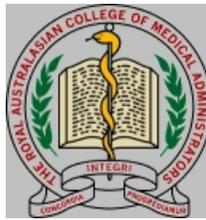


**Issues paper – performance appraisal and support for senior medical practitioners in Victorian public hospitals**



**Table of contents**

Executive summary ..... 1

Background ..... 3

Purpose of this paper ..... 3

Why performance management, appraisal and support in Victoria now? ..... 4

Medical professionalism ..... 4

Some key performance management tools ..... 5

Requirements to make performance management & appraisal systems work ..... 8

What seems to work – general organisation performance appraisal ..... 10

Performance appraisal and the medical profession ..... 11

What is in place in other jurisdictions ..... 12

Industrial and legal issues ..... 14

Case law ..... 15

Anti-discrimination legislation ..... 16

Natural justice ..... 16

References ..... 17

## **Executive summary**

- 1 A consortium led by DLA Phillips Fox and incorporating the Royal Australasian College of Medical Administrators and SACS Consulting has been appointed by the Department of Human Services to develop a performance management process for senior medical practitioners working in Victorian public health services.
- 2 This issues paper is being circulated people who have indicated their intention to attend one of a series of workshops which are being conducted throughout Victoria in March and April 2009. The objective of the workshops is to enable participants to contribute their ideas about how performance management systems for senior medical practitioners can be designed and implemented effectively in Victorian public health services.
- 3 A number of factors have influenced the decision to implement performance management systems for senior medical practitioners, including the successful introduction of mandatory credentialing and definition of scope of clinical practice; contractual requirements of many senior medical practitioners that they participate in performance management; recognition by health services of the need to improve engagement with senior medical practitioners in a mutually-agreed approach to the delivery of safe, high quality care; a provision in the by-laws of some hospitals; and an accreditation requirement for health services that performance management systems must be in place.
- 4 The medical profession holds a rare position characterised by high respect and trust of the community which in turn is tied to significant professional and personal responsibility. Society grants professions a monopoly over the use of a body of knowledge and skills and allows autonomy through the privilege of self-regulation, for which the profession guarantees competence, integrity and altruism. Currently, senior medical practitioners working in public hospitals in Victoria are subject to professional registration with the Medical Practitioners Board of Victoria; a requirement of compliance with the continuing education requirements of a Specialist Medical College; and work-based systems of accountability. Victorian medical practitioners, therefore, are subject to both significant external processes and obligations inherent in being a member of the medical profession. Nonetheless there are increasing expectations that formal performance management systems will be implemented to support and enhance the performance of individual medical practitioners and health services.
- 5 Effective performance management systems involve an integrated approach, with both formal and informal processes which include goal setting and performance appraisal, as well as on-going informal feedback throughout the performance cycle.
- 6 Key elements of good practice in the design and implementation of effective performance management practice include alignment with the mission, values, and objectives of the organisation; credibility where the Board, CEO and management demonstrate commitment to the process and engage and win the support of staff; and integration of the performance system as part of the overall management structure.

- 7 Implementation of appraisal and feedback systems for medical practitioners requires the right environment which includes trained and skilled appraisers; a properly resourced process with protected time and appropriate remuneration for participating; support for the individual to fulfil his or her action plan; use of appraisal outcomes to inform organisation strategy; useful evaluation and development of the appraisal system.
- 8 The outcome of an appraisal usually includes a personal development plan and a number of agreed goals. Goals should be set collaboratively by the supervisor and the individual, with the importance of goal attainment understood by the parties. Feedback on goal progress should be provided through clear performance metrics and goals should be specific and time bound.
- 9 Performance management systems will need to be consistent with provisions in the relevant industrial agreements and contracts of employment.
- 10 This paper explores the factors that may contribute to the effectiveness of performance management systems and raises the following questions for consideration by workshop participants.
  - What organisational performance programs or processes would be beneficial to individual medical practitioners to assist and enable them to provide high quality care in a Victorian health service?
  - What performance management tools can reasonably form part of a performance system for Victorian medical practitioners?
  - What would engender clinicians' trust in a performance management system?
  - What would destroy clinician's trust in a performance system?
  - What organisational factors are needed to make performance systems effective?
  - What potential benefits or detriments do you foresee from the introduction of a formal performance management system?
  - What benefits should accrue from goal achievement?
  - How should performance appraisal relate to re-credentialling, definition of scope of practice or continuing education requirements?

