



## COST RESPONSIBILITY FOR PERFORMANCE RE-ASSESSMENTS POSITION STATEMENT

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**Summary:** The Council considers that a practitioner should be liable for the costs of having his or her professional performance assessed but only if a Performance Review Panel has again found the practitioner's performance is unsatisfactory and further re-assessments are necessary in order to determine whether the practitioner has remediated his or her practice.

**Applies to:** Practitioners in the Performance Program, Performance Review Panel members

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**Relevant legislation:** *Health Practitioner Regulation National Law (NSW)*

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## **COST RESPONSIBILITY FOR PERFORMANCE RE-ASSESSMENTS POSITION STATEMENT**

### **PURPOSE**

A Performance Assessment is a broad based assessment which is used by the Medical Council of NSW (the Council) in order to consider a practitioner's fitness to practise. The Council has previously determined that a practitioner will not be liable for the costs of the assessment or any future reassessment.

However, recently the Council has considered whether a practitioner should be liable for the costs of a re-assessment following an earlier finding that the practitioner's performance is unsatisfactory and if so, in what circumstances.

The Council has come to the view that a different approach is warranted for practitioners who are given the opportunity to remediate deficiencies in their practice and who do not improve, so that further re-assessments and reviews into their professional performance become necessary.

### **BACKGROUND**

When the Performance Program was first introduced in October 2000, the former NSW Medical Board determined that a medical practitioner would not be liable for the costs of the initial Performance Assessment. The rationale for this approach was that the question as to whether or not the practitioner's performance was or was not unsatisfactory was still under consideration. No determinative finding arose because a Performance Assessment had been ordered. Instead a Performance Assessment was a means by which further information could be obtained in order to assess whether or not the medical practitioner's performance was unsatisfactory. As there had been no finding made against the practitioner, it was open for the assessors to conclude that the practitioner's professional performance was in fact satisfactory, following that assessment. In these circumstances, it was considered appropriate that a practitioner not bear the costs of the initial Performance Assessment.

The Council has recently considered the issue in light of its experiences since the inception of the Performance Program. When a Performance Review Panel finds that a medical practitioner's professional performance is unsatisfactory, they are usually ordered to undertake appropriate remediation and/or have conditions placed on their registration. One means of determining whether a practitioner has improved their professional performance is by undertaking a re-assessment at a future point in time.

The majority of medical practitioners do in fact remediate their practice and any protective orders or conditions that were appropriate are removed following a satisfactory re-assessment. In these circumstances, it is still appropriate that the practitioner not bear the costs of the re-assessment as it is necessary to assess remediation and often the practitioner has improved his or her practice.

However there are a small number of medical practitioners who do not remediate their practice and a further performance review through a further Performance

Review Panel is necessary. Often, following this further performance review, further orders or conditions are imposed on the practitioner's registration.

The Council is of the view that in those circumstances, where a second re-assessment is appropriate (or any further re-assessments thereafter) then a Performance Review Panel should consider ordering that the practitioner is required to meet either part of the costs or the full costs of the future re-assessment, unless circumstances apply which would warrant not making such an order.

## ISSUES CONSIDERED

The Council accepts that a practitioner should not ordinarily be required to meet the costs of an assessment but that there should be scope to order that a practitioner is responsible for either part of the costs or the full costs of any re-assessment in limited circumstances.

In considering this matter, the Council has noted that there are different approaches concerning the costs incurred by the Council or a medical practitioner arising from various assessments of competence under the *Health Practitioner Regulation National Law (NSW)*.

For example, where the Council requires a practitioner to undergo an assessment by a Council appointed practitioner, then the Council is required by section 152B(3) of the *Health Practitioner Regulation National Law (NSW)* to meet the costs of the assessment and any subsequent report. Moreover, it is a principle of the Council's Health Program that the Council meet the costs of any future re-assessments and reports by a Council appointed practitioner. An Impaired Registrants Panel will therefore recommend that the conditions indicate that the Council is responsible for the costs of the review assessments and reports.

Conversely, there are other assessments of competence which might be necessary and where the practitioner is liable to meet the costs arising from that particular activity including the costs of the reports. For example, a practitioner who requires supervision from another medical practitioner is responsible for the costs of the supervision and any reports by the supervisor. Similarly where a practitioner is subject to an audit for example to assess compliance with infection control standards or the adequacy of record-keeping, then the costs of the audit and any subsequent report are borne by the practitioner. The relevant adjudication body will therefore impose a condition or conditions concerning supervision or an audit and specify that the practitioner is liable for the costs of the activity and subsequent report.

