



medico-legal directory 2006

The Essential Guide to AMAQ Members
with Experience in Medico-Legal Work

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MEDICO-LEGAL GUIDELINES

This document sets out general guidelines regarding the process to be followed when doctors are approached for assistance by solicitors. In particular, it sets out considerations when requested to write reports, perform examinations and attend Court as a witness in personal injury cases.

This document is not a substitute for legal advice. Members with particular issues are encouraged to contact AMA Queensland's *Workplace Relations and Legal Department* to discuss them specifically.

AMA Queensland desires to promote harmonious relations between the members of both professions and to ensure that the efforts of doctors and solicitors best serve the efficient settlement of patients' claims. It is recognised that doctors' primary concern is for their patients' medical treatment and that they wish to co-operate with members of the legal profession acting on their clients' instructions.

PRIVACY ACT

In general, the *Privacy Act 1988* requires all organisations to keep personal information, including health information secure, and free from unauthorised access, modification and disclosure.

The privacy legislation allows the release of a patient's information where either the patient consents to the release, or where the release is authorised by law. This means that unless a patient provides an authorisation for disclosing information held about them, or the release of that information is required by law, information cannot be disclosed to any third party, including solicitors.

NOTICES OF NON-PARTY DISCLOSURE

A notice of non-party disclosure allows a party to a legal action access to medical records in a doctor's possession regarding a specific patient. The notice is an order of the court, and is therefore a circumstance in which releasing the information is "authorised by law" for the purposes of the *Privacy Act 1988*.

The extent of the access requested must be specified in the notice. The notice:

- does not require a signed patient consent (it is an order of the court);
- obliges the applicant (the party to the action) to pay all reasonable costs, including the costs for obtaining legal advice about the notice, of providing the documents;
- must be served on the doctor within three months of being issued;
- allows the doctor 14 days to produce the documents.

The doctor is only **obliged to produce documents** if:

- the documents relate to a matter in question between the parties to the proceeding;

- the document is in the possession or control of the nominated party;
- the document is capable of being required to be produced at trial;
- there is no other reasonably simple, inexpensive way for the requesting party to prove what the documents show.

Further, the Notice **must be served** on:

- a) a person, other than a party to the proceeding named in title, about whom the information is sought and
- b) the owner of the document if it is other than the nominated party (nominated in the Notice).

The doctor may object (in writing) to providing some or all of the requested documents for any one of a number of reasons. These include unreasonable expense and inconvenience, lack of relevance, claim of privilege or confidentiality, the effect of disclosure on an individual, or a defect in the notice. The objection must be lodged with the party who sought the Notice, within seven days of receiving the Notice.

OTHER REQUESTS FOR DOCUMENTS

Personal injury claims in Queensland essentially fall into three categories – workers’ compensation claims, compulsory third party (CTP) motor vehicle claims and other claims.

The *Workers Compensation and Rehabilitation Act 2003* regulates workers’ compensation claims. CTP claims are conducted under the *Motor Accident Insurance Act 1994*; while all other claims are regulated by the *Personal Injuries Proceedings Act 2002*. All three Acts impose similar procedures on the conduct of personal injury claims.

It is likely that a medical practitioner will at some time receive a request to release medical records from a solicitor acting on behalf of an insurer under one of these schemes. These requests are based on authorities which claimants are obliged to provide as part of procedures to avoid litigation. The authorities provide written consent to the insurer obtaining information from various sources, including doctors and hospitals. A valid authority can therefore constitute “consent” to the release for the purposes of the *Privacy Act 1988*.

These requests are not notices of non-party disclosure. Usually, there will be no court proceedings on foot at the time the request is made. It is a matter for individual doctors whether they decide to release documents in response to these requests, based on the nature of the request and the extent of the authority provided.

Members are encouraged to contact AMA *Queensland’s Workplace Relations and Legal Department* to discuss individual cases.

REQUEST FOR A TREATING DOCTOR’S MEDICAL REPORT

A patient’s treating doctor may be asked by the patient’s solicitor to supply a report on that patient before a medico-legal examination and report is requested from a medico-legal specialist. In certain circumstances the treating doctor may have to examine the patient before preparing a report.

The solicitor should request from the patient’s treating doctor, in writing, a report within reasonable time frames. The solicitor should guarantee agreed payment in

writing and an original patient consent form should be enclosed with the solicitor's letter (again for privacy legislation compliance purposes).

The solicitor should ensure that the treating doctor is aware that the report will be reviewed by other doctors. The doctor should understand that the report will be provided to the other party in the claim.

In the absence of an agreement, there is no legal obligation on a treating doctor to provide a report. Once the doctor agrees to provide a report however, there is then a contract and both the doctor and the solicitor must abide by the terms of it.

REQUEST FOR A MEDICO-LEGAL EXAMINATION AND REPORT

A solicitor may request a doctor to examine a person and prepare a medico-legal report.

The examining doctor should be given reasonable notice and a full explanation of the nature of the legal action intended, the nature of the examination and the nature of the requested report at the first contact by the solicitor. No appointment should be made until the doctor is fully informed by the solicitor.

The examining doctor should be given the opportunity to review any reports from the patient's treating practitioners or from other medico-legal examiners before the examination.

Confirmation of an appointment for an examination and report must be in writing, enclosing an original patient consent form. The confirmation letter should also contain a brief description of:

- the facts of the matter; such as the circumstances of the accident, and (especially) the date;
- particulars of the alleged injury;
- disabilities complained about;
- the specific matters which the solicitor requires the doctor to examine and report on, for example:
 - an opinion on whether the injuries were caused by the accident;
 - residual disability;
 - further cost of treatment;
 - capacity for work etc; and
- copies of any medical reports already in the possession of the solicitor should be forwarded to the examining doctor with the confirmation letter.

Relevant existing diagnostic records must be taken to the examination. An examining doctor shall only order new tests on the approval of the patient and solicitor.

PROVIDING THE REPORT

Doctors should **only** provide information that has been requested by the solicitor (as supported by patient consent terms). Should a patient not have consented to the release of information a solicitor has requested, that information must not be provided to the solicitor. Often a request for information will be broad, whereas the consent form is very specific. It is also important to note the date of the consent form to ensure it is current, for example, no more than six months old.

Following agreement and any necessary examination, the doctor should promptly furnish a report to the solicitor. The turnaround time for a report will vary depending on the availability of the doctor and the complexity of the report. If the time taken to

provide a report is likely to be extended for any reason (such as illness or absence from the practice), the doctor should advise the solicitor up-front or as soon as the relevant circumstances emerge.

Doctors should request payment for the examination and report, in advance, based on an estimation of costs. AMA Queensland recommends that doctors have a right to withhold a report until they have received their fee or a guarantee that the fee will be met. It is the solicitor's responsibility to organise payment for the report. Doctors should not be required to seek payment from the patient directly unless prior agreement with the doctor is reached.

It is recognised that in some circumstances, it will not be possible to calculate the fee for a report until after the report has been written. Doctors should discuss the matter with the solicitor and seek a resolution personally, and in writing. Delivery of the report should be by an agreed secure mechanism.

COURT ATTENDANCE AS MEDICAL WITNESSES

Doctors, like any experts, may be called as expert witnesses in court hearings. Solicitors hold the key to maximising doctors' co-operation by minimising the inconvenience and ensuring that there are no financial losses suffered by medical practitioners who are required to give evidence.

The solicitor should inquire into the medical practitioner's availability before applying for a hearing date. Doctors should also understand that the court sets hearing dates, not the solicitor, and the hearing date allocated may not be the most convenient. Also, it is not possible for a solicitor to determine precisely, in advance, when a witness will be required.

The solicitor should write to the doctor as soon as the case is listed and inquire about the doctor's other commitments.

The solicitor should maintain contact with the doctor to ensure that they are fully updated on the likelihood of a case proceeding. Doctors may supply solicitors with an out-of-hours telephone number to facilitate this communication. The solicitor should ascertain what times cause the least disruption for the doctor and attempt to have the doctor's evidence heard at that time.

The solicitor should telephone the doctor approximately one hour before the already advised scheduled time for giving evidence to confirm the doctor's attendance.

Doctors recognise that the calling of witnesses may be delayed for reasons beyond the control of the requesting solicitor. Consideration should be given to the taking of evidence by remote means, for example, video conferencing or telephone. This is becoming more common and can be very cost-effective. In many cases, evidence will be given by these means; but there are occasions when a doctor's personal attendance at court may be required.

Where the case is resolved, or adjourned, before the doctor's arranged attendance time, the solicitor should give the doctor the maximum notice possible so as to minimise any inconvenience. There are no restrictions to a doctor imposing a fee for the cancellation of their appearance as a witness, or seeking upfront payment of such a fee as a "deposit".

A solicitor should not issue a subpoena to secure the attendance of a doctor unless it is the only course open. Courteous and professional discussions between solicitors and doctors are encouraged to ensure subpoenas are only used as an absolute last resort.

Once a subpoena is issued a doctor must attend or risk being in contempt of court.

PAYMENT OF FEES

All doctors are advised and should at all times regard themselves as being free to make their own judgment as to what fees they will charge for any service. Doctors should satisfy themselves in each individual case as to a fair and reasonable fee having regard to the particular circumstances of the case. Doctors may elect to charge fees appropriate to their hourly rate.

The fee paid to a doctor for a report, examination, or attendance as a witness should bear a proper relationship to the time taken, the complexity involved and expertise brought to bear.

It is recommended that doctors secure a bond paid to guarantee attendances. Where a report, examination or attendance is requested the doctor should be paid in advance or be guaranteed reasonable payment in writing (either by the solicitor or by another appropriate party, such as an insurer) for the time, effort, skill and expertise involved. In cases of client hardship it is the solicitor's duty to make prior arrangements with the medical practitioner.

The doctor should obtain the patient's consent and the solicitor's approval before diagnostic tests are carried out for the purpose of providing a report.

All attendance fees should be comprehensive and include:

- time away from the practice (including travelling time, meal breaks, waiting time);
- meals, accommodation and incidentals;
- kilometres travelled or appropriate transport fares.

These fees should be agreed before the hearing.

Cancellation and deferment fees are applicable for any lost practice time caused by the cancellation or deferment of an examination, hearing, video conference or scheduled meeting.

Fees for verbal advice over the telephone or hearing of evidence by teleconferencing facilities shall be agreed prior to the event. Fees charged should be fair and reasonable having regard to the specific circumstances and the individual's hourly rate

CONFIDENTIALITY OF REPORTS OR RECORDS

Solicitors must be aware that patient records are confidential and that information can only be revealed with a written original authority signed by the patient. Notices of non-party disclosure, as orders of the court, are not subject to the same requirement for personal authority.

The *Privacy Act 1988* does not prevent the release of information pursuant to a notice of non-party disclosure, because the disclosure is required by law. For more details about privacy, please contact AMA Queensland.