## **Background**

- 11 The Department of Human Services has contracted with a consortium comprising DLA Phillips Fox, SACS Consulting and the Royal Australasian College of Medical Administrators (RACMA) to undertake this project on senior medical staff performance appraisal and support. DLA Phillips Fox is a major law firm with a leading health consulting practice, which will lead the project. DLA Phillips Fox workplace relations legal practice will provide expert guidance about industrial relations and employment law. SACS Consulting is a human resources and organisational psychology consulting firm with an expert understanding of the research about developing best practice performance management systems. RACMA is Specialist Medical College, with substantial experience in education and training of medical leaders, administrators and managers.
- 12 The purpose of the project is to develop a performance management program which:
- meets the needs of all participants so that they are willing to be involved in the process, especially the appraisers and those whom are appraised; and
  - is best practice, that is evidence based and which leads to the recognition and optimisation of performance.
- 13 The methodology includes a thorough analysis of literature, policy and legal and industrial requirements. There will be consultation with key opinion leaders and through workshops with senior medical staff, hospital managers and representatives of professional associations and specialist colleges. This document has been prepared as background for the workshops.
- 14 Following the workshops a framework and toolkit for the introduction of a performance system will be developed and piloted. Finally, an analysis of training needs of appraisers and appraisees, through the identification of core appraisal and support techniques and the competencies needed to support them, will be undertaken.

## **Purpose of this paper**

- 15 The purpose of this paper is to inform consultation about the proposed introduction of performance appraisal and support systems for senior medical practitioners in Victorian health services. The paper:
- identifies some of the key issues related to performance management, appraisal and support;
  - provides some detail about important terminology;
  - considers evidence as to what is needed to make appraisal effective;
  - identifies features of medical performance management systems in place overseas and interstate; and

- reviews industrial and legal aspects of medical performance management and appraisal.

### **Why performance management, appraisal and support in Victoria now?**

- 16 A number of factors have come into play which together have influenced the timing about the introduction of a performance system for senior medical practitioners working in Victorian health services. These are:
- the successful introduction of mandatory credentialing and definition of scope of clinical practice, which must occur at least every five years. A performance management system can provide guidance about performance and professional development in the period between formal credentialing and scope of clinical practice reviews;
  - a requirement in most senior medical practitioner contracts that annual participation in performance review should occur;
  - recognition by health services of the need to improve engagement with senior medical practitioners in a mutually-agreed approach to the delivery of safe, high quality care;
  - the requirement in the by-laws of some hospitals that the hospital has responsibility to oversight and monitor senior medical practitioner professional development; and
  - an accreditation requirement for health services that performance management systems must be in place.
- 17 In addition, the change is consistent with other Australian states and overseas jurisdictions, where formal performance review is becoming an increasingly prominent feature of oversight and review of medical practitioner performance.

### **Medical professionalism**

- 18 The medical profession holds a rare position characterised by high respect and trust of the community which in turn is inextricably tied to significant professional and personal responsibility. This relationship is founded in the concept of professionalism. Society grants professions a monopoly over the use of a body of knowledge and skills and allows autonomy through the privilege of self-regulation, for which the profession guarantees competence, integrity and altruism (Cruess et al 2002). Therefore the profession has an obligation to set and maintain standards for education and training, entry into practice and provision of care.
- 19 In recent years, as a consequence of the uncovering of clinical governance failures interstate and overseas and also as a result of the continuing managerialist push into the public sector there has been a drive by government and consumer groups to increase regulation and oversight of the profession (Maynard & Bloor 2003). The profession itself has proposed and introduced measures to address quality, safety and standards issues.