The Council has considered the different circumstances where it is required to meet the costs of an assessment into a practitioner's competence as opposed to the practitioner. In coming to its position, the Council has considered the non-disciplinary and remedial nature of its Performance Program and its emphasis on developing cooperative strategies to improve or modify a practitioner's practice in order to reduce or eliminate any potential risk to the public.

## COUNCIL POSITION

The Council is of the view that a medical practitioner should not be required to meet the costs of an assessment, nor a first re-assessment, following a finding that his or

her professional performance is unsatisfactory and that remedial conditions are required.

Concerning the initial Performance Assessment, it is a means by which further information is obtained in order to assess whether or not the medical practitioner's performance is or is not unsatisfactory. As there had been no finding made against the practitioner and the assessors may conclude that the practitioner's professional performance is satisfactory, then a practitioner should not bear the costs of this initial Performance Assessment.

A medical practitioner should also not be responsible for the costs of any first re-assessment. This is because a Performance Review Panel, if it finds that a practitioner's professional performance is unsatisfactory, will usually impose conditions or orders in order to remediate the deficiencies in the practitioner's practice. The ordering of a re-assessment at a future point in time is necessary in order to ensure that the practitioner has in fact improved his or her practice following compliance with the conditions or orders imposed by the Performance Review Panel. On other occasions, a Performance Review Panel may still find the practitioner's performance to be unsatisfactory, but not impose any conditions or orders, as it is satisfied that these are not warranted. A re-assessment may still be ordered in order to demonstrate the deficiencies identified in the assessment process have been satisfactorily addressed.

There is an expectation that practitioners will comply with the conditions or orders imposed and will address the deficiencies identified through the Performance Assessment and performance review. The majority of medical practitioners will demonstrate that their performance is satisfactory following the re-assessment. In these circumstances, it is still appropriate that the practitioner not bear the costs of the re-assessment as first, it is necessary to assess remediation and second, it often concludes that the practitioner has in fact improved their practice.

However, the Council is of the view that if the re-assessment finds that the practitioner's performance is still unsatisfactory and that a second Performance Review Panel is convened in order to conduct a performance review, then that Performance Review Panel should consider imposing a condition requiring the practitioner to meet either part or the full costs of any future re-assessment that may be required, unless circumstances apply which would warrant not making such an order.

The rationale for this approach is that the practitioner has been given the opportunity to remediate the deficiencies in his or her practice. It is reasonable to expect a practitioner to comply with conditions and orders imposed by a Performance Review Panel and improve their practice. If a practitioner has not done so, then a Performance Review Panel should, in taking all of the circumstances of the matter into account, order that the practitioner is required to meet either part or the full costs of the second re-assessment (including any further re-assessments thereafter) that may again be required, unless circumstances apply which would warrant not making such an order.

When considering whether or not to make such an order through the wording of conditions, a Performance Review Panel might wish to consider the findings of the

re-assessment including the nature and scope of any continuing deficiencies and the reasons why the practitioner has not improved his or her practice, for example, whether or not the practitioner has been fully compliant with conditions and/or fully engaged with the Performance Program.

A Performance Review Panel should also take into account the particular circumstances of the practitioner including the location of his or her practice and in particular whether it is in a rural or remote area when deciding whether or not the practitioner should meet either part or the full costs of any future re-assessment. The Council does not consider that practitioners in rural or remote locations should be unfairly disadvantaged because of their location (by potentially having to pay more than a metropolitan practitioner), if an order is made that the practitioner is to meet either part or the full costs of any future re-assessment.

In order to further reflect this position, the costs of the re-assessment that a practitioner might be required to meet in full or in part will be limited to the costs of engaging the assessors to undertake the assessment and write the report, and will not include the costs incidental to re-assessment, such as travel or other incidental costs.

A Performance Review Panel can specifically indicate in its orders under section 156D of the *Health Practitioner Regulation National Law (NSW)* that the practitioner is liable for the costs or part of the costs of the re-assessment which will be conducted at a future date to be determined by the Council.

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