment Instruction 4 - Employee Performance Management and Development Systems

Employment Instruction 5 – Medical Examinations

Employment Instruction 6 - Employee Performance and inability

Commissioner’s Guideline – Performance and Inability

Employment Instruction 12 – Code of Conduct

Agency Human Resource Delegations

Relevant agency policies, procedures and guidelines