- 20 Currently, senior medical practitioners working in public hospitals in Victoria are subject to three significant processes to determine their suitability to work:
- professional registration with the Medical Practitioners Board of Victoria;
  - compliance with the continuing education and maintenance of standards requirements of a Specialist Medical College;
  - work-based systems including employment contracts, credentialling, definition of scope of practice, clinical audit and quality assurance.
- 21 However, above and beyond these external processes, medical practitioners have a personal professional responsibility to the patients in their care, the extent of which is detailed in the *AMA Code of Ethics*, in the Medical Board's guidance, *Good Medical Practice* and in additional professional guidance promulgated by the Specialist Colleges.
- 22 Victorian medical practitioners, therefore, are subject to both significant external processes and obligations inherent in being a member of the medical profession.

### **Issue 1**

What organisational performance programs or processes would be beneficial to individual medical practitioners to assist and enable them to provide high quality care in a Victorian health service?

### **Some key performance management tools**

- 23 For the purpose of discussion, the following section will provide a broad view of relevant terminology, some of which exceeds the remit of this project.
- 24 At its broadest, performance management involves a number of activities or strategies to improve the performance of individuals, teams and organisations. It can involve:
- clarification of performance objectives and expectations;
  - formal periodic performance appraisal and feedback;
  - ongoing informal feedback on what is going well and what can be improved;
  - recognition and/or reward for performance;
  - capability building at the team and individual level;
  - coaching or other action to deal with developmental areas;
  - counselling about poor performance; and

- development of particular capabilities linked with organisational objectives (Australian Public Service Management Advisory Committee 2001).
- 25 Effective performance management systems involve an integrated approach, with both formal and informal processes, which include goal setting and performance appraisal (i.e. assessment of what has been attained in specific time-periods) as well as on-going informal feedback throughout the performance cycle. There is strong evidence that good performance management increases employee attraction and retention, increases career optimisation, and increases discretionary effort and productivity (Kuvaas, 2006). When leaders use informal and continuous positive feedback loops focussing on performance strengths, individual performance and organisational performance is enhanced (Vigoda-Gadot & Angert, 2007).
- 26 Performance appraisal, the two fundamental components of which are feedback on performance and objective setting (West 2002), is a key part of most performance management systems. In both general and medical management literature, appraisal is presented as a positive, self-reflective, non-punitive process. When appraisal is formative and educational it can become a powerful tool in personal development (Lakhani 2005). However, it can also be used for management-authorized summative assessment, the purpose of which relates to efficiency and resource use (Taylor et al 2002). In the UK National Health Service formal performance appraisal is defined as a '... positive process to give someone feedback on their performance, to chart their continuing progress, and to identify developmental needs. It is a forward-looking process essential for the developmental and educational planning needs of an individual' (NHS 2006). In the NHS a formal appraisal meeting, which usually occurs on an annual basis, is structured around documentation prepared in advance by the appraisee and includes: reference to previous years goals and objectives; information about clinical work, administrative load, teaching, research; participation in audit, quality assurance and CPD; and information about relationship with colleagues and patients.
- 27 Multi-source (360 degree) feedback (MSF) is the structured evaluation of performance through review by peers, other members of the clinical team and patients (Epstein 2007). In the UK it will be used along with performance appraisal to determine eligibility for re-licensing (re-registration). When interpersonal communication, professionalism, or teamwork behaviours need to be assessed MSF is one of the better tools available (Lockyer 2003). MSF is most effective when it includes narrative comments as well as statistical data; the sources are recognised as credible; the feedback is framed constructively; and the entire process is accompanied by good mentoring and feedback (Norcini 2003b). Reactions are influenced by perceptions of accuracy, credibility and usefulness of feedback. Factors shaping these perceptions included: recruiting credible reviewers; ability of reviewers to make objective assessments; use of the assessment tool; and the specificity of the feedback (Sargeant et al 2005).
- 28 Practice and work performance assessment is the quantitative assessment of performance based on rates at which patients of doctors experience certain outcomes of care and/or the rates at which physicians adhere to evidence-based processes of

