

Special Commission of Inquiry into Healthcare Funding

Statement of Melissa Collins

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1. This statement sets out the evidence that I would be prepared, if necessary, to give to the Special Commission of Inquiry into Healthcare Funding (**Commission**). The statement is true to the best of my knowledge and belief.
2. I have provided a statement to the Commission dated 17 July 2024.
3. This, my second statement, is provided in response to a request from Special Commission of Inquiry into Healthcare Funding made by letter to the Crown Solicitor's Office dated 1 August 2024 to provide a statement with respect to non-standard arrangements involving staff specialists and visiting medical officers (**VMOs**) in NSW Health. I explain the term 'non-standard arrangements' below.

A. WHAT ARE NON-STANDARD ARRANGEMENTS INVOLVING SENIOR MEDICAL PRACTITIONERS

4. I describe a non-standard arrangement as any arrangement, contract or agreement (which may be formal or informal) which provides for payments or other employment related benefits or conditions for staff specialists or VMOs, that increase the doctor's remuneration to an amount that exceeds, or provides employment conditions more beneficial than, that provided by the relevant award or determination.
5. Non-standard arrangements fall into two broad categories:
 - a. those for which approval has been granted by the Secretary, in the circumstances I describe below (**approved non-standard arrangements**); and
 - b. those for which no such approval has been granted (**unapproved non-standard arrangements**).

Terms fixed centrally

6. Broadly, the terms and conditions of engagement of senior doctors (staff specialists and VMOs) are established centrally by NSW Health.

Staff Specialists

7. In respect of staff specialists:

- (a) Terms and conditions of employment of staff specialists are set out in the *Staff Specialists (State) Award*.
- (b) The Secretary exercises the employer functions of the Government in relation to staff employed in the NSW Health Service, including staff specialists, under section 116(3) of the *Health Services Act 1997 (the Act)*.
- (c) The Secretary has a power under section 116A(1) of the Act to fix the salary, wages and conditions of staff employed under Part 1 of Chapter 9 of the Act, in so far as they are not fixed by or under any other law. Pursuant to that power, the Secretary has fixed certain terms and conditions of employment of staff specialists pursuant to the *Staff Specialists Determination 2015*.
- (d) The Secretary's power to fix salary, wages and conditions of employment of NSW Health Service staff, including staff specialists, is delegated to certain senior executives in the Ministry of Health, but is not delegated to any staff of the NSW Health Service, including those employed in local health districts or specialty networks: see Delegation S117 of the NSW Health Combined Delegations Manual.
- (e) From time to time, the Ministry is approached by NSW Health agencies with a request to approve non-standard arrangements in respect of NSW Health staff, including staff specialists. If approved by the Secretary or an authorised delegate, these non-standard arrangements are contained in what is known as a "**Determination**". NSW Health Policy Directive *Non-Standard Remuneration or Conditions of Employment PD2018_040 (the Policy Directive)* specifies the process for consideration and approval of such requests. The Policy Directive governs such matters in respect of all NSW Health staff, including staff specialists. Under the Policy Directive, an application for approval of a non-standard arrangement must be made to the Ministry's Workplace Relations Branch and is required to address the following considerations:
 - (i) Recruitment and retention;
 - (ii) Budgetary implications, including the availability of sufficient funds within existing budgetary allocations;

- (iii) The potential for approval to the requested non-standard arrangements to lead to pressure to flow-on the same or similar arrangements to other staff in the health organisation or more broadly in the NSW Health Service.
- 8. I estimate that some 20 – 30 such applications involving senior doctors are approved each year. Typically, such applications are made in respect of individual staff specialists or small groups of staff specialists.

VMOs

- 9. In respect of VMOs:
 - (a) they are engaged and appointed by public health organisations as contractors (and not as employees or locums) under Chapter 8 of the Act.
 - (b) Similarly to the situation with staff specialists, the terms and conditions of engagement of VMOs are set out in instruments having statewide application, the most significant of which are:
 - (i) Two Determinations made pursuant to Division 3 of Part 2 of Chapter 8 of the *Health Services Act*:
 - a. the *Public Hospitals (Visiting Medical Officers Fee-for-Service Contracts) Determination 2014* and
 - b. the *Public Hospitals (Visiting Medical Officers Sessional Contracts) Determination 2014*.
 - (ii) Model VMO contracts, the terms of which are determined by the Ministry of Health. As to the latter, the most significant Model VMO contracts comprise what are known as the 'Model Fee-for-Service Service Contract' and the 'Model Sessional Service Contract'.
 - (c) Remuneration arrangements for VMOs are disclosed in periodically-updated Information Bulletins published by the Ministry of Health – the current Information Bulletins are *Remuneration Rates for Fee-for-Service Visiting Medical Officers IB2021_054* and *Remuneration Rates for Sessional Visiting Medical Officers IB2024_001*.

