A JOINT STATEMENT OF MEDICO-LEGAL RELATIONS BY THE LAW SOCIETY OF NEW SOUTH WALES AND AUSTRALIAN MEDICAL ASSOCIATION (NSW) LIMITED

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1. INTRODUCTION

1.1 Legal practitioners and medical practitioners should conduct their professional dealings according to the same principles of honesty, integrity and fairness which characterise their relations with the courts and their fellow professionals, and in a manner that is consistent with the interests of the client/patient. Both professions are expected to adhere to their respective Statements of Ethics and relevant codes of conduct.

1.2 The objects of this document are:

1.2.1 To promote mutual co-operation between the medical and legal professions;

1.2.2 To make each profession aware of the relevant duties, responsibilities and obligations of the other;

1.2.3 To make each profession aware, in particular, of the responsibilities of the other in relation to the:

- preparation of a medical report for the purpose of legal proceedings;
- production of medical records or clinical notes relating to a patient, under a subpoena[1] as required by law or under privacy laws with the consent of the patient;
- attendance under a subpoena to give evidence in legal proceedings; and
- payment of fees in respect of any medico-legal examinations or any of the matters above.

[1] The word 'subpoena' in this Joint Statement is to be read as encompassing equivalent documents, such as directions, summonses or orders for production or to give evidence, as the context requires.

1.3 Information in this document does not apply equally to all types of legal proceedings, particularly in relation to fees. For example, the State Insurance Regulatory Authority ("SIRA") has a range of requirements for provision of information and reports in workers compensation matters and Compulsory Third-Party Insurance ("CTP") matters, and in most instances, fees are prescribed in legislative instruments. It is incumbent on the legal practitioner to inform the medical practitioner where an alternative arrangement is in place. In such circumstances, a medical practitioner may not charge in excess of the prescribed fee. Further information should be sought directly from SIRA or the Independent Review Office ("IRO").

2. THE ROLE OF THE LEGAL PRACTITIONER

2.1 A legal practitioner's overriding duty is to the Court and the administration of justice.

2.2 The primary role of the legal practitioner representing a client as plaintiff or applicant who has suffered harm in the context of an injury or condition, compensation claim or claim for damages ("a claim") is to advise and represent the client with a view to ascertaining whether a legal claim for allowance, benefit, compensation or damages exists, and obtaining proper and adequate allowance, benefit, compensation or damages for the client. The primary role of the legal practitioner representing a client in other legal proceedings, such as criminal prosecutions or family law disputes, is to advise and represent the client in order to obtain an appropriate outcome in those proceedings.

2.2 The role of the legal practitioner representing a client as defendant or respondent in the context of a claim — whether an employer, insurance company or a person who is claimed to be responsible for a condition or injuries suffered or sustained by the plaintiff — is to advise and represent the client with a view to examining the merits and value of the claim and, if appropriate, resisting any such claim in court.

2.3 Legal practitioners have a duty to their clients to obtain expert opinion to establish (if relevant):

- the nature and history of the incident/accident;
- the diagnosis of the nature and extent of the condition or injury;
- the relationship of any such condition or injury to the incident/accident;
- the therapeutic or other treatment provided and/or required;
- the prognosis for recovery from the condition or injury;
- the effects of the condition or injury on the client's employment and/or enjoyment of life;
- in relation to a claim of alleged medical negligence, whether the treatment and/or advice was consistent with the exercise of reasonable care, and/or provided in a manner that at the time was widely accepted in Australia by peer professional opinion as competent professional practice; and
- in relation to other legal proceedings, such as criminal prosecutions or family law disputes, the issues relevant to the proceedings.

3. THE ROLE OF THE MEDICAL PRACTITIONER

3.1 The primary role of a treating medical practitioner is to identify the condition or injury and treat the patient with a view to remedying or curing any condition or injury suffered or sustained, and aiding the patient's recovery. A medical practitioner should, with the prior consent of the patient, provide such report or information to the patient's legal practitioner as may be reasonably required, including the matters in paragraph 3.2 below. However, a medical practitioner is under no obligation to prepare a report in relation to their treatment of a patient. A treating medical practitioner must, in accordance with legislation, provide copies of a patient's medical records if requested to do so by or on behalf of a patient. The medical practitioner may charge reasonable copying fees, information on which can be obtained from the Australian Medical Association (NSW) ("AMA").[2]