care during practice (Landon et al 2003). Performance assessment is one of the four pillars upon which Maintenance of Certification in the USA is built. There are a number of substantial problems with assessment of outcomes: the patient's outcome must be attributable solely to the doctor's actions; patients with the same conditions will vary in complexity, as statistical adjustment is not completely effective; there is unevenness in case mix between doctors so comparison against set standards is problematic; the number of patients needs to be statistically significant which limits assessment to the most common conditions (Norcini 2003a); there is lack of evidence based measures for many specialties; and there is often no definition of thresholds of acceptable care (Landon et al 2003). There is a danger that comparative measures, such as morbidity and mortality, can be over-interpreted which can lead to ill-considered performance management programs, which divert attention from genuine improvement strategies to superficial solutions (Lilford et al 2004). Overall the assessment of medical practitioners' performance at work is considered to be in its infancy (Norcini 2005).

- 29 Feedback, whether or not part of a formal appraisal system, can be used to communicate an individual's performance in relation to a standard of behaviour or professional practice, with various bases for feedback including professional judgment, a local standard, evaluations, report cards and rankings. There is strong evidence that feedback on an individual's performance is associated with improvements in performance and a reduction in errors across all employment sectors (Ilgen et al 1979). There is also information about the impact of feedback on specific changes to clinical practice. A systematic review (studies related to prescribing, referrals for diagnostics, management of common conditions) on assessment and feedback on medical practitioners' clinical performance found it can change performance when provided systematically over multiple years by authoritative, credible sources. The effects of formal assessment and feedback on medical practitioner performance are influenced by the source and duration of feedback (Veloski et al 2006). A Cochrane Review of 118 studies reported that audit and feedback can be effective in improving clinical practice, however when it is effective, the effects are generally small to moderate. The relative effectiveness is likely to be greater when baseline compliance is low and when feedback is delivered more intensively (Jamtveldt et al 2006). Canadian general practitioners also report that private feedback they received was valuable and necessary part of medical professionalism; however they were reluctant to share this information with their patients (Rowan et al 2006). Other factors, such as practitioner's active involvement in the process, the amount of information reported, the timing and amount of feedback, and other concurrent interventions, such as education, guidelines, reminder systems and incentives, also appear to be important, though their impact is not well documented (Veloski et al 2006).
- 30 Self-assessment of knowledge is essential to the practice of medicine and self-directed life-long learning (Antonelli 1997). It is needed to assess specific learning needs and to choose educational activities to meet these needs (Davis et al 2006). Self-assessment may be linked to assessment of competency and formal appraisal and be potentially useful in surveillance and demonstrating particular skills or it may emphasise a developmental approach which encourages personal and professional

growth (Brown et al 1997). In Australia participation in continuing education usually involves significant self-assessment activities. A systematic review of the accuracy of self-assessment found that the preponderance of evidence suggests that medical practitioners have a limited ability to accurately self-assess (Davis et al 2006). The worst accuracy for self-assessment was amongst doctors who were the least skilled and those who were the most confident. (Davis et al 2006).

## Issue 2

What performance management tools can reasonably form part of a performance system for Victorian medical practitioners?

### Requirements to make performance management & appraisal systems work

31 The establishment and maintenance of an effective system of performance management and appraisal will likely rise and fall on the level of trust each party has with the system and with each other. Trust builds up over time after repeated interactions by parties in a relationship (Ring & Van de Ven 1992) and represents a willingness to accept vulnerability based upon expectations about positive behaviour from the other party (Hutt et al 2000). Trust is beneficial for organisations and as a basis for organisational relationships as it is potentially more cost-effective than detailed contracting and costly performance monitoring (Maynard & Bloor 2003).