- (d) Public health organisations are not permitted to offer VMOs remuneration or other conditions of service other than in accordance with the rates and conditions specified in the relevant NSW Policy Directives or the relevant VMO determinations made under Chapter 8 of the Act (see section 15.3 of the *Visiting Practitioners Appointments in the NSW Public Health System* Policy Directive PD2016_052). Further, I understand section 88 of the Act to, in effect, mandate that any service contract entered into with a VMO must contain the set of conditions contained in the relevant 'standard service contract' (as defined in s87(2) – relevantly, those contracts to which I refer in paragraph 9(b) above).

B. TYPES OF UNAUTHORISED NON-STANDARD ARRANGEMENT OF WHICH THE MINISTRY IS AWARE

10. The Ministry does not consider it is appropriate for potentially widespread unauthorised non-standard arrangements to be in place across NSW Health.
11. The Ministry has sought legal advice as to the nature and extent of unauthorised non-standard arrangements across NSW Health with a view to adopting a system wide approach to identifying and, where appropriate, either approving them or directing their cessation or remediation (for example, by replacement with approved non-standard arrangements in different terms). I am not authorised to, and do not, waive legal professional privilege in respect of that.
12. The existence of unauthorised non-standard arrangements has been identified in various ways, including:
- (a) disputes involving individual or groups of staff specialists or VMOs in respect of which the Ministry has become involved that have revealed the existence of such an arrangement;
 - (b) requests to the Ministry to extend an existing non-standard arrangement for which the Ministry holds no record of prior approval; and
 - (c) anecdotal accounts of the existence of such arrangements from officers working in NSW Health agencies.
13. In my experience, unauthorised non-standard arrangements that come to the Ministry's attention are sometimes of a longstanding nature and the documentation relating to the arrangement may be limited or even non-existent. The oldest unauthorised non-

standard arrangement I am aware of dates from approximately the 1990s. For example, the unauthorised non-standard arrangement involving doctors in the Radiology Department at Western Sydney Local Health District, which I discuss below, dated from approximately 1995.

14. From information available to me from the sources I refer to in paragraph 12 above, I believe there are certain types or categories of unauthorised non-standard arrangements. The main categories are briefly summarised below.

Non-standard issuing of contracts or application of policy

15. These types of arrangements involve departures from NSW Health standard contracts or policy requirements. For example:
 - (a) Offering sessional, fee-for-service, or Rural Doctor Settlement Package contracts to VMOs at a facility that is not applicable or eligible for the respective type of contract under NSW Health policy¹.
 - (b) Offering a doctor dual Staff Specialist and VMO appointments within a given department at a given facility.

Payment inconsistent with template contract and/or industrial instrument

16. These types of arrangements can take different forms, but examples include:
 - (a) Paying practitioners when not providing services, or granting a paid day off without recording leave.
 - (b) Paying allowances when not eligible – for example, payment of a managerial allowance to a staff specialist who does not manage any staff.
 - (c) Permitting Level 5 Staff Specialists not to attend work for 25% of time allocated for private practice, in circumstances where the Staff Specialist should be providing services to private patients in the hospital during this time.
 - (d) Allowing time off in lieu arrangements outside those permitted by Clause 6(c) of the *Staff Specialists Determination 2015*.

¹ Facilities having such eligibility are those described in a Policy Directive: Visiting Practitioner Appointments in the NSW Health Public Health System PD2016_052.

- (e) Paying sessional VMOs ordinary hourly rates to be offsite and on call.
- (f) Permitting Staff Specialists to work in private practice on days paid by the hospital and not providing any services in the hospital on those days.

Payments involving inappropriate use of VMoney, payroll or trust accounts

17. These types of arrangements can take different forms, but examples include:
- (a) Paying from a Health agency's General Fund into a Staff Specialist's No 1 Account, which typically takes the form of an additional payment or supplementation guaranteeing private practice income at a particular level, known as a "Level 4 or 5 guarantee".
 - (b) Paying from the General Fund directly to the staff specialist or VMO's personal bank account, bypassing payroll or VMoney.
 - (c) Paying from the Staff Specialist No 2 account to No 1 account, which is generally not permitted under the Determination.
 - (d) Paying a doctor on a VMO contract using the VMoney 'Miscellaneous' line or 'Daily Locum' category, resulting in remuneration in excess of that provided by the approved VMO contracts to which I refer above.

Non-standard arrangements involving private patient revenue

18. These types of arrangements can take different forms, but examples include:
- (a) Infrastructure charges that are less than those prescribed by NSW Health Policy Directive *Infrastructure Charges for Visiting Medical Officers and Salaried Medical Practitioners* PD2021_020.
 - (b) Arrangements under which sessional VMOs do not reduce the amount of time claimed for services under their Sessional VMO Service Contract to reflect time spent providing services to private patients.
 - (c) Offering financial incentives to VMOs or Staff Specialists to accept admitted patients as so-called "no-gap" private patients, for example by, the Health agency offering to pay a "top-up" amount to the VMO in addition to their standard remuneration arrangements.

Senior doctors providing services outside approved contracts or arrangements

19. An example of this type of arrangement would be a senior doctor who provides services under a contract for services that is not a standard VMO services contract.
20. Another example would be an arrangement with a senior doctor who holds an appointment as a staff specialist or a VMO but who also provides services under a separate contract with the facility or Health service for out of hours services, usually under a fee for service arrangement at non-standard rates.