When a treating doctor has been requested to provide a report, the doctor must be aware that he or she is not at liberty to pass on to solicitors, information contained in other doctors' letters eg reports included with referral letters.

Medical reports are no longer privileged documents in Queensland; but they remain confidential documents. Therefore, their contents may only be disclosed to a third party with the consent of the patient or pursuant to the requirements of legislation.

The patient or other party to a claim (such as an insurer) is entitled to see a medical report or records obtained by their solicitor. If a treating or examining doctor requests the solicitor not to disclose information to the patient (when disclosure may impede recovery or endanger the safety of the patient or the doctor) the solicitor should at all times respect that request.

It is recognised that a solicitor may be required to disclose the contents of any medical report received in the course of advising their client. This is also the case with medical records obtained by notice of non-party disclosure or otherwise. In doing so, care should be taken not to interfere with the medical treatment of the patient. When in doubt, the solicitor should discuss the matter with the treating doctor and vice versa.

Also, it is recognised that in most cases, legislation and court rules will require the report or records to be disclosed to the other party.

Doctors should be careful to confine themselves to the facts of the matter and not speculate on any part of the case, including settlement.

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MEDICO-LEGAL LISTING

ADDICTION MEDICINE

SAUNDERS, John B

RPP

Centre for Drug & Alcohol
Studies

Department of Psychiatry

Royal Brisbane Hospital

HERSTON 4029

Ph: 07 -3238-4078

Fax: 07 -3365-5488

Pgr: 1300-555-555 Ext: 89984

jbsaunders@compuserve.com

(SI: All Drug & Alcohol
Problems, Medical Education,
Medico-legal)

ANAESTHETICS

BRADLEY, James P

Wesley Medical Centre

40 Chasely St

AUCHENFLOWER 4066

Ph: 07 -3870-5118

Fax: 07 -3870-3139

(SI: Medico-legal, Pain
Management)**BRUCE, Alison E***St Andrew's Place Anaesthetic
Practice

Suite 310 33 North St

SPRING HILL 4000

Ph: 07 -3839-1288

Fax: 07 -3839-1270

Pgr: 07 -3834-6933

(SI: Medico-legal)

(Lang: French)

CRAMOND, Tess*

RPP

Multi Disciplinary Pain Centre

4th Fl Dr James Mayne Building

Royal Brisbane Hospital

HERSTON 4029

Ph: 07 -3636-7130

Fax: 07 -3636-6142

A/H: 07 -3636-8111

Pgr: 07 -3636-8111

(SI: Medico-legal, Pain
Medicine, Palliative Medicine)**MAYCOCK, Buff***

Princess Alexandra Hospital

Ipswich Rd

WOOLLOONGABBA 4102

Ph: 07 -3240-2822

Fax: 07 -3374-2302

Mob: 041-7078-719

A/H: 07 -3374-2164

buffm@bigpond.net.au

Cognitive Institute

65 Park Rd

MILTON 4064

Ph: 07 -3876-5711

Fax: 07 -3876-5522

(SI: Anaesthetic Allergic
Reactions, Medico-legal)**SCOTT, Carl B**Nambour General Hospital
Hospital Rd

NAMBOUR 4560

Ph: 07 -5470-6600

Fax: 07 -5470-6841

Mob: 041-4248-604

Pgr: 07 -5470-6600 Ext: 176

(SI: Anaesthetics, Intensive Care,
Medico-legal)

ANAESTHETICS

WASSELL, James C

Retired

PO Box 338

BURLEIGH HEADS 4220

jwassell@fan.net.au

(SI: Medico-legal)

MEDICO-LEGAL LISTING

ANATOMICAL PATHOLOGY

TANNENBERG, Anthony EG

QML
60 Ferry Rd
WEST END 4101
Ph: 07 -3840-4015
Fax: 07 -3840-4476
Mob: 040-9484-525
A/H: 07 -3356-9072
anthonytannenberg@qml.com.au

(Sl: Medico-legal,
Neuropathology)

AVIATION MEDICINE

HETHERINGTON, Ross R

53 Wood St
WARWICK 4370
Ph: 07 -4666-9666
Fax: 07 -4666-9600
Mob: 041-3824-275
rheterington@conmed.com.au
(Sl: Medico-legal, Rural
Medicine)

TAYLOR, Ross P

ANZAC Square Medical Centre
280 Ann St
BRISBANE 4000
Ph: 07 -3229-1344
Fax: 07 -3221-2694
Mob: 041-8159-141
A/H: 07 -3277-0006
rosstaylor@anzacsquaremc.
com.au

(Sl: Aviation Medicine, Medico-
legal)

(Lang: German)

CARDIOLOGY

GALEA, Eugene G

St Andrew's Place
33 North St
BRISBANE 4000
Ph: 07 -3839-4494
Fax: 07 -3016-1199
Mob: 043-8723-560
A/H: 07 -3870-7154
gusg@qcg.com.au

(Sl: Congenital Heart Disease,
Coronary Heart Disease,
Medico-legal, Valvular Heart
Disease)

HENDERSON, Alan

Brisbane North Physicians
Strathpine Specialist Centre
32 Dixon St
STRATHPINE 4500
Ph: 07 -3881-3444
Fax: 07 -3881-3443
Mob: 041-1598-092
A/H: 07 -3325-1330
alan.henderson@hsn.org.au

(Sl: Intensive Care, Perioperative
Assessment, Heart Failure,
Medico-legal, General
Medicine)

HOSSACK, Kenneth F

St Andrew's Place
33 North St
BRISBANE 4000
Ph: 07 -3832-0899
Fax: 07 -3832-0901
Mob: 040-8735-933
A/H: 07 -3829-1084
khossack@bigpond.net.au

150 Queen St
SOUTHPORT 4215
Ph: 07 -5532-5462
Fax: 07 -5532-6758

(Sl: Interventional Cardiology,
Medico-legal)

RIHA, Andrea Z*

The Wesley Vascular Centre
2nd Floor Sandford Jackson
Bldg.
30 Chasely St
AUCHENFLOWER 4066
Ph: 07 -3377-5900
Fax: 07 -3377-5901
vascular.centre@wesley.com.au

(Sl: Cardiovascular Disease,
Medico-legal, Vascular
Medicine)

(Lang: German, Czech, French)

MEDICO-LEGAL LISTING

CARDIO-THORACIC SURGERY

NICHOLSON, Douglas A

McCullough Specialist Centre
9/259 McCullough St
SUNNYBANK 4109
Ph: 07 -3345-6667
Fax: 07 -3344-1752
Mob: 041-7636-635
A/H: 07 -3841-0888
danila@ozemail.com.au

(SI: Medico-legal, Laparoscopic Surgery)

CLINICAL HAEMATOLOGY

DURRANT, Simon TS

Mater Private Redland
41 Weippin St
CLEVELAND 4163
Ph: 07 -3335-1900
Fax: 07 -3256-1871
Mob: 041-9720-625
Pgr: 07 -3834-6922
sts_durrant@hotmail.com

St. Stephen's Medical Centre
166 John St
MARYBOROUGH 4650
Ph: 07 -3335-1900
Fax: 07 -3256-1871

Haematology/Oncology Clinic
1st Floor Wesley Medical
Centre
40 Chasely St
AUCHENFLOWER 4066
Ph: 07 -3335-1900
Fax: 07 -3256-1871

Mater Private Bundaberg
309 Bourgong St
BUNDABERG WEST 4670
Ph: 07 -3335-1900
Fax: 07 -3256-1871

(SI: Medico-legal, Leukaemia,
Adolescent Oncology, Bone
Marrow Transplantation)

(Lang: French)

DERMATOLOGY

MUIR, James B

Belmont Specialist Centre
1202 Creek Rd
CARINA 4152
Ph: 07 -3843-0577

(SI: Dermatology, Medico-legal)

NEEDHAM, Bob

Morris Towers
149 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-9550
Fax: 07 -3832-2172
A/H: 07 -3262-5442

(SI: Dermatology, Medico-legal)

WILSON, Perry

59 Margaret St
TOOWOOMBA 4350
Ph: 07 -4638-1566
Fax: 07 -4639-2446
Mob: 040-8771-674
A/H: 07 -4659-8006

(SI: MOHS Surgery, Medico-
legal, Dermatological Surgery)

MEDICO-LEGAL LISTING

DIAGNOSTIC RADIOLOGY

EARWAKER, John WS

RPP
Department of Medical Imaging
Mater Children's Hospital
Raymond Tce
SOUTH BRISBANE 4101
Ph: 07 -3840-8311
Fax: 07 -3840-8062
J.Earwaker@uq.edu.au
Department of Radiology
Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07 -3240-7164
Fax: 07 -3240-2230
(Sl: Medico-legal,
Musculoskeletal Radiology,
Neuroradiology)

EMERGENCY MEDICINE

BOWE, Paul CS

Emergency Department
Gold Coast Hospital
108 Nerang St
SOUTHPORT 4215
Ph: 07 -5571-8660
Fax: 07 -5571-8313
Mob: 041-9021-5111
paul_bowe@health.qld.gov.au

(Sl: Medico-legal)

(Lang: Italian)

BROWN, Tony

Emergency Medicine
Royal Brisbane & Women's
Hospital
Herston Rd
HERSTON 4029
Ph: 07 -3636-7901
Fax: 07 -3636-1643
Mob: 040-8748-051
Pgr: 07 -3636-8111 Ext: 59351
af.brown@uq.edu.au

(Sl: Anaphylaxis, Medico-legal,
Resuscitation, Trauma Medicine)

SCOTT, Bob

PO Box 214
HAMILTON CENTRAL 4007
Mob: 041-3029-747
drbobscott@hotmail.com

(Sl: Observation Medicine,
Cardiology, Critical Care
Medicine, Health Services
Management, Medico-legal,
Medical Imaging)

SPAIN, David J

Gold Coast Hospital
Nerang St
SOUTHPORT 4215
Ph: 07 -5571-8211
Fax: 07 -5571-8313
Mob: 041-4416-546
A/H: 07 -5503-1439
spaind@optusnet.com.au

Medico Legal Practice
19 Winchester St
SOUTHPORT 4215

(Sl: Medico-legal, Teaching, Risk
Management)

TRESTON, Gregory T

Redcliffe Hospital
Emergency Department
Anzac Ave
REDCLIFFE 4020
Ph: 07 -3883-7777
Mob: 041-4577-362

St Andrew's Hospital
257 Wickham Tce
SPRING HILL 4000
Ph: 07 -3834-4444

EMERGENCY MEDICINE

Rockhampton Hospital
Emergency Department
North St
ROCKHAMPTON 4700
Ph: 041-4577-362
(Sl: Medico-legal, Tropical
Medicine)