However, consistent and marked differences as to how medical practitioners and health service management evaluate aspects of system reform and change are likely to militate against the development of trust. Medical clinicians, medical managers and general managers have distinct profession-based conceptions of clinical work. In a large multinational survey, medical clinicians held strongly individual rather than systemised views of clinical work and were equivocal about the importance of the real cost of care and transparent accountability, whereas medical managers whilst supporting an individual view about clinical care recognised the value of financial realism and accountability. General managers supported systematised clinical work, financial realism and transparent accountability (Degeling et al 2003). These results confirm that differing professional cultures contribute to tensions between doctors and managers (Edwards & Marshall 2003).

In addition, opposition by medical practitioners to a blind and unrelenting drive for throughput and cost efficiency at the expense of clinical priorities (Degeling et al 2000) and to management-oriented paperwork lacking in clinical significance provides grounds for resistance to change by the profession (Degeling et al 2003).

Proponents of performance management systems must therefore necessarily overcome a number of cultural hurdles to convince clinicians of its value. To build trust in the system it should be reliable, valid, acceptable, feasible and have some educational impact (McKinley et al 2001).

Another major issue will be concerns as to how performance information is collected, used and stored. For instance, in the UK general practitioners see benefit in formative assessment to guide education and professional development, its original use, but not

if its linked to formal revalidation, a later add-on (Boylan et al 2005). Trust in performance management and appraisal will therefore be dependent upon agreed collection and use protocols.

Managers need to build trust and interpersonal relationships, notwithstanding likely professional tensions, however trust is dependent upon meeting expectations and not reverting to opportunistic behaviour (Hutt et al 2002).

### Issue 3

What would engender clinicians' trust in a performance management system?

What would destroy clinician's trust in a performance system?

- 32 Key elements of good practice in the design and implementation of effective performance management practice include:
- alignment – where systems are based on an understanding of the mission, values, objectives, culture and history of the organisation;
  - credibility – the Board, CEO and management demonstrate commitment to the process and engage and win the support of staff; the gap between rhetoric and reality is narrowed; and poor performance is addressed;
  - integration – the performance system is part of the overall management structure of the organisation and there is a clear link between the responsibilities of the individual and the goals of the organisation (APSMAC 2001).
- 33 Further, the NHS (2005) has devised a framework for quality assurance for appraisal of doctors, which is based upon four high level indicators:
- organisational ethos – there is unequivocal commitment from the highest levels of the organisation to deliver a quality assured system of appraisal integrated with other quality systems;
  - appraiser selection, skills and training – there is a process for selection of appraisers, whose skills are continually reviewed and developed;
  - appraisal discussion – the discussion is challenging and effective; it is informed by valid supporting evidence that reflects the breadth of the doctor's practice and results in a personal development plan which prioritises the doctor's development needs and helps to inform organisational strategy (Conlon 2003); and
  - systems and infrastructure – the supporting systems are effective and ensure that all doctors are supported and appraised annually.

#### Issue 4

What organisational factors are needed to make performance systems effective?

#### What seems to work – general organisation performance appraisal

- 34 Generic management literature has identified that formal appraisal sessions should:
- Focus on performance strengths (CLC 2002), however if weaknesses need to be addressed, it is important that discussions are clearly focussed on specific suggestions for improvement or development, rather than simply telling the individual they did a 'bad job' or that they did something wrong (Locke & Latham 2007).
  - Provide feedback from different sources (e.g. 360 degree feedback), as this helps increase the sense that the performance management process is fair in that it provides a broader view, not just the view of the direct manager (CLC 2002).
  - Ensure that the employee has a clear understanding of expected performance standards (Bell & Kozlowski 2002).
  - Provide a clear link between the individual development plan and organisational goals and strategy (CLC 2002).
  - Ensure there are sufficient levels of accountability and responsibility appropriate to the individual (CLC 2002).
- 35 The outcome of an appraisal usually includes a personal development plan with some guidance as to the long-term career path and which also includes a number of agreed goals. Indeed effective goal-setting is the most potent element of appraisal (Murphy & Cleveland 1995). Locke and Latham (2002) identified the following features:
- Goals should be set collaboratively by the manager and the employee.
  - Goals should be set at an appropriate level of difficulty.
  - The importance of goal attainment by the individual and the potential personal and organisational impact should be understood.
  - Feedback on goal progress should be provided through clear performance metrics.
  - Goals should be specific and time bound.