3.2 The role of a non-treating medical practitioner is to provide such expert opinion as may be required to establish (if relevant):

- the diagnosis of the nature and extent of the condition or injury;
- the relationship of any such condition or injury to the incident/accident;
- the prognosis for recovery from the condition or injury;
- the effects of the condition or injury on the patients employment and/or enjoyment of life; and
- in relation to a claim of alleged medical negligence, whether the treatment and/or advice was consistent with the exercise of reasonable care, and/or provided in a manner that at the time was widely accepted in Australia by peer professional opinion as competent professional practice.

3.3 Medical practitioners must comply with such expert witness code of conduct as may apply in the court or tribunal in which the claim is made.

4. THE MEDICAL REPORT

4.1 In this Joint Statement, a medical report required for legal purposes is referred to as a "medico-legal report".

Special considerations in relation to criminal proceedings

4.2 A medico–legal report may be presented on behalf of a defendant (accused). It is usually a report prepared by a psychiatrist, with or without supporting reports from a treating general practitioner. On some occasions, a medico–legal report from a general practitioner is deemed sufficient.

Medico-legal reports generally

4.3 When requesting a medico-legal report, a legal practitioner should:

4.3.1 Recite an accurate history or background for the medical practitioner's consideration;

4.3.2 Set out clearly the information and issues for the medical practitioner to consider;

[2] Note that in some prescribed proceedings, such fees are not permitted or are limited by regulation or fees orders. See 1.3 above.

4.3.3 Provide relevant documentation, which is appropriately indexed, for the medical practitioner's consideration, noting that the legal practitioner should restrict documentation to relevant material only and should, where practicable, reference the documentation in the request for the report;

4.3.4 State any specific requirements of the medico-legal report, including compliance with such expert witness code of conduct as may apply in the court or tribunal in which the claim is made; and

4.3.5 Where a specific or prescribed fee is applicable, provide written confirmation of the relevant fee or change and the relevant fees order or regulation under which the fee is imposed.

4.4 The legal practitioner should also:

4.4.1 Clearly identify the client by name and date of birth;

4.4.2 In the case of referral to a non-treating specialist medical practitioner, especially a psychiatrist, neurologist or consultant in rehabilitation medicine, ensure that the client understands the type of medical practitioner to whom they have been referred, and whether the purpose of the referral is to provide a medico-legal report for the client's own legal practitioner, the other party's legal practitioner or a joint report;

4.4.3 Ensure that the patient takes with them any relevant imaging and investigatory reports they may have;

4.4.4 Include with each report request the client's authority, or forward an authority from the client allowing the medical practitioner to supply the report;

4.4.5 In the case of referral to a non-treating specialist medical practitioner, especially a psychiatrist, arrange for the attendance of an independent accredited interpreter (not being a relative of the client), fluent in the client's language/dialect and having regard to any cultural sensitivities.

4.5 A medico-legal report should include a statement of (where relevant):

4.5.1 The patient's date of birth;

4.5.2 The patient's history relevant to the condition or injuries alleged to have arisen out of the incident/accident, and history of treatment;

4.5.3 The present condition from which the patient is suffering;

4.5.4 The results of any examination of the patient by the medical practitioner;

4.5.5 Any special diagnostic report outcome relied upon, including imaging, pathology, ECG, EEG or other relevant reports;

4.5.6 The diagnosis of the patient's condition;

4.5.7 The prognosis of the patient's condition;

4.5.8 If asked to do so in relation to a claim of alleged medical negligence, whether the treatment and/or advice was consistent with the exercise of reasonable care, and/or provided in a manner that at the time was widely accepted in Australia by peer professional opinion as competent professional practice; and

4.5.9 Compliance with such expert witness code of conduct as may apply in the court or tribunal in which the claim is made, if appropriate.

4.6 The medical practitioner should direct their attention to the questions asked by the legal practitioner.

4.7 A legal practitioner should make any request for a medico-legal report directly with the medical practitioner. The client should not be referred back to their general practitioner with a request for a referral to a specialist when the purpose is to obtain a medico-legal report. An appointment for a medico-legal examination should be confirmed in writing by the legal practitioner. Except when necessary to maintain the client's legal and medical interests, the appointment should be arranged with sufficient notice so as not to disrupt the medical practitioner's schedule. The medical practitioner should make sufficient appointment times available to avoid undue delays in obtaining a suitable appointment.