MEDICO-LEGAL LISTING

ENDOCRINOLOGY

SENATOR, Gordon B

Suite 7
Brockway House
82 Queen St
SOUTHPORT 4215
Ph: 07 -5531-0297
Fax: 07 -5531-0337
Mob: 041-9792-066
gordbren@iprimus.com.au

John Flynn Medical Centre
Inland Dve
TUGUN 4224

(SI: Diabetes, Endocrinology,
Epidemiology, Medico-legal)

ENT/HEAD & NECK SURGERY

ALTMANN, Cameron R

Mater Consulting Rooms
21-35 Fulham Rd
PIMLICO 4812
Ph: 07 -4728-9886
Fax: 07 -4728-6380
(SI: Medico-legal, Paediatric
ENT, Rhinoplasty)

ANNING, Frank W

Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-3422
Fax: 07 -3832-3328
A/H: 07 -3262-4171
Pgr: 07 -3862-1946
eanning@bigpond.net.au

Strathpine Specialist Centre
32 Dixon St
STRATHPINE 4500

North West Medical Centre
125 Flockton St
EVERTON PARK 4053
Ph: 07 -3832-3422

5 Violet St
REDCLIFFE 4020

(SI: Medico-legal, Snoring,
Endoscopic Sinus Surgery)

BIRD, Russell

4th Floor
Watkins Medical Centre
225 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-5144
Fax: 07 -3832-6457
A/H: 07 -3392-7414
Pgr: 07 -3862-1946
ebird@bigpond.net.au

Corinda Specialist Centre
667 Oxley Rd
CORINDA 4075
Ph: 07 -3832-5144
Fax: 07 -3832-6457

66 Station Rd
INDOOROOPIILLY 4068
Ph: 07 -3832-5144
Fax: 07 -3832-6457

Sherwood Specialist Centre
686 Sherwood Rd
SHERWOOD 4075
Ph: 07 -3832-5144
Fax: 07 -3832-6457

(SI: Medico-legal, ENT Surgery,
Paediatric Otorhinolaryngology,
Rhinoplasty, Rhinosinusitis/nasal
Allergy)

ENT/HEAD & NECK SURGERY

BLACK, Robert J

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-2444
A/H: 07 -3862-1946
Pgr: 07 -3862-1946

North West Medical Centre
125 Flockton St
EVERTON PARK 4053

Sunnybank Hills Specialist Ctr
Beenleigh Rd & Wynne St
SUNNYBANK 4109

Belmont Specialist Centre
1202 Creek Rd
CARINA 4152

(SI: Medico-legal, Paediatrics,
ENT Surgery, Head & Neck
Surgery)

COMAN, William B

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-6411
Fax: 07 -3839-2051
Mob: 041-1517-453
drcoman@powerup.com.au

(SI: Head & Neck Cancer,
Medico-legal, Otology,
Endoscopic Sinus Surgery, Head
& Neck Surgery, Rhinoplasty)

HODGE, Rob

Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-5294
Fax: 07 -3839-0876
Mob: 041-9302-450
A/H: 07 -3352-5800
rahodge@mail.bigpond.com

Peninsula Specialist Centre
George St
KIPPA-RING 4021

(SI: Medico-legal, Endoscopic
Surgery, Head & Neck Surgery,
Rhinoplasty)

JOBBINS, Donald E

Level 2
Ladhope Chambers
131 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-2050
Fax: 07 -3831-7239
A/H: 07 -3861-0293

The Specialist Centre
91 Clara St
WYNNUM 4178
Ph: 07 -3393-5122

(SI: Medico-legal)

MEDICO-LEGAL LISTING

ENT/HEAD & NECK SURGERY

KELLY, Sharon*

Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-7866
Fax: 07 -3839-0876
Mob: 041-9674-911
skelly@qldbar.asn.au

Greenslopes Private Hospital
Newdegate St
GREENSLOPES 4120
Ph: 07 -3394-7061

(Sl: Medico-legal, Paediatric
ENT, Sinus Surgery)

QUAYLE, John

Brisbane Clinic
79 Wickham Tce
BRISBANE 4000
Ph: 07 -3270-4576
Fax: 07 -3832-3586
Mob: 041-1470-830
A/H: 07 -3262-2126
cjquayle@thehub.com.au

(Sl: Medico-legal)

WILSON, Roger LK

Suite 5 5th Floor
Pacific Private Clinic
123 Nerang St
SOUTHPORT 4215
Ph: 07 -5526-4699
Fax: 07 -5526-4122
Mob: 040-8264-699
A/H: 07 -5564-8380
rogear@bigpond.net.au

(Sl: Allergy, Medico-legal,
Middle Ear Surgery, Sinus
Surgery)

GASTROENTEROLOGY

HARRIS, Owen D

Retired
Mob: 042-1316-974
A/H: 07 -3394-3142
bevowen@bigpond.com.au
(Sl: Gastroenterology,
Hepatology, Medico-legal)

HOURIGAN, Kevin JP

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-0470
Fax: 07 -3839-3095
Mob: 041-1407-609
A/H: 07 -3371-5955
Pgr: 1300-555-555 Ext: 6417

18 Banfield St
CHERMESIDE 4032
Ph: 07 -3839-0470
Fax: 07 -3839-3095

667 Oxley Rd
CORINDA 4075
Ph: 07 -3839-0470
Fax: 07 -3278-5564

1000 Waterworks Rd
THE GAP 4061
Ph: 07 -3839-0470
Fax: 07 -3300-5329
(Sl: Hepatology, Medico-legal)

STEPHENSON, Peter M

Brisbane Gastroscopy &
Colonoscopy
Level 2 35 Astor Tce
BRISBANE 4000
Ph: 07 -3833-6701
Fax: 07 -3835-1075
Mob: 040-0444-414
pstephenson@montserrat.com.au

12 Riverview Tce
INDOOROOPILLY 4068

383-391 Samford Rd
GAYTHORNE 4051

(Sl: Gastroenterology, Medico-
legal)

GENERAL SURGERY

COHEN, David

Morris Towers
149 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-0286
Fax: 07 -3832-3164
Mob: 041-4831-028
djcohen@bigpond.com

Ashmole Road Medical Centre
Cnr Ashmole Road & Porter St
REDCLIFFE 4020

(Sl: Skin Cancer, Medico-legal,
Breast Surgery, Hernia Surgery)

DAVIS, Neville C

Retired
(Prac Res to Medico-Legal,
Reports)
401 / 53A Newstead Tce
NEWSTEAD 4006
Ph: 07 -3854-0935
Fax: 07 -3854-0936
A/H: 07 -3854-0935
nevDavis@bigpond.net.au
(Sl: Medico-legal)

GOUGH, Ian

Wesley Medical Centre
40 Chasely St
AUCHENFLOWER 4066
Ph: 07 -3870-2450
Fax: 07 -3371-6143
A/H: 07 -3832-0990
Pgr: 1300-555-555 Ext: 6443
goughmed@bigpond.com

The North West Breast Clinic
137 Flockton St
EVERTON PARK 4053
Ph: 07 -3870-2450

(Sl: Medico-legal, Breast
Surgery, Endocrine Surgery)

LANCASTER, John F

Noosa Surgical & Endoscopy
Centre
22 Mary St
NOOSAVILLE 4566
Ph: 07 -5473-0400
Fax: 07 -5473-0444
Mob: 041-8902-496
j.lancaster@ozemail.com.au
www.noosasurgical.com

(Sl: Medico-legal, Breast
Surgery, Cutaneous Malignancy
Surgery, Gastrointestinal
Surgery)

LYNCH, John

86 Boundary Rd
BARDON 4065
Mob: 041-4319-175
A/H: 07 -3367-2653

(Sl: Medico-legal, Thyroid &
Parathyroid, Biliary Surgery,
Laparoscopic Surgery)

MEDICO-LEGAL LISTING

GENERAL SURGERY

MAGUIRE, Errol J

Retired
RPP
Faculty of Health Science and
Medicine
Bond University
BOND UNIVERSITY 4229
Ph: 07 -5545-4336
Fax: 07 -5595-4416
Mob: 041-7634-804
A/H: 07 -5545-4336
ejmaguire@bigpond.com
(SI: Medico-legal, Thyroid
Disease, Breast Surgery,
Endocrine Surgery,
Laparoscopic Surgery)
(Lang: Italian)

MCLEOD, G Roderick C

Retired
50 Markwell Street
HAMILTON 4007
grmcleod@bigpond.net.au
(SI: Malignant Melanoma,
Medico-legal)

MILLER, Geoffrey

RPP
Suite 4
6th Floor
119-123 Nerang St
SOUTHPORT 4217
Ph: 07 -5503-0101
Fax: 07 -5503-0408
Mob: 041-1413-459
A/H: 07 -5539-3761
gamiller@onthenet.com.au
(SI: Endoscopy, Medico-legal,
Breast Surgery, Endoscopic
Surgery, Laparoscopic Surgery)

NICHOLSON, Douglas A

McCullough Specialist Centre
9/259 McCullough St
SUNNYBANK 4109
Ph: 07 -3345-6667
Fax: 07 -3344-1752
Mob: 041-7636-635
A/H: 07 -3841-0888
danila@ozemail.com.au
(SI: Medico-legal, Laparoscopic
Surgery)

PEGG, Stuart P

Retired
RPP
Private Practice Spec Clinic
Royal Brisbane Hospital
HERSTON 4029
Ph: 07 -3636-1621
Fax: 07 -3636-1314
A/H: 07 -3341-3645
(SI: Burns, Medico-legal)

GENERAL SURGERY

PURSEY, Brian S

16 Minno St
CHAPEL HILL 4069
Ph: 07 -3878-8786
Fax: 07 -3878-8785
Mob: 041-1221-606
A/H: 07 -3878-8786
bpursesey@bigpond.net.au
(SI: Medico-legal, Mtr Veh Acc
- Alcohol & Drug, Mtr Veh Acc
- Seat Belts)

SCARLETT, Phil

Strathpine Specialist Centre
4/32 Dixon St
STRATHPINE 4500
Ph: 07 -3881-1234
Fax: 07 -3881-2020
Caboolture Sessional Rooms
Caboolture Private Hospital
CABOOLTURE 4060
Ph: 07 -3881-1234
(SI: Medico-legal, Ambulatory
Surgery, General Surgery)

GENETICS

WITHERS, Stephen J

RPP
Genesis Clinical Genetics
Service
Specialist Centre-Pacific
PrivateClinic
Suite 2 Level 5 123 Nerang St
SOUTHPORT 4215
Ph: 07 -5532-7655
Fax: 07 -5591-9183
S.Withers@griffith.edu.au
(SI: Genetics, Medico-legal)

MEDICO-LEGAL LISTING

GERIATRICS

BERRY, Glenise C*

RPP
C/- GARU
Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07-3240-2312
Fax: 07-3240-2900
Mob: 040-8767-561
A/H: 07-3379-9510
Pgr: 07-3240-2111 Ext: 718
Glenise_Berry@health.qld.gov.au
Sinnamon Vill Day Therapy Ctr
Seventeen Mile Rocks Rd
JINDALEE 4074
Ph: 07-3714-5141