- There should be no more than 5-7 goals to achieve at any one time as more than this leads to goal diffusion and results in reduction of motivation and achievement of the goal (Shaw 2004).

- 36 In order for the performance appraisal to be carried out effectively there should be coaching and training in effective performance management for appraisers including: how to have performance related conversations; effective goal setting techniques; and how to use adaptive guidance techniques which assist employees to learn how to guide their own development path (Bell & Kozlowski 2002). The employee should be also be trained in how to set goals, how to accept feedback and how to guide their own development.
- 37 General management literature also recommends the establishment of grievance channels for disputed performance review outcomes. There should be fairness in the rating system with performance standards that are perceived as fair and linked to organisational success and strategy. Regular evaluation of the appraisal system should also be undertaken.

#### **Issue 5**

What potential benefits or detriments do you foresee from the introduction of a formal performance management system?

#### **Issue 6**

What benefits should accrue from goal achievement?

#### **Performance appraisal and the medical profession**

- 38 If appraisal is formative and educational it can become a powerful tool in personal development, however if it becomes a regulatory tool or an objective judgement about a doctor's practice, its purpose will be undermined (Lakhani 2005). Positive drivers of appraisal include the use of personal development plans as a vehicle for life-long planning, processes that are consistent with organisational cultural change such as clinical governance and confidential arrangements which are consistent with a learning, not a shaming culture (Conlon 2003).
- 39 Effective implementation of appraisal and feedback systems for medical practitioners requires the right environment, which includes:
- trained and skilled appraisers;
  - properly resourced process, with protected time and appropriate remuneration for participating;
  - support for the individual to fulfil his or her action plan;
  - being seen to use appraisal outcomes to inform organisation strategy;

- useful evaluation of the appraisal system, and improving the process as it develops (Conlon 2003).
- 40 In the UK medical appraisers must: be on the GMC register; have been appraised themselves; have attended and completed training as an appraiser and be able to give constructive feedback to the appraisee; understand the content of the appraisal; undertake refresher programs for appraisers and attend relevant meetings. Appraisers are paid for undertaking this role (NHS 2006).
- 41 A survey of three years of appraisal experience of Scottish general practitioners found that 47% of respondents had altered their educational activity, 33% had undertaken additional education as a result of the appraisal and 13% felt it had impacted their career development. However by third year only 41% reported appraisal was valuable or extremely valuable, down from 47% in the first year. The authors concluded that there is a clear requirement to ensure appraisal becomes relevant for all participants (Colthart et al 2008). A study of Welsh general practitioners found concerns about: the time spent on appraisal; questions about probity and health; links to revalidation; summative rather than formative assessment (Lewis et al 2003).

#### **What is in place in other jurisdictions**

- 42 In the United Kingdom, as a result of the Shipman Inquiry, a comprehensive revalidation program for the regulation of the practice of medicine is currently being implemented. Revalidation has three elements:
- Re-licensure to confirm that medical practitioners do practise in accordance with the General Medical Council's generic standards set out in guidance established in *Good Medical Practice*.
  - Recertification to confirm that medical practitioners on the GMC's specialist register or GP register continue to meet the standards appropriate for their specialty.
  - Identification for further investigation and remediation medical practitioners whose practice is impaired or may be impaired.
- 43 Re-licensing, which will occur at least every five years, has three main elements:
- Participation in annual appraisal within the workplace based on the doctor's folder of information about their practice, which could include information about appraisal, CPD, audit, teaching and training undertaken, understanding about changes to clinical practice, probity and health (DH 2006). A standardised module derived from *Good Medical Practice* and agreed by the GMC will be part of all appraisal systems. The following domains, as a minimum, will be reviewed and discussed during the appraisal:
    - knowledge, skills and performance;