C. EXAMPLE OF AN UNAUTHORISED NON-STANDARD ARRANGEMENT

21. A recent example of an unauthorised non-standard arrangement is that involving staff specialist radiologists in the Radiology Department at Western Sydney Local Health District (WSLHD). Many of the details of this non-standard arrangement are set out in the reasons for decision of the NSW Industrial Relations Commission: *Australian Salaried Medical Officers' Federation (NSW) v Health Secretary in respect of the Western Sydney Local Health District (No 3)* [2022] NSWIRComm 1076.
22. There were a series of unauthorised non-standard arrangements involving staff specialist radiologists at WSLHD stretching over a number of years. In summary, those arrangements provided for non-standard entitlements for staff specialist radiologists as follows:
 - (a) reduced hours of work (generally seven sessions per week, equating to 3.5 days), when the award requires not less than 40 hours or 10 sessions per week of work,
 - (b) payment of 'penalty rates' for weekend work, when the award is a salaried award that does not contain penalty rates,
 - (c) guaranteed 'Level 5' income and Training, Education and Study Leave without meeting the requirements in the Determination, and a higher base salary for Level 5 than the Determination provides,
 - (d) an entitlement to exercise rights of private practice without paying infrastructure or facility fees, as the Determination requires, and
 - (e) in the version of the Agreement that came into effect in 2015, an arrangement called the "bureau" in which staff specialist radiologists were engaged effectively as contractors to perform backlog reporting work at private rates outside hours.

23. The arrangement was brought to the attention of the Ministry in 2020 and the Ministry's assessment was that, having regard to the nature of the arrangements and the fact the arrangement had never (to the Ministry's knowledge) been authorised in accordance with section 116A of the *Health Services Act*, it was in the public interest that the arrangement should be brought to an end.
24. The proposed cessation of the arrangement was opposed by the radiologists involved, and a dispute was notified on behalf of the radiologists in the NSW Industrial Relations Commission by the Australian Salaried Medical Officers' Federation (NSW) (**ASMOF**). ASMOF sought a direction requiring the Secretary to continue the terms of the non-standard arrangement.
25. On 16 September 2022, Commissioner Constant gave judgment in the Health Secretary's favour and dismissed ASMOF's dispute notification. Among other things, the Commission found that:
 - (a) the conditions provided for in the Radiology Agreements were inconsistent with, and substantially in excess of, the conditions in the Award and Determination,
 - (b) the Commission was not satisfied that the Radiology Agreements were authorised by the Health Secretary or an authorised delegate in accordance with the Act, and therefore the Commission was not satisfied that they were valid and enforceable,
 - (c) the arrangement created operational challenges related to the physical coverage at the hospital across the breadth of the five-day working week and corresponding risks to patient care as a consequence of the radiologists being absent from work for 1.5 days every week,
 - (d) the bureau arrangement gave rise to a conflict between the radiologists' duties to the hospital and to act in patients' best interests, and their own financial interest associated with participating in "outsourced" reporting for which they can charge their employer private rates, and
 - (e) for those reasons (and others) the conditions in the Radiology Agreements were not fair and reasonable conditions of employment for staff specialist radiologists.

D. REASONS FOR UNAUTHORISED NON-STANDARD ARRANGEMENTS AND NSW HEALTH RESPONSE

26. Based on my observations over time, and in general terms, the reasons Health agencies appear to have agreed to unauthorised non-standard arrangements with staff specialists and VMOs are as follows (these reasons may apply differently, and potentially overlap, in individual cases):
- (a) because of the need to maintain clinical services in a NSW Health facility in circumstances where standard remuneration arrangements have not been successful in securing or retaining appropriate senior medical workforce,
 - (b) because of the need to attract senior medical workforce in rural and regional areas to work in that area,
 - (c) because of the use of market power by, and the shortage of, senior medical practitioners,
 - (d) because of the need to meet the remuneration expectations of individual doctors or groups of doctors. This might include matching remuneration that a doctor or doctors can obtain in private practice,
 - (e) knowledge of other non-standard arrangements within hospital or other hospitals and desire to receive equal remuneration (this is one of the reasons why Ministry considers precedent risk before approving any determination), and
 - (f) pressure from local community for example via the Mayor and local petitions to keep a particular doctor in a town which will require additional remuneration.
27. The existence of unauthorised non-standard arrangements reflects, in my assessment, matters raised in my previous statement: that is, unfavourable comparable remuneration arrangements as between NSW Health and other jurisdictions, as well as between NSW Health and the private sector in many medical specialties. It also reflects a longstanding cultural expectation among some doctors that they can petition for better than standard terms with market power to achieve them. Combined with workforce shortages in many medical specialties, there is a disconformity between supply and demand in the senior medical workforce, which creates conditions where senior doctors can seek to bargain at a local level to achieve more beneficial terms and conditions than those contained in the system wide awards and determinations.



Melissa Collins



Witness: Lucy Pinnock

3 August 2024

Date

3 August 2024

Date