(Sl: Dementia, Geriatric
Functional Assessmnt, Medico-
legal, Parkinson's Disease)

HIRSCHFELD, Keith E

Ballou Chambers
121 Wickham Tce
BRISBANE 4000
Ph: 07-3831-1449
Mob: 041-9781-778

(Sl: Geriatrics, Medico-legal,
Rehabilitation Medicine)

POWELL, Glenda J*

RPP
Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07-3240-2312
Fax: 07-3240-2900
A/H: 07-3848-1976

(Sl: Alzheimer's/other Dementia,
Geriatrics, Medico-legal, Stroke
Illness Management)

GYNAECOLOGICAL ONCOLOGY

CRANDON, Alexander J

(Prac Res to Gynaecological
Cancer & Gynaecology)
Suite 5 Level 7
Brisbane Private Specialist Ctr
259 Wickham Tce
BRISBANE 4000
Ph: 07-3834-7011
Fax: 07-3834-7012
Mob: 040-2133-562
A/H: 07-3300-6414
Pgr: 07-3309-1084
a.crandon@igcs.com.au

John Flynn Hospital
Inland Dve
TUGUN 4224
Ph: 07-5598-9000

St Vincent's Medical Centre
Scott St
TOOWOOMBA 4350
Ph: 07-4688-5488

(Sl: Gynaecological Oncology,
Medico-legal)

GYNAECOLOGY

BRUNELLO, Lawrence P

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07-3831-6462
Fax: 07-3831-5303
A/H: 07-3356-2965
Pgr: 1300-555-555 Ext: 941

(Sl: Medico-legal, Vaginal
Surgery)

(Lang: Italian)

GUEST, Adrian

Ballou Chambers
121 Wickham Tce
BRISBANE 4000
Ph: 07-3839-8282
Fax: 07-3839-0010
A/H: 07-3876-6927
Pgr: 1300-555-555 Ext: 71366

Mayne Health
Caloundra Private Hospital
Beerburum St
CALOUNDRA 4551
Ph: 07-3839-8282

(Sl: Colposcopy, Medico-legal,
Cervical Pathology, Minimally
Invasive Surgery)

O'CONNOR, Dan

St Andrew's Place
33 North St
SPRING HILL 4000
Ph: 07-3831-5116
Fax: 07-3832-1374
Mob: 041-8770-117
A/H: 07-5492-6415
qeri@bigpond.com.au

4 Ormuz Ave
CALOUNDRA 4551
Ph: 07-3831-5116

(Sl: Endometriosis, Hormone
Replacement Therapy, Medico-
legal, Endoscopic Surgery,
Gynaecological Surgery, Laser
Surgery)

(Lang: French)

MEDICO-LEGAL LISTING

HAEMATOLOGY

DAVIDSON, Peter WG
Healthcare Centre
720 Albany Creek Rd
ALBANY CREEK 4035
Ph: 07 -3264-1932
Fax: 07 -3264-5672
Mob: 040-2903-915
Pgr: 1300-555-555 Ext: 28010
Peter.Davidson@qml.com.au
(Sl: Coagulation Disorders,
Medico-legal, Transfusion
Medicine, Non Malignant
Haematology)

INFECTIOUS DISEASES

MCCORMACK, Joseph G
RPP
University of Queensland
Dept of Medicine
Mater Hospital
Raymond Tce
SOUTH BRISBANE 4101
Ph: 07 -3840-8518
Fax: 07 -3840-1548
Mob: 041-8744-187
A/H: 07 -3371-9361
Pgr: 07 -3831-6199 Ext: 1765
jmccorma@mater.org.au
Suite 40 Level 7
Mater Medical Centre
293 Vulture St
SOUTH BRISBANE 4101
(Sl: Infectious Diseases, Medico-
legal)

WHITBY, Michael
Specialist Centre
Greenslopes Private Hospital
Newdegate St
GREENSLOPES 4120
Ph: 07 -3394-4788
Fax: 07 -3324-2722
A/H: 07 -3394-2287
Pgr: 07 -3836-3309
m.whitby@uq.edu.au
Mater Medical Centre
293 Vulture St
SOUTH BRISBANE 4101
Ph: 07 -3394-4788
Fax: 07 -3324-2722
(Sl: Medico-legal)

INTENSIVE CARE

HENDERSON, Alan
Brisbane North Physicians
Strathpine Specialist Centre
32 Dixon St
STRATHPINE 4500
Ph: 07 3881 3444
Fax: 07 3881 3443
Mob: 041-1598-092
A/H: 07 -3325-1330
alan.henderson@hsn.org.au
(Sl: Intensive Care, Perioperative
Assessment, Heart Failure,
Medico-legal, General
Medicine)

MCCARTHY, John
Selangor Private Hospital
62 Netherton St
NAMBOUR 4560
Ph: 07 -5441-2311
Fax: 07 -5441-5619
Mob: 041-3028-721
A/H: 07 -5448-8046
Pgr: 07 -3309-1469
John.McCarthy@affinityhealth.
com.au
(Sl: Medical Education, Medico-
legal, Rural Medicine)

SCOTT, Carl B
Nambour General Hospital
Hospital Rd
NAMBOUR 4560
Ph: 07 -5470-6600
Fax: 07 -5470-6841
Mob: 041-4248-604
Pgr: 07 -5470-6600 Ext: 176
(Sl: Anaesthetics, Intensive Care,
Medico-legal)

MEDICO-LEGAL LISTING

INTERNAL MEDICINE

BERRY, Glenise C*

RPP
C/- GARU
Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07-3240-2312
Fax: 07-3240-2900
Mob: 040-8767-561
A/H: 07-3379-9510
Pgr: 07-3240-2111 Ext: 718
Glenise_Berry@health.qld.gov.au
Sinnamon Village Day Therapy
Centre
Seventeen Mile Rocks Rd
JINDALEE 4074
Ph: 07-3714-5141

(Sl: Dementia, Geriatric
Functional Assessmnt, Medico-
legal, Parkinson's Disease)

CARROLL, Patrick A

RPP
Director of Medicine
Redcliffe Hospital
Anzac Ave
REDCLIFFE 4020
Ph: 07-3883-7788
Fax: 07-3883-7530
Mob: 041-2610-062
A/H: 07-3861-9947
Pgr: 1300-555-555 Ext: 7772
Patrick_Carroll@health.qld.gov.
au
Suite 17
Peninsula Specialist Centre
George St
KIPPA-RING 4021
Ph: 07-3284-2200
Fax: 07-3883-2570

(Sl: Medico-legal, Toxicology)

DOLTON, Ronald L

Level Two
Cnr The Esplanade & Second
Ave
COTTON TREE 4558
Ph: 07-5479-6886
Fax: 07-5479-6889

(Sl: Cardiology, Medico-legal)

DOUGLAS, William AC

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07-3831-2437
Fax: 07-3831-4207
A/H: 07-3378-6522
w_b_doug@bigpond.net.au
(Sl: Diving Medicine, Medico-
legal)

(Lang: French)

INTERNAL MEDICINE

GOODWIN, Robert M

Retired
4 Degan Crt
HIGHFIELDS 4352
A/H: 07-4630-8919

(Sl: Cardiac Rehabilitation,
Medico-legal)

HENDERSON, Alan

Brisbane North Physicians
Strathpine Specialist Centre
32 Dixon St
STRATHPINE 4500
Ph: 07 3881 3444
Fax: 07 3881 3443
Mob: 041-1598-092
A/H: 07-3325-1330
alan.henderson@hsn.org.au
(Sl: Intensive Care, Perioperative
Assessment, Heart Failure,
Medico-legal, General
Medicine)

HIRSCHFELD, Keith E

Ballow Chambers
121 Wickham Tce
BRISBANE 4000
Ph: 07-3831-1449
Mob: 041-9781-778

(Sl: Geriatrics, Medico-legal,
Rehabilitation Medicine)

KERR, Ronald V

7th Floor
Morris Towers
149 Wickham Tce
BRISBANE 4000
Ph: 07-3839-0854
Fax: 07-3839-0854
A/H: 07-3353-2756
Pgr: 07-3839-0854

Strathpine Specialist Centre
Dixon St
STRATHPINE 4500
Ph: 07-3839-0854
Fax: 07-3839-0854

Moreton Centre
5 Violet St
REDCLIFFE 4020
Ph: 07-3839-0854
Fax: 07-3839-0854

Bon Accord Shopping Centre
Lagoon St
SANDGATE 4017
Ph: 07-3839-0854

North West Medical Centre
125 Flockton St
EVERTON PARK 4053
Ph: 07-3839-0854
Fax: 07-3839-0854

INTERNAL MEDICINE

Arana Specialist Centre
Shop 9 Patricks Place
Cnr Patricks & Dawson Rds
ARANA HILLS 4054
Ph: 07-3839-0854

(Sl: Diabetes, Hypertension,
Medico-legal, Multi-sysem
Disease)

MCCORMACK, Joseph G

RPP
University of Queensland
Dept of Medicine
Mater Hospital
Raymond Tce
SOUTH BRISBANE 4101
Ph: 07-3840-8518
Fax: 07-3840-1548
Mob: 041-8744-187
A/H: 07-3371-9361
Pgr: 07-3831-6199 Ext: 1765
jrmccorma@mater.org.au

Suite 40 Level 7
Mater Medical Centre
293 Vulture St
SOUTH BRISBANE 4101
(Sl: Infectious Diseases, Medico-
legal)

MORRISON, Stephen C

RPP
Royal Brisbane Hospital
Herston Rd
HERSTON 4029
Ph: 07-3636-7631
Fax: 07-3636-5651
Mob: 041-9720-719
A/H: 07-3202-6095
Pgr: 07-3636-8111 Ext: 59359
stephen_morrison@health.qld.gov.au

(Sl: Sleep Disorders,
Breathalyser Testing, Medico-
legal, Hyperbaric/underwater
Medicine)

POWELL, Glenda J*

RPP
Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07-3240-2312
Fax: 07-3240-2900
A/H: 07-3848-1976

(Sl: Alzheimer's/other Dementia,
Geriatrics, Medico-legal, Stroke
Illness Management)

MEDICO-LEGAL LISTING

INTERNAL MEDICINE

SAUNDERS, John B

RPP

Centre for Drug & Alcohol
Studies

Department of Psychiatry

Royal Brisbane Hospital

HERSTON 4029

Ph: 07 -3238-4078

Fax: 07 -3365-5488

Pgr: 1300-555-555 Ext: 89984

jbsaunders@compuserve.com

(SI: All Drug & Alcohol
Problems, Medical Education,
Medico-legal)