- safety and quality;
  - communication, partnership and teamwork; and
  - maintaining trust with patients and colleagues.
- Participation in an independent process for obtaining multi-source feedback (MSF) from patients and colleagues.
  - Secure confirmation from the 'Responsible Officer', usually the Medical Director, in their local healthcare organisation that any concerns about the doctor's practice have been resolved.
- 44 Recertification applies to those doctors who are on the GMC's specialist register or GP register. These doctors must demonstrate that they continue to meet the particular standards that apply to their specialty or area of practice. The Academy of Medical Royal Colleges, the individual Colleges and specialist societies have a key role in setting recertification standards and designing methods by which doctors will be evaluated. The GMC will have to agree the standards and method of evaluation (UK DH 2008).
- 45 In the United States, recent developments have especially related to specialist re-certification. Since 2002 all 24 member boards of American Board of Medical Specialties (ABMS) have agreed to comparable standards of Maintenance of Certification (Cassel & Holmboe 2006). All boards have agreed to issue time-limited certificates that necessitate subsequent recertification, usually at 10 years or less, with a more continuous process of accessing competence (Steinbrook 2005). MOC includes four major components:
- professional standing, including an unrestricted license to practise medicine;
  - lifelong learning and self-assessment in relevant clinical fields which requires undertaking education modules to qualify for continuing education points;
  - demonstrated cognitive expertise with evidence including performance on standardised, monitored examination, which for instance in internal medicine, consists of three, two-hour tests on one day; and
  - practice performance assessment.
- 46 In New South Wales and Queensland senior medical staff are contractually required to undergo performance appraisal (annual NSW; twice yearly QLD) by their clinical manager. The structure and objectives of performance management in both jurisdictions is similar, with the development of a written annual plan and record of performance review, as well as a formal fact-to-face appraisal meeting.
- 47 In NSW the stated objectives include:

- to enhance professional development through regular candid two-way feedback and by identifying appropriate development opportunities;
- to ensure that each specialist meets his/her contractual obligations in a competent manner that meets the expectations of the organisation;
- to review quality assurance and clinical risk management activities and ensure that relevant activities are established for the following year; and
- to vary the contracts and update targets and performance criteria.

48 In Queensland the personal development plan must refer to:

- service objectives which link organisational objectives to staff performance;
- interpersonal objectives such as professionalism, teamwork, accountability;
- technical objectives the evaluation of which may be supported by Credentialing and Scope of Practice and clinical audit processes;
- developmental needs including developmental aspects of the role (e.g. their own learning needs, participation in teaching and/or research).

49 It is likely that national registration and accreditation in Australia will lead to the introduction of new registration requirements including mandatory, minimum standards of continuing education, which is consistent with overseas approaches.

#### **Issue 7**

How should performance appraisal relate to re-credentialing, definition of scope of practice or continuing education requirements?

#### **Industrial and legal issues**

50 All the senior medical practitioners, whether engaged at metropolitan or rural hospitals, will have their engagement governed by a contract. In the case of metropolitan and large regional hospitals, which generally engage medical practitioners as employees, that contract will be a contract of employment. In the case of rural hospitals, it usually will simply be an independent contract although some rural hospitals are implementing employment arrangements for some senior medical practitioners. Generally there will be written contracts.