4.8 A legal practitioner should not encourage their client to consult a medical practitioner on the pretext that the consultation is for treatment, when it is for a medico-legal report.

4.9 It may be necessary to arrange an appointment for a medico-legal examination at short notice. In such cases, co-operation between legal practitioners and medical practitioners is essential. The legal practitioner should give the medical practitioner as much notice as possible and be very clear about the timeframes involved. The medical practitioner should only agree to examine the patient and prepare a report if the timeframes specified can be met.

4.10 Upon receipt of a request for a medico-legal report and a signed authority from the client (expressly authorising the provision of a medico-legal report), the medical practitioner should provide the report within a reasonable time, normally within 21 days. If the medical practitioner believes that there is a need for further time to provide the report, or that there are good reasons for not providing the report, they should promptly inform the legal practitioner of their view and reasons.

4.11 When a medical practitioner-patient relationship already exists, the medical practitioner should not disclose information about the patient, except in answer to a subpoena or upon receipt of a signed authority from the patient. This guideline is subject to paragraph 8.9 on client legal privilege.

4.12 In litigation, a medico-legal report serves two purposes. First, the report is a statement of facts by the medical practitioner of the history given and their observations. Second, the report contains the medical practitioner's expert opinion. Once tendered as evidence in the court case, the report provides the judge with material upon which to make findings as to the nature and extent of the condition or injuries and their effects on the injured person. In cases of alleged medical negligence, the report provides the judge with material upon which to make findings as to whether the treatment and/or advice was consistent with the exercise of reasonable care, and/or provided in a manner that at the time was widely accepted in Australia by peer professional opinion as competent professional practice.

4.13 A medico-legal report is a vital part of the legal practitioner's service to their client and is essential for the proper presentation of the case in court. The way in which the report is expressed may have a significant bearing on the claim.

4.14 Medical practitioners should provide medico-legal reports which are accurate, comprehensive and fair. The report should use descriptive, narrative terms.

4.15 A report which does not address the legal practitioner's request or is uninformative, ambiguous or lacking in detail may not assist the court. It may increase the likelihood of the medical practitioner being called to give evidence to supplement or clarify the report.

4.16 The medical practitioner should refrain from expressing an opinion about matters on which they are not qualified to do so. The medical practitioner should not express an opinion, either directly to the patient or in their report to the legal practitioner, on legal aspects of the claim, in particular, the amount of damages that the patient may recover. It is a matter for the court or tribunal to determine both liability and quantum of damages.

4.17 If a medical practitioner considers that further imaging, pathology tests or other reports are necessary, they must first obtain authorisation from the legal practitioner. The legal practitioner should accept responsibility for payment in accordance with the principles set out in section 5.

5. PAYMENT OF MEDICO-LEGAL FEES

5.1 The client has a strict legal responsibility to pay the fee for provision of the medico-legal report. However, where a legal practitioner arranges for a client to be medically examined and the medical practitioner provides a report of their findings and opinion, the legal practitioner is responsible for paying the medical practitioner's proper fee for that service, unless arrangements have been made with the medical practitioner for the medical practitioner to seek payment from the client.

5.2 The legal practitioner should contact the medical practitioner at the outset to agree on the fee for provision of the medico-legal report and to be advised of any fees associated with imaging or similar testing. The legal practitioner should be prepared to pay for the report from their general account. Alternatively, the legal practitioner should either obtain funds from the client before requesting the report or arrange for legal aid to cover payment, unless other arrangements have been made with the medical practitioner.

5.3 If a client fails to attend a medico-legal appointment, or the appointment is cancelled with less than two working days' notice or such other period as may be agreed between the medical practitioner and the legal practitioner, the legal practitioner should accept responsibility for payment of any cancellation fee, unless arrangements have been made with the medical practitioner for the medical practitioner to seek payment from the client.

5.4 Before the expense of further diagnostic investigation for medico-legal purposes is incurred (including imaging, pathology, ECG, EEG, psychometric or other testing required or recommended by a treating medical practitioner) other than the fees referred to in paragraph 5.2, the medical practitioner should obtain the legal practitioner's permission to have such investigation carried out and to enable the legal practitioner to obtain sufficient funds to cover such additional expense.

5.5 A medical practitioner may request prepayment of the recommended or agreed fee for the preparation of a medico-legal report. Where the legal practitioner requests a report and the medical practitioner does not request pre-payment, unless arrangements have been made beforehand with the medical practitioner, the legal practitioner should either:

- have funds in their trust account sufficient to pay the fee; or
- be prepared to bear the cost from their general account.

If the legal practitioner notifies the medical practitioner that the report is no longer required, the fee is payable if the report has been prepared. If the report has not been prepared but the examination has been conducted, a reasonable fee is payable for the work done.

5.6 If there is a regulated maximum fee for medico-legal work, the legal practitioner should make that clear to the medical practitioner.

5.7 The legal practitioner is not liable for payment of the treating medical practitioner's treatment fees, unless an appropriate and irrevocable authority has been received from the patient to receive any verdict or settlement monies and to pay any such outstanding treatment fees. A medical practitioner should not withhold a medico-legal report that they have agreed to provide and have prepared until treatment fees are paid.

5.8 The legal practitioner should make reasonable enquiries to ascertain the extent of outstanding treatment and other medico-legal expenses before undertaking negotiations for settlement or proceeding to hearing.

6. HEARINGS

6.1 In the Supreme Court of NSW, all expert evidence is to be given concurrently, unless there is a single expert appointed by the court, or the court grants leave for expert evidence to be given in another manner. Concurrent evidence can also take place in other courts and in tribunals. "Concurrent evidence" means "two or more expert witnesses giving evidence at the same time". Where evidence is given concurrently, expert witnesses are expected to usually meet before the hearing to produce a joint report.

6.2 When fixing a matter for hearing, the legal practitioner should first enquire with the medical practitioner, whom they intend to call at the hearing, about their availability to attend court.

6.3 When the matter has been fixed for hearing, the legal practitioner should immediately inform the medical practitioner of the projected hearing date, and that their attendance will be required in court, or that they must be available to give evidence by video link or telephone link (if permitted by the court). However, in many instances the legal practitioner will not know the exact date or time when the hearing will commence, due to the nature of court listings and the length of hearings of other cases. A subpoena for the attendance of the medical practitioner at the hearing should be served in accordance with the court rules. If the court has ordered the medical practitioner to give evidence by video link or telephone link, the legal practitioner must provide details of the order and link location to the medical practitioner.

6.4 On the day before the hearing, after the List Clerk has been contacted to ascertain the position of the case, the legal practitioner should again contact the medical practitioner to ascertain the most suitable time for attendance to give evidence and, if possible, to advise the approximate time when they will be required to give evidence.

6.5 The legal practitioner should assist the medical practitioner by calling them at a time which is convenient and would require the minimum period of absence from their practice. Efforts should be made to have the medical practitioner's evidence taken as soon as possible after arrival at court.

6.6 A requirement for concurrent evidence creates practical difficulties for a legal practitioner in coordinating a convenient time for all experts to give their evidence

together. Medical practitioners should cooperate with each other and the legal practitioner in the making of these arrangements.

6.7 A requirement for concurrent evidence usually requires the medical practitioner before a hearing to attend a joint conference with the other experts who will give their evidence concurrently, assist with preparation of a joint report for the court arising out of the joint conference, and attend conferences with barristers and the legal practitioner.

6.8 Medical practitioners should discuss with the legal practitioner whether they will likely be required to give evidence concurrently (or otherwise) and the pre-hearing procedures, such as meetings of the expert witnesses associated with giving concurrent evidence. Medical practitioners should be aware that the appointed time for their attendance at court (if required) may not be flexible, given that several experts must attend at the same time.

6.9 If a case is settled, or if the legal practitioner becomes aware that the medico-legal evidence for any other reason will not be required, they should so notify the medical practitioner as soon as possible.

6.10 Fees for standby, cancellation or attendance at court should be disclosed by the medical practitioner to the legal practitioner and, where possible, agreed in advance.

7. RESOLUTION OF DISPUTES

7.1 Disputes may arise between medical practitioners and legal practitioners. Legal practitioners and medical practitioners should resolve any such disputes through courteous professional discussion.

8. ACCESS TO MEDICAL INFORMATION

8.1 A medical practitioner must, under the *Health Practitioner Regulation National Law* (NSW), keep detailed and contemporaneous records of observations and other relevant information obtained at each consultation with the patient. Such records are confidential between the patient and the medical practitioner and subject to privacy laws, but are not subject to client legal privilege. Accordingly, a medical practitioner's notes must be produced to the court, if subpoenaed.

8.2 The medical practitioner's notes may contain sensitive material about the patient, which could damage the therapeutic relationship between the medical practitioner and the patient. Medical practitioners should contact patients to advise when the patient's records have been subpoenaed and must be produced. Medical practitioners should arrange to see the patient where counselling or explanation of material in the records is considered necessary or appropriate. Medical practitioners may also wish to advise the patient to seek further guidance from a legal practitioner in relation to legal options available to suppress contents of the records.

8.3 Medico-legal information should be obtained primarily through a properly prepared report. Where the necessary information is not disclosed by the report, it may then be appropriate for the legal practitioner to issue a subpoena for the production of further records (for example, hospital records, medical practitioner's notes etc) as a means of putting the relevant evidence before the court. In cases of alleged medical negligence, however, access to and consideration of clinical records, rather than a report in relation to them, is of paramount importance regarding liability issues.

8.4 If the subpoena requires production of documents only and does not compel the witness to attend personally, the medical practitioner may comply with the subpoena

by delivering the documents to the Registrar of the court together with a copy of the subpoena.

8.5 In some courts and tribunals, copies of documents may be produced instead of originals without the need for communication with the legal practitioner who has had the subpoena issued. Some courts and tribunals also now permit production electronically. If so, the subpoena will include information to this effect.

8.6 The original documents should be retained by the medical practitioner. If the medical practitioner is required to produce the original notes to the court, they should always retain a copy of the patient's record. Generally, records produced in answer to a subpoena are retained until the case has been completed and the time for filing an appeal has expired. The documents should then be returned by the Registry to the person who produced the documents.

8.7 Documents provided by the medical practitioner to the court in answer to a subpoena should be retained by the court and not removed from the court building, except as specifically approved by the court.

8.8 The legal practitioner must make available to the court all evidence which may be relevant to the issues before the court. Legal practitioners should treat the medical practitioner's notes and other documents produced in answer to a subpoena with care and respect, remembering that sensitive material disclosed to the patient might harm them or their relationship with the medical practitioner. Legal practitioners should also consider their obligations under federal and state privacy legislation and guidelines, in respect of the safe handling of medical records.

8.9 Documents brought into existence for the purposes of prosecuting or defending an action are privileged (that is, they do not need to be disclosed to anyone, including the opposing party, except in accordance with law). Many medico-legal reports will fall into this category. For example, where a client is referred by a legal practitioner to a specialist for a medico-legal report to be used in proceedings, information obtained during the consultation and in the report is privileged. The right belongs to the client and can only be waived by the client. Accordingly, privileged documents should not be disclosed to anyone without the client's permission.

8.10 A medical practitioner who:

- is engaged by others (for example, a Commonwealth Medical Officer, or a medical practitioner employed by the Australian Defence Force, the Australian Federal Police or an insurance company);
- does not have the ongoing responsibility for caring for the patient; and
- does not have a written authority from the patient

is not entitled to seek or obtain information from the patient's treating medical practitioner. See, in particular, paragraphs 4.11 and 8.9 on patient authority and privilege.

9. MEDICO-LEGAL FEES AND EXPENSES

9.1 Clients pay their legal practitioners legal costs, which are largely fixed by court rules or may be prescribed by government regulation. There are two types of costs: legal practitioner-client costs and party-party costs. Party-party costs are those costs payable by the unsuccessful party to the successful party to compensate for the proper costs incurred in the preparation and presentation of the case. Legal

practitioner-client costs include all party-party costs and other costs properly incurred by the legal practitioner in carrying out the client's instructions.

9.2 Any fee paid by a legal practitioner to a medical practitioner for medico-legal work is a disbursement (that is, a payment made by a legal practitioner on the client's behalf in the preparation and presentation of the case). The tribunal rules regulate what disbursements are permitted to be recovered from the unsuccessful party or a third party agency, such as in the NSW workers compensation scheme