MEDICAL ADMINISTRATION

BRENNAN, Colin K

RPP

Rossett & Gresford Sts

WEST CHERMSIDE 4032

Ph: 07 -3359-4686

A/H: 07 -3359-4686

Alexandra

201 Wickham Tce

BRISBANE 4000

(SI: Forensic Psychiatry, General
Adult Psychiatry, Insurance
Psychiatry, Child Protection,
Medico-legal, Workers'
Compensation, Superannuation)

JEFFERY, Robert J

Princess Alexandra Hospital

Ipswich Rd

WOOLLOONGABBA 4102

Ph: 07 -3240-7596

Fax: 07 -3240-7011

robert_jeffery@health.qld.gov.au

(SI: Medico-legal, Tropical
Medicine, Medical
Administration)

STABLE, Rob

Bond University

Gold Coast

BOND UNIVERSITY 4229

Ph: 07 -5595-1050

Fax: 07 -5595-1026

robert_stable@bond.edu.au

(SI: Medico-legal)

MUSCULOSKELETAL MEDICINE

HARDING, Geoff

Sandgate Spinal Medicine Clinic
1st Floor

67 Brighton Rd

SANDGATE 4017

Ph: 07 -3269-5522

Fax: 07 -3269-6407

Mob: 040-9633-945

A/H: 07 -3263-3945

geoffharding@uq.net.au

(SI: Medical Education, Medico-
legal, Musculoskeletal Medicine)

JACKSON, Peter MC

Brisbane Musculoskeletal Clinic

400 Gregory Tce

SPRING HILL 4000

Ph: 07 -3236-5866

Fax: 07 -3236-5228

Mob: 040-8887-193

jacksonp@bigpond.net.au

(SI: Disabilities, Medico-legal,
Musculoskeletal Medicine)

MASTERS, Scott

Caloundra

Spinal & Sports Medicine Ctr.

39 Minchinton St

CALOUNDRA 4551

Ph: 07 -5491-1144

Fax: 07 -5491-1253

scotty1@ozemail.com.au

(SI: Medico-legal,
Musculoskeletal Medicine,
Sports Medicine)

MEDICO-LEGAL LISTING

NEUROLOGY

CAMERON, John

11th Fl Watkins Medical Ctr
225 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-6081
Fax: 07 -3832-7175
jcneurol@ihug.com.au

(Sl: Aviation Medicine,
Medico-legal, Neurophysiology,
Neurotoxicology, Occupational
Neurology)

CORBETT, John L

Consultant Neurologist
Credentialed Sleep Physician
Electrophysiology Laboratory at
159 Nerang Street Southport
Phone 5557 0000

Fax 5531 1277
EMG/NCS, EEG's 1 to 8 hours,
Licensed for Botox clinical
conditions, Vestibular Disorders,
Epilepsy
Electrophysiology Laboratory at
Meadowbrook.

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tests only

Fax referrals to 5557 0077

SNORE AUSTRALIA

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and CPAP Titration Studies
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suburbs

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DISORDERS CENTRE
Diagnostic Polysomnography
and CPAP Titration Studies
159 Nerang Street, Southport
Phone 5527 0555

Fax 5531 1277

www.corbett.com.au for all
centres to download referral
forms.

EDWARDS, Vivian

St Andrew's Hospital

2 Pring St

IPSWICH 4305

Ph: 07 -3281-6200

Fax: 07 -3202-4848

Mob: 041-7009-107

A/H: 07 -5464-4294

edwardsv@tpg.com.au

(Sl: Clinical Neurophysiology,
Medico-legal, Neurology)

NEUROLOGY

LANDY, Peter JB

Suite 1 Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-0449
Fax: 07 -3831-0449

(Sl: Epilepsy, Headaches,
Medico-legal, Multiple Sclerosis,
Parkinson's Disease)

MORLEY, Barrie

Suite 21

St Andrew's Hospital

280 North St

TOOWOOMBA 4350

Ph: 07 -4633-2299

Fax: 07 -4633-1700

Mob: 041-8700-434

A/H: 07 -4632-2914

bmorley@tpg.com.au

(Sl: Epilepsy, Medico-legal,
Multiple Sclerosis, Parkinson's
Disease)

OHLRICH, Greg

(Prac Res to Medico-Legal
Work.)

Queensland Medilaw

Ground Floor Inergise House

135 Wickham Tce

BRISBANE 4000

Ph: 07 -3832-7177

Fax: 07 -3832-6363

A/H: 07 -3371-5912

gohlrich@gil.com.au

(Sl: Medico-legal)

O'SULLIVAN, John D

3rd Floor

Ladhope Chambers

131 Wickham Tce

BRISBANE 4000

Ph: 07 -3832-0501

Fax: 07 -3832-0502

Mob: 043-8747-118

Pgr: 07 -3830-5867

josull@tpg.com.au

(Sl: Huntington's Disease,
Medico-legal, Movement
Disorders, Parkinson's Disease,
Botulinum Toxin)

PASCOE, Melinda K*

Neurology Choice

Level 6 Pacific Private Clinic

123 Nerang St

SOUTHPORT 4215

Ph: 07 -5503-4133

Fax: 07 -5503-4199

info@neurologychoice.com

(Sl: Electro Myogram, Medico-
legal, Neuromuscular Disorders,
Neurophysiology)

NEUROLOGY

REID, Alison C*

Dennis Crt

8 Dennis Rd

SPRINGWOOD 4127

Ph: 07 -3290-0290

Fax: 07 -3290-3571

Silverton Place

101 Wickham Tce

BRISBANE 4000

Ph: 07 -3290-0290

(Sl: Medico-legal,
Neurophysiology)

SAINES, Noel S

Wesley Medical Centre

40 Chasely St

AUCHENFLOWER 4066

Ph: 07 -3371-5188

Fax: 07 -3870-4885

Pgr: 1300-555-555 Ext: 22478

St Vincent's Hospital

Scott St

TOOWOOMBA 4350

Cleveland Specialist Centre

45 Wynyard St

CLEVELAND 4163

(Sl: Botox, Clinical
Neurophysiology, Epilepsy,
Medico-legal, Multiple Sclerosis,
Stroke)

TODMAN, Donald H

Brisbane Clinic

79 Wickham Tce

BRISBANE 4000

Ph: 07 -3270-4562

Fax: 07 -3839-4694

A/H: 07 -3342-0760

dntodman@optusnet.com.au

(Sl: Cerebrovascular Disease,
Medico-legal, Migraine)

MEDICO-LEGAL LISTING

NEUROSURGERY

BAKER, John

Greenslopes Private Hospital
Newdegate St
GREENSLOPES 4120
Ph: 07 -3397-3607
Fax: 07 -3847-5065
Mob: 041-8791-149
A/H: 07 -3397-3607
jgbaker@bigpond.com.au

Mater Private Hospital
301 Vulture St
SOUTH BRISBANE 4101
Mater Hospital
Ward St
ROCKHAMPTON 4700
(Sl: Medico-legal)

CAMPBELL, Scott

RPP
Private Practice Clinic
Royal Brisbane Hospital
Herston Rd
HERSTON 4029
Ph: 07 -3636-8346
Fax: 07 -3636-1563
Mob: 040-2485-042
Pgr: 07 -3636-8111
scott_campbell@health.qld.gov.au

(Sl: Medico-legal, Pituitary
Surgery, Spinal Surgery)

CORONEOS, Michael

Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-9511
Fax: 07 -3831-9512
Mob: 041-3539-580
A/H: 07 -3343-9580

Logan Private Hospital
Consulting Suites
Armstrong Rd
MEADOWBROOK 4131
Ph: 07 -3831-9511

McCullough Specialist Centre
245 Mains Rd
SUNNYBANK 4109
Ph: 07 -3831-9511

(Sl: Medico-legal, Pain
Management, Cranial &
Spinal Surgery, Neurosurgery,
Peripheral Nerve Surgery)

(Lang: Greek)

GUAZZO, Eric P

North Ward Clinic
65 Eyre St
North Ward
TOWNSVILLE 4810
Ph: 07 -4772-2844
Fax: 07 -4772-2834
Mob: 040-2296-838
A/H: 07 -4721-2810
nqneurosurgery@austarnet.com.au

NEUROSURGERY

Cairns Specialist Centre
207 Lake St
CAIRNS 4870
Ph: 07 -4051-7944
Fax: 07 -4031-2873

(Sl: Medico-legal, Spinal
Surgery)

(Lang: Italian)

HALL, Bruce

Suite 19 Level 1
Greenslopes Specialist Centre
Newdegate St
GREENSLOPES 4120
Ph: 07 -3421-6000
Fax: 07 -3397-4185
A/H: 07 -3309-1151
Pgr: 07 -3309-1151
brucehall@qns.com.au

Suite 14 Level 6
Mater Medical Centre
293 Vulture St
SOUTH BRISBANE 4101
Ph: 07 -3421-6000
Fax: 07 -3844-0901

(Sl: Medico-legal, Neuro-
oncology, Skull Base Surgery,
Stereotaxy & Funct Neurosurg,
Spinal Surgery)

(Lang: Japanese)

STUART, Gordon G

RPP
Dept of Neurosurgery
Royal Brisbane Hospital
HERSTON 4029
Ph: 07 -3636-7470
Fax: 07 -3636-1563
Mob: 041-9721-207
gpmstuart@yahoo.com.au

Private Practice Clinic
Royal Brisbane Hospital
HERSTON 4029
Ph: 07 -3636-8346

(Sl: Medico-legal)

WEIDMANN, Michael J

Watkins Medical Centre
225 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-7704
Fax: 07 -3839-9040
Mob: 041-8721-227
michael@weidmann.com.au

(Sl: Medico-legal)

OBSTETRICS & GYNAECOLOGY

CRANDON, Alexander J

(Prac Res to Gynaecological
Cancer & Gynaecology)
Suite 5 Level 7
Brisbane Private Specialist Ctr
259 Wickham Tce
BRISBANE 4000
Ph: 07 -3834-7011
Fax: 07 -3834-7012
Mob: 040-2133-562
A/H: 07 -3300-6414
Pgr: 07 -3309-1084
a.crandon@igcs.com.au

John Flynn Hospital
Inland Dve
TUGUN 4224
Ph: 07 -5598-9000

St Vincent's Medical Centre
Scott St
TOOWOOMBA 4350
Ph: 07 -4688-5488
(Sl: Gynaecological Oncology,
Medico-legal)

DOOLEY, Desmond J

Retired
2/19 Leigh Street
COORPAROO 4151
A/H: 07 -3397-0292

(Sl: Medico-legal)

ERIAN, Mark MS

RPP
Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-7399
Fax: 07 -3832-7394
Mob: 043-8327-399
A/H: 07 -3843-2790
Pgr: 1300-555-555 Ext: 23271
m.erian@mailbox.uq.edu.au

(Sl: High Risk Pregnancy,
Medico-legal, Minimally Invasive
Surgery)

(Lang: Arabic, Greek, French,
Dutch)

MCLAREN, Glenda R*

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-7399
Fax: 07 -3832-7394
Mob: 040-7123-400
Pgr: 1300-555-555 Ext: 59473
glenros@bigpond.net.au

Carindale Specialist Centre
Carindale Shopping Centre
Creek Rd
CARINDALE 4152
Ph: 07 -3832-7399

(Sl: Colposcopy, High Risk
Obstetrics, Medico-legal)

MEDICO-LEGAL LISTING

OBSTETRICS & GYNAECOLOGY

SHARMA, D Lata*

RPP
Toowoomba Base Hospital
PMB 2
TOOWOOMBA 4350
Ph: 07 -4616-6000
Fax: 07 -4616-6202
Mob: 041-7797-146
latasharma25@yahoo.com

Private Practice
Ph: 07 -4616-6287

(Sl: Abnormal Paps,
Colposcopy, Infertility, Medico-
legal, Laparoscopic Surgery)

(Lang: Russian)

YAZDANI, Anusch

RPP
Suite 6.01
Mater Private Medical Centre
550 Stanley St
SOUTH BRISBANE 4101
Ph: 07 -3840-2840
Fax: 07 -3010-2111
www.mygynaecologist.com

Dept of Obstetrics &
Gynaecology
Royal Women's Hospital
Herston Rd
HERSTON 4006

Dept of Obstetrics &
Gynaecology
Mater Mothers Hospital
Raymond Tce
SOUTH BRISBANE 4101

(Sl: Cervical Dysplasia,
Endometriosis, Medico-legal,
Menstrual Disorders, Pelvic Pain,
Fertility Control)

(Lang: German, French)

OCCUPATIONAL MEDICINE

BURKE, Nicholas J

Cadogan House
1382 Sandgate Rd
NUNDAH 4012
Ph: 07 -3266-7444
Fax: 07 -3266-2744
Mob: 041-9747-728
njburke87@hotmail.com

16 Pring St
HENDRA 4011

(Sl: Medico-legal, Rehabilitation
Medicine, Toxicology,
Impairment Assessments)

GOODE, Steven J

RPP
PO Box 7075
HOLLAND PARK EAST 4121
Ph: 1300-555-555
Fax: 07 -3901-7436
Pgr: 1300-555-555 Ext: 64188
drsgoode@optusnet.com.au

Medical Consultants Australia
Suites 26-29 Level 2
Silverton Pl 101 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-4788
Fax: 07 -3832-1629

Occupational Health Unit
Private Practice Spec. Clinic
RBH

HERSTON 4029
Ph: 07 -3636-7626
Fax: 07 -3636-8503

Medical Services Unit
Australia Post
3rd Floor GPO 261 Queen St
BRISBANE 4000
Ph: 07 -3405-1726
Fax: 07 -3405-1628

Health for Industry
Level 7
340 Adelaide St
BRISBANE 4000
Ph: 07 -3307-9435
Fax: 07 -3307-9441

(Sl: Medico-legal, Occupational
Rehabilitation, Impairment &
Disability Assessment)

MONRO, John D

RPP
11 Fulham Rd
PIMLICO 4812
Ph: 07 -4775-3655
Fax: 07 -4775-6155
A/H: 07 -4775-2334
dr_j_monro@bigpond.com

(Sl: Cardiovascular Physiology,
Medico-legal, Occupational
Rehabilitation, Physical
Medicine)

OCCUPATIONAL MEDICINE

OLSEN, Johnn

28 See St
BARGARA 4670
Ph: 07 -4159-1488
Fax: 07 -4159-1597

Suite 7 Level 5
Mater Private Clinic
550 Stanley St
SOUTH BRISBANE 4101
Ph: 07 -4159-1488
Fax: 07 4159-1597

(Sl: Medico-legal,
Musculoskeletal Medicine,
Occupational Medicine,
Occupational Rehabilitation)

TURNER, Beryl V*

Occupational Medical Services
20 Tank St
GLADSTONE 4680
Ph: 07 -4972-0329
Fax: 07 -4972-9539
bturner@occmed.com.au

(Sl: Hazardous Chem. Hlth
Surveil., Independ't Medical
Examination, Medico-legal,
Occupational Rehabilitation,
Hyperbaric/underwater
Medicine)

MEDICO-LEGAL LISTING

OPHTHALMOLOGY

DENMAN, P David

Tobruk House
8 Archer St
ROCKHAMPTON 4700
Ph: 07 -4922-6699
Fax: 07 -4922-6599
Mob: 040-7225-011
david@capricorneyecare.com.au
Hillcrest Specialist Centre
5 Borilla St
EMERALD 4720
Ph: 07 -4922-6699
Fax: 07 -4922-6599

(SI: Diabetic Eye Disease,
Medico-legal, Paediatrics,
Cataract Surgery, Oculoplastic
Surgery, Vitreoretinal
Microsurgery)

HARRISON, John D

2nd Floor
113 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-4972
Fax: 07 -3832-5964
A/H: 07 -3371-1881
john.harrison@mailbox.uq.edu.au
Findlay Specialist Centre
209 Stafford Rd
STAFFORD 4053
Ph: 07 -3357-8411
Fax: 07 -3857-7851

(SI: Medico-legal, Neuro-
ophthalmology)

HARRISON, Mark R

Retired
"Alameda"
65 Manchester Terrace
INDOOROOPIILLY 4068
(SI: Glaucoma, Medico-legal)

HILTON, Alan F

Findlay Medical Spec. Centre
209 Stafford Rd
STAFFORD 4053
Ph: 07 -3357-8411
Fax: 07 -3857-7851
Mob: 040-8068-775
a.f.hilton@uq.net.au

The Eye Centre
Shop 2 Parkway Centre
Cnr Robina Parkway
ROBINA 4226
Ph: 07 -5589-8350
Fax: 07 -5562-0196

The Eye Centre
Level 4 / 2 Short St
SOUTHPORT 4215
Ph: 07 -5557-8300
Fax: 07 -5531-2016

OPHTHALMOLOGY

21 South St
IPSWICH 4305
Ph: 07 -3281-5844
Fax: 07 -3281-5770
Albany Creek Specialist Centre
698 Albany Creek Rd
ALBANY CREEK 4035
Ph: 07 -3357-8411
Fax: 07 -3857-7851
(SI: Medico-legal, Paediatric
Ophthalmology, Strabismus)

STARK, Denis J

Longreach Hospital
Jabiru St
LONGREACH 4730
Ph: 07 -4658-4700
Fax: 07 -4658-1491
Mob: 041-9028-896
denisstark@eyedr4kids.com
Vision Centre Gold Coast
91 Nerang St
SOUTHPORT 4215
Ph: 07 -5528-4800
Fax: 07 -5528-4822
(SI: Medico-legal, Paediatric
Ophthalmology, Strabismus)

SULLIVAN, Francis P

Cadogan House
1382 Sandgate Rd
NUNDAH 4012
Ph: 07 -3266-3733
Fax: 07 -3266-8361
A/H: 07 -3262-3801
fpsull@bigpond.net.au
Aspley Specialist Centre
Gympie & Zillmere Rds
ASPLEY 4034
Ph: 07 -3263-5844
Fax: 07 -3263-6451

135 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-0101
Fax: 07 -3831-3203
(SI: General Ophthalmology,
Medico-legal, Work Cover
Requested Assess)

VANDELEUR, Kevin W

Ladhope Chambers
131 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-3623
Fax: 07 -3832-7108
Mob: 040-3063-261
(SI: General Ophthalmology,
Medico-legal)

ORAL/MAXILLOFACIAL SURGERY

MOLONEY, Francis B

Suite 2 15th Floor
T & G Building
141 Queen St
BRISBANE 4000
Ph: 07 -3003-0011
Fax: 07 -3003-0133
Mob: 041-7611-866
A/H: 07 -3300-0738
frankmol@hotkey.net.au
Armidale Private Hospital
Rusden St
ARMIDALE 2350
Ph: 1800-184-184
Fax: 07 -3003-0133
Baringa Private Hospital
COFFS HARBOUR 2450
Ph: 1800-184-184
Fax: 07 -3003-0133
(SI: Medico-legal, Jaw Implants)

MEDICO-LEGAL LISTING

ORTHOPAEDIC SURGERY

LABROM, Robert D

Wesley Medical Centre
Suite 30
40 Chasely St
AUCHENFLOWER 4066
Ph: 07 -3232-7566
Fax: 07 -3232-6266
Mob: 042-2384-556
robert.labrom@qldoc.com.au

Royal Children's Hospital
Herston Rd
HERSTON 4006
Ph: 07 -3253-8111

(Sl: Medico-legal, Spinal
Surgery)

SOMMERVILLE, Scott MM

Wesley Medical Centre
Suite 30 Level 2
40 Chasely St
AUCHENFLOWER 4066
Ph: 07 -3232-7566
Fax: 07 -3232-6266
A/H: 07 -3232-7566

Sunnybank Private Hospital
McCullough St
SUNNYBANK 4109
Ph: 07 -3232-7566
Fax: 07 -3232-6266

Greenslopes Private Hospital
Newdegate St
GREENSLOPES 4120
Ph: 07 -3232-7566
Fax: 07 -3232-6266

(Sl: Medico-legal, Arthroplasty
of Hip & Knee, Orthopaedic
Oncology)

ORTHOPAEDICS

BOOKLESS, Gregory J

4 Mylne St
TOOWOOMBA 4350
Ph: 07 -4638-1388
Fax: 07 -4638-3734
Mob: 041-8718-758
gjb33@bigpond.net.au
(Sl: Medico-legal, Arthroscopic
Surg Knee/shldr, Joint
Replacement Surgery)

BOYS, Peter B

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-1060
Fax: 07 -3831-8165
waraboys@bigpond.com
(Sl: Medico-legal)

BRAZEL, Peter W

Suite 1
Cunningham Specialist Centre
10 Pring St
IPSWICH 4305
Ph: 07 -3812-3077
Fax: 07 -3281-6775
(Sl: Medico-legal, Foot & Ankle
Surgery, Hip Surgery, Knee
Surgery, Shoulder Surgery)

COLEMAN, Stephen G

(Prac Res to Hand & Wrist
Surgery)
Brisbane Hand & Upper Limb
Clinics
9 / 259 Wickham Tce
BRISBANE 4000
Ph: 07 -3834-6543
Fax: 07 -3834-6544

Mater Redlands
Weippin St
CLEVELAND 4163

McCullough Medical Centre
259 McCullough St
SUNNYBANK 4109

(Sl: Medico-legal, Hand & Wrist
Surgery)

COOKE, Cameron J

Mater Private Clinic
Level 5
550 Stanley St
SOUTH BRISBANE 4101
Ph: 07 -3010-5755
Fax: 07 -3010-5766
Mob: 040-7157-907
cameroncooke@lowerlimb.com.au
North West Specialist Centre
Suite 11 / 137a Flockton St
EVERTON PARK 4053
Ph: 07 -3353-9850
Fax: 07 -3862-1504

(Sl: Medico-legal, Arthroplasty
of Hip & Knee)

ORTHOPAEDICS

COOKE, Robert J

Level 1
135 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-5130
Fax: 07 -3832-1080
Mob: 041-1420-758
rcooke@cooke.com.au

(Sl: Medico-legal, General
Orthopaedic Surgery, Joint
Replacement Surgery, Paediatric
Orthopaedic Surgery, Spinal
Surgery)

CRAWFORD, Ross W

RPP
Level 5
Clinical Sciences Building
Prince Charles Hospital
CHERMSIDE 4032
Ph: 07 -3350-8481
Fax: 07 -3350-8043
Mob: 041-7420-759
A/H: 07 -3311-5976
r.crawford@qut.edu.au

Prof of Orthopaedic Research
Prince Charles Hospital
Rode Rd
CHERMSIDE 4032

Private Practice Clinic
Prince Charles Hospital
Rode Rd
CHERMSIDE 4032
Ph: 07 -3350-8207

Level 5 Arnold Janssen Centre
Brisbane Private Hospital
Wickham Tce
BRISBANE 4000
Ph: 07 -3350-8481

(Sl: Medico-legal, Adult Hip &
Knee Reconst. Surg, Research)

DAY, Gregory A

RPP
5th Floor
St Andrew's Place
33 North St
SPRING HILL 4000
Ph: 07 -3831-1872
Fax: 07 -3831-5375
g.day@mailbox.uq.edu.au
(Sl: Medico-legal, Spinal Surgery,
Trauma Surgery)

DODD, Peter A

Osler House
16 Tweed St
SOUTHPORT 4215
Ph: 07 -5591-1008
Fax: 07 -5591-1273
A/H: 07 -5533-5134
Pgr: 016-302-226
bonedoc@austarnet.com.au

MEDICO-LEGAL LISTING

ORTHOPAEDICS

Palm Beach Specialist Centre
24 Palm Beach Ave
PALM BEACH 4221

(Sl: Medico-legal, Arthroscopy,
Joint Replacement Surgery)

DONNELLY, William J
RPP

Holy Spirit Northside Hospital
627 Rode Rd
CHERMSIDE 4032
Ph: 07-3230-5400
Fax: 07-3256-4634
Mob: 041-7774-654
bill@boss.net.au

Prince Charles Hospital
Rode Rd
CHERMSIDE 4032

Brisbane Private Hospital
Level 7 Arnold-Janssen Centre
259 Wickham Tce
BRISBANE 4000

(Sl: Medico-legal, Hip
Arthroscopy, Knee Arthroscopy,
Arthroplasty of Hip & Knee)

DUKE, Phil

Level 2
St Andrew's Place
33 North St
SPRING HILL 4000
Ph: 07-3839-1366
Fax: 07-3839-1377
Mob: 040-8345-332
pduke@upperlimb.com

(Sl: Medico-legal, Hand Surgery,
Shoulder Surgery)

FAIRBAIRN, Scott M

33 North St
SPRING HILL 4000
Ph: 07-3831-6422
Fax: 07-3832-7179
sfairbairn@pop.sawmh.org.au

Parkview Specialist Centre
189 Old Cleveland Rd
CAPALABA 4157

Ashgrove Specialist Centre
Harry St
ASHGROVE 4060

Wynnum Specialist Centre
Clara St
WYNNUM 4178

(Sl: Medico-legal, Sports
Orthopaedics, Arthroplasty)

ORTHOPAEDICS

FOOTE, Kingsley
(Prac Res to Orthopaedics)
Suite 4 Hillcrest Spec. Ctre
Hillcrest Hospital
Talford Lane
ROCKHAMPTON 4700
Ph: 07-4922-1335
Fax: 07-4922-4295

(Sl: Medico-legal, Foot Surgery,
Hand Surgery, Joint Rep'ment
Surg (hip&knee), Trauma
Surgery)

(Lang: Afrikaans)

FRASER, John G
Sandford Jackson Building
Wesley Hospital
30 Chasely St
AUCHENFLOWER 4066
Ph: 07-3870-1900
Fax: 07-3870-4243

Kenmore Specialist Centre
2081 Moggill Rd
KENMORE 4069

North West Medical Centre
125 Flockton St
EVERTON PARK 4053

(Sl: Medico-legal, Hip
Replacement Surgery, Joint
Replacement Surgery, Knee
Surgery)

GANKO, Anthony D

(Prac Res to Knee Surgery
(Personally Restricted))
Brisbane Orthopaedic Spec.
Service
Level 7 Arnold Janssen Centre
259 Wickham Tce
BRISBANE 4000
Ph: 07-3230-5422
Fax: 07-3230-5455
Mob: 041-2221-832
tganko@boss.net.au

Holy Spirit Northside
Rode Rd
CHERMSIDE 4032
Ph: 07-3230-5422

(Sl: Medico-legal, Sports
Medicine, Knee Surgery)

GIBBERD, Richard J

34 Fulham Rd
PIMLICO 4812
Ph: 07-4779-8244
Fax: 07-4779-8414
A/H: 07-4779-4682

(Sl: Medico-legal)

ORTHOPAEDICS

GILLETT, Greg
Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07-3839-1060
Fax: 07-3831-8165
greg.gillett@bigpond.com.au
(Sl: Medico-legal, Arthroplasty
of Hip & Knee)

HALLIDAY, Brett
RPP

Suite 15 Level 1
Holy Spirit Northside Hospital
627 Rode Rd
CHERMSIDE 4032
Ph: 07-3326-3760
Fax: 07-3326-3761
Pgr: 07-3836-3110

(Sl: Medico-legal, Arthroplasty
of Hip & Knee, Orthopaedic
Trauma, Revision Arthroplasty)

HUANG, Kevin JX

(Prac Res to Surgery of the
Hand, Shoulder and Upper
Limb, including Microsurgery.)
Level 5
Mater Private Clinic
550 Stanley St
SOUTH BRISBANE 4101
Ph: 07-3010-3351
Fax: 07-3010-3343
Mob: 043-8828-899
Pgr: 07-3835-9595
kjsxhuang@mc.mater.org.au

Greenslopes DVA Clinic
Newdegate St
GREENSLOPES 4120

North West Private Clinic
125 Flockton St
EVERTON PARK 4053

(Sl: Medico-legal, Hand Surgery,
Microsurgery, Shoulder Surgery,
Upper Limb Surgery)

IVERS, Robert W

Toowoomba Orthopaedic
Group
St Vincent's Medical Centre
Scott St
TOOWOOMBA 4350
Ph: 07-4688-5486
Fax: 07-4688-5485
Mob: 041-9789-924
bivers@bigpond.com.au

(Sl: Medico-legal, Hip Surgery,
Knee Surgery, Shoulder Surgery)

MEDICO-LEGAL LISTING

ORTHOPAEDICS

JOHNSON-NURSE, Christopher
RPP
The Grange
Ellough
BECCLES UK NR34 7TR
chrisj-n@linfont.co

(Sl: Medico-legal, Knee Surgery)

JOHNSTONE, Peter O

Level 7 Suite 26
Mater Medical Centre
293 Vulture St
SOUTH BRISBANE 4101
Ph: 07-3844-0455
Fax: 07-3844-0955
Mob: 041-8687-097
Sunnybank Private Hospital
McCullough St
SUNNYBANK 4109

Grand Plaza Medical Centre
1 Grand Plaza Dr
BROWNS PLAINS 4118

Specialist Centre
70 Bryants Rd
LOGANHOLME 4129

(Sl: Medico-legal, Joint
Rep'ment Surg (hip&knee),
Knee Surgery, Sports Surgery,
Trauma Surgery)

KUHNEMANN, Jonathan B

Suite 5 Level 6
123 Nerang St
SOUTHPORT 4215
Ph: 07-5591-5177
Fax: 07-5591-1508
drbkuhn@bigpond.net.au

(Sl: Medico-legal, Hip
Replacement Surgery, Knee
Surgery)

LANE, Julian

Suite 20 Level 1
Greenslopes Specialist Centre
Newdegate St
GREENSLOPES 4120
Ph: 07-3394-4228
Fax: 07-3394-4227

Greenslopes Private Hospital
Newdegate St
GREENSLOPES 4120

(Sl: Medico-legal, Lower Limb
Surgery)

LANGLEY, Noel F

(Prac Res to Orthopaedic &
Medico-Legal Consulting)
Niecon Plaza
Victoria Ave
BROADBEACH 4218
Ph: 07-5592-1535
Fax: 07-5592-1420
Mob: 041-9688-891
A/H: 07-5572-3223
nflangley@iprimus.com.au

ORTHOPAEDICS

Specialists Centre
70 Bryants Rd
LOGANHOLME 4129
Ph: 07-3801-1333
Fax: 07-3806-1377

CBD Medico-Legal Consultants
Suite 2 Level 6
231 Macquarie St
SYDNEY 2000
Ph: 02-9232-0222

(Sl: Medico-legal, Orthopaedics)

LESLIE, Ian J

RPP
2 Clifton Park
BRISTOL UK BS8 3BS
Ph: 117-9064-208
Fax: 145-4633-602
ianjleslie@hotmail.com

Dept Orthopaedic Surgery
Bristol Royal Infirmary
BRISTOL BS2 8HW UK
Ph: 117-9283-899

(Sl: Medico-legal, Hand Surgery)

LICINA, Paul

Ground Floor
Holy Spirit Hospital
627 Rode Rd
CHERMSIDE 4032
Ph: 07-3230-5411
Fax: 07-3319-6506
Mob: 041-0525-354
spine@boss.net.au

(Sl: Medico-legal, Spinal Surgery)

MAGUIRE, John J

7 Fulham Rd
PIMLICO 4812
Ph: 07-4728-3999
Fax: 07-4728-3399
Mob: 040-8283-999
john@nqo.com.au

(Sl: Medico-legal, Knee Surgery,
Orthopaedic Surgery, Shoulder
Surgery)

MARTIN, Bruce A

20 Gilgandra St
INDOOROOPILLY 4068
A/H: 07-3870-2186
marsix@bigpond.net.au

(Sl: Medico-legal, Workers
Compensation Assess.)

MCPHEE, Ian B

(Prac Res to Spinal Surgery)
7th Floor
Ladhope
131 Wickham Tce
BRISBANE 4000
Ph: 07-3831-0475
Fax: 07-3839-6084

ORTHOPAEDICS

H Fl Orthopaedics Division
Clinical Sciences Building
Royal Brisbane Hospital
HERSTON 4029
Ph: 07-3365-5532
Fax: 07-3365-5539

(Sl: Medico-legal, Spinal
Surgery)

MILLROY, Peter J

(Prac Res to Consultations Only
- Ceased Operating)
Watkins Medical Centre
225 Wickham Tce
BRISBANE 4000
Ph: 07-3832-2808
Fax: 07-3831-0319

(Sl: Medico-legal, Hand Surgery,
Upper Limb Surgery)

MORGAN, David AF

Suite 1 Level 8
Arnold Janssen Centre
Brisbane Private Hospital
BRISBANE 4000
Ph: 07-3832-1652
Fax: 07-3832-1039
Pgr: 1300-555-555 Ext: 832
office@davidafmorgan.com.au

Cadogan House
1382 Sandgate Rd
NUNDAH 4012
Ph: 07-3266-7444

(Sl: Hip & Knee Disorders,
Medico-legal, Transplantation
Surgery)

NAVE, Denis H

(Prac Res to Medico Legal
Work)
Queensland Medilaw Pty Ltd
Ground Floor Inergise House
135 Wickham Tce
BRISBANE 4000
Ph: 07-3832-7177
Fax: 07-3832-6363

(Sl: Medico-legal)

NUTTING, Gregory H

McCullough Specialist Centre
259 McCullough St
SUNNYBANK 4109
Ph: 07-3344-1166
Fax: 07-3344-3493
A/H: 07-3397-4875
gnutting@spin.net.au

Suite 1
Mater Medical Centre
Weippin St
CLEVELAND 4163

Greenslopes Private Hospital
Newdegate St
GREENSLOPES 4120

MEDICO-LEGAL LISTING

ORTHOPAEDICS

Arnold Janssen Centre
259 Wickham Tce
BRISBANE 4000

(SI: Medico-legal, Sports
Medicine, Joint Replacement
Surgery, Shoulder Surgery)

PARKINGTON, Thomas R

John Flynn Hospital
Inland Dve
TUGUN 4224
Ph: 07 -5598-0098
Fax: 07 -5598-0118
Mob: 040-7683-634
A/H: 07 -5598-9000
orthopod@onthenet.com.au

Allamanda Surgicentre
Day Surgery Centre
103 Nerang St
SOUTHPORT 4215

Consulting Suites
John Flynn Hospital
Arbour Crt
ROBINA TOWN CENTRE 4230

(SI: Medico-legal, Arthroscopic
Surgery, Joint Replacement
Surgery)

PURSSEY, Brian S

16 Minno St
CHAPEL HILL 4069
Ph: 07 -3878-8786
Fax: 07 -3878-8785
Mob: 041-1221-606
A/H: 07 -3878-8786
bpursesey@bigpond.net.au

(SI: Medico-legal, Mtr Veh Acc
- Alcohol & Drug, Mtr Veh Acc
- Seat Belts)

ROBINSON, Mark W

(Prac Res to Surgery of the
Hand, Upper Limb, and
Shoulder)

Level 5
Mater Private Clinic
550 Stanley St
SOUTH BRISBANE 4101
Ph: 07 -3010-3353
Fax: 07 -3010-3343
Mob: 041-7771-164
A/H: 07 -3899-2798
Pgr: 07 -3830-5616
mrobinson@hn.ozemail.com.au

Suite 1
Mater Medical Centre - Redland
Weippin St
CLEVELAND 4163

(SI: Medico-legal, Hand Surgery,
Microsurgery, Shoulder Surgery)

ORTHOPAEDICS

ROSS, Mark

(Prac Res to Upper Limb
Surgery)
Level 9 Arnold Janssen Centre
Brisbane Private Hospital
259 Wickham Tce
BRISBANE 4000
Ph: 07 -3834-6592
Fax: 07 -3834-6593
Pgr: 07 -3835-9281
markross@upperlimb.com

(SI: Medico-legal, Elbow
Surgery, Hand Surgery,
Reconstructive Microsurgery,
Shoulder Surgery, Upper Limb
Surgery)

SAXBY, Terence S

Arnold Janssen Centre
Level 9
259 Wickham Tce
BRISBANE 4000
Ph: 07 -3834-6640
Fax: 07 -3834-6641
Mob: 041-8727-685
A/H: 07 -3374-0642

(SI: Medico-legal, Foot & Ankle
Surgery)

SCOTT, John

Times Square
Suite 213A
250 McCullough St
SUNNYBANK 4109
Ph: 07 -3344-1811
Fax: 07 -3344-1822
Mob: 041-3781-341
jandjscott@optushome.com.au

(SI: Medico-legal, Upper Limb
Surgery)

SOMMERVILLE, Scott MM

Wesley Medical Centre
Suite 30 Level 2
40 Chasely St
AUCHENFLOWER 4066
Ph: 07 -3232-7566
Fax: 07 -3232-6266
A/H: 07 -3232-7566

Sunnybank Private Hospital
McCullough St
SUNNYBANK 4109
Ph: 07 -3232-7566
Fax: 07 -3232-6266

Greenslopes Private Hospital
Newdegate St
GREENSLOPES 4120
Ph: 07 -3232-7566
Fax: 07 -3232-6266

(SI: Medico-legal, Arthroplasty
of Hip & Knee, Orthopaedic
Oncology)

ORTHOPAEDICS

SOUTH, Michael

Mater Medical Centre
Jessie St
ROCKHAMPTON 4700
Ph: 07 -4922-7220
Fax: 07 -4922-7211
Mob: 041-8797-010
A/H: 07 -4922-7892
mrsouth@bigpond.net.au

(SI: Medico-legal, Arthroscopic
Surg Knee/shldr, Joint Rep'ment
Surg (hip&knee))

STEADMAN, Peter B

Level 7 Suite 32
Mater Medical Centre
293 Vulture St
SOUTH BRISBANE 4101
Ph: 07 -3844-0201
Fax: 07 -3844-0210
Mob: 040-3189-841
psteadman@optusnet.com.au

Beautesert Medical Centre
47 Williams St
BEAUTESERT 4285

Wesley Medical Centre
Chasely St
AUCHENFLOWER 4066
Ph: 07 -3844-0201
Fax: 07 -3844-0210

(SI: Medico-legal, Joint
Replacement Surgery,
Orthopaedic Oncology,
Shoulder Surgery, Trauma
Surgery)

THOMAS, William L

Wallamurra
191 Abbott St
CAIRNS 4870
Ph: 07 -4051-3510
Fax: 07 -4031-2746

(SI: Medico-legal)

TOFT, Lloyd A
Watkins Medical Centre
225 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-2447
Fax: 07 -3832-4634

(SI: Medico-legal)

TUFFLEY, John

St Andrews Place
33 North St
SPRING HILL 4000
Ph: 07 -3832-6421
Fax: 07 -3832-7179
A/H: 07 -3832-6421
jtuffley@pop.sawmh.org.au

MEDICO-LEGAL LISTING

ORTHOPAEDICS

North West Medical Centre
125 Flockton St
EVERTON PARK 4053

(Sl: Medico-legal, Orthopaedics,
Scoliosis Management, Joint
Replacement Surgery, Paediatric
Orthopaedic Surgery)

VAN DER WALT, Izak D

90 Takalvan St
BUNDABERG 4670
Ph: 07 -4152-2116
Fax: 07 -4151-1241
Mob: 040-9263-404
A/H: 07 -4152-1818

(Sl: Medico-legal)

WALLACE, Malcolm

Suite 6
Waterloo Chambers
147 Queen St
CLEVELAND 4163
Ph: 07-3821-0677
Fax: 07-3826-5747
Mob: 041 2600 365

(Sl: Medico-legal, Arthroscopic
Surg Knee/shldr, Arthroplasty of
Hip & Knee)

WALTERS, David W

10 Pring St
IPSWICH 4305
Ph: 07 -3202-1688
Fax: 07 -3812-2676
Mob: 042-7693-131
A/H: 07 -5464-3746

(Sl: Medico-legal, Paediatric
Orthopaedic Surgery)

WALTERS, John

Arnold Janssen Centre
259 Wickham Tce
BRISBANE 4000
Ph: 07 -3834-6535
Fax: 07 -3834-6536
Mob: 041-2187-870
A/H: 07 -3268-4852
waltersj@bigpond.net.au

Medical Centre
Holy Spirit Northside Hospital
Rode Rd
CHERMSIDE 4032
Ph: 07 3834-6535

Strathpine Specialist Centre
Dixon St
STRATHPINE 4500
Ph: 07 -3834-6535

Cadogan House
1382 Sandgate Rd
NUNDAH 4012
Ph: 07 -3834-6535

(Sl: Medico-legal, Hand Surgery,
Microsurgery)

ORTHOPAEDICS

WHITE, A David N
5487 Bay Hill Tce
SANCTUARY COVE 4212
Ph: 07 -5577-8950
Fax: 07 -5577-8346

(Sl: Medico-legal, Orthopaedic
Surgery)

WINSTANLEY, Peter L

36 Mapleton Rd
NAMBOUR 4560
Ph: 07 -5441-6422
Fax: 07 -5441-7010
Mob: 041-8712-653
Pgr: 016-7625-68
mail@winstanley.com.au

Cooloola Specialist &
Diagnostic Centre
74 - 76 Channon St
GYMPIE 4570

Noosa Hospital and
Specialist Centre
111 Goodchap St
NOOSAVILLE 4566

(Sl: Medico-legal, Joint
Replacement Surgery)

ZELLER, Leo F

Suite 1
St Vincent's Hospital
Scott St
TOOWOOMBA 4350
Ph: 07 -4639-5559
Fax: 07 -4639-5558
Mob: 041-9711-251
Izell@ozemail.com.au

(Sl: Medico-legal, Occupational
Medicine, Rehabilitation
Medicine, Trauma Medicine,
Spinal Surgery)

(Lang: Spanish)

PAEDIATRICS

COLDITZ, Paul B

RPP
Perinatal Research Centre
Royal Brisbane and Women's
Hospital
HERSTON 4029
Ph: 07 -3636-1761
Fax: 07 -3636-1769
Mob: 041-6290-018
P.Colditz@uq.edu.au

(Sl: Cerebral Palsy, Medico-
legal, Neonatal Medicine,
Perinatal Medicine)

MCWHIRTER, William R

Strathpine Specialist Centre
Dixon St
STRATHPINE 4500
Ph: 07 -3881-0144
Fax: 07 -3881-0411
Mob: 041-4233-850
A/H: 07 -3374-1587
bmcwhirt@bigpond.net.au

Private Practice Clinic
Royal Children's Hospital
HERSTON 4006
Ph: 07 3636-7000
Fax: 07 3636-1674

(Sl: Medico-legal, Paediatric
Haematology)

O'DUFFY, John F

Retired
68 Crescent Rd
HAMILTON 4007
Mob: 040-9344-735
A/H: 07 -3268-5242
(Sl: Medico-legal