51 Metropolitan and large regional hospitals typically engage senior medical practitioners under written contracts which contain common terms of employment such as those relating to the duties, hours of work, remuneration and termination of employment. They will also generally contain terms specific to medical practitioners such as private practice arrangements and insurance issues. In some cases they may also contain references to matters of credentialing although typically these would simply be governed by relevant policies or by-laws (whether incorporated into the contract or not).

- 52 Where an Award or certified agreement (or workplace agreement) governs the employment of a medical specialist, it has the effect of setting minimum terms and conditions of employment in respect of the subject matter contained in those awards or agreements. There are no provisions relating to performance management and support in the Award. However, industrial agreements may contain clauses dealing with performance review, performance management or performance support. Where they do not, hospitals can lawfully introduce a performance management system without being in breach of provisions in the relevant industrial agreement.
- 53 Performance management systems will need to be consistent with other provisions in the relevant industrial agreements and contracts of employment. Such provisions might include termination of employment provisions, discipline provisions, duties and responsibilities of senior medical specialists. In addition, dispute resolution clauses in industrial agreements (which relate to disputes or grievances senior medical specialists may have in the workplace) may impact upon any performance supporting management system.
- 54 VMOs engaged by rural hospitals as independent contractors will not be covered by any awards or industrial agreements as awards and industrial agreements can only apply to employees, not independent contractors. Their terms and conditions will simply be set by the terms of their contract of engagement, whether written, oral or through implied terms or a combination of those.
- 55 Whilst performance management systems are typically associated with employees, there is no reason why independent contractors cannot also be subject to a performance management and support system. However, one of the risks of using a performance management and support system for independent contractors VMOs is that it may give rise to arguments that the VMOs are not truly independent contractors but are, or have become, employees. The more control that is exercised by the principal over the independent contractor, the more likely it is that there will be a finding that the contractor is indeed an employee rather than an independent contractor. Therefore care needs to be taken when considering the issue of a performance management system for VMOs engaged by rural hospitals (or any other medical specialists engaged as independent contractors) to avoid a finding that they are in fact employees.

### **Case law**

- 56 Performance management will, as a general rule, only become litigious where it leads to discipline of the employee or the termination of the employment. Therefore, there is no case law specifically on performance management and support systems.
- 57 Performance management and support systems may become relevant, however, as part of the rubric of factors that a court or tribunal will consider when assessing whether a doctor's dismissal, suspension or other disciplinary action taken has been warranted. As a matter of logic, it follows that the more robust the performance management support system has been, the higher the chances of an employer defending any disciplinary action taken against an employee (including their

suspension or dismissal), at least in the case where performance issues are in question.

- 58 It should also be noted that in recent years there has been considerable development of the implied term of trust and confidence that is owed by an employer to its employees. As part of that implied term, an employer has an obligation to treat the employee in a fair and reasonable manner during the employment. No doubt performance management and support systems will be factors that will be raised by both employees and their employers to support an argument that the term has been breached (or not breached) as the case may be.

### **Anti-discrimination legislation**

- 59 Anti-discrimination legislation potentially will have a greater impact on the development of a performance support and management system than, say, unfair dismissal laws. This is because at both a federal and state level, discrimination laws apply, not only to the termination of employment, but also during employment. The discrimination legislation will apply to, amongst other things, unfair treatment of employees based on one of the protected discriminatory attributes. Therefore, a performance management and support system which discriminates against those with protected attributes will risk raising of discrimination claims. It may even do so if the performance support and management system does not appropriately take into account those protected attributes, certainly in its implementation. For example, indirect discrimination may occur where an employee's particular protected attribute have not been properly considered or accommodated when offering performance support or management.

### **Natural justice**

- 60 Natural justice will generally apply to decisions which are made by an employer in the employment setting. It would be most relevant where a dismissal occurs. Natural justice has less of a role to play in actions or events which do not give rise to or lead to a termination of employment. Nevertheless, a sound performance support and management system can be an element of natural justice where a dismissal occurs and compliance with natural justice in terms of a performance support and management process may become relevant in such a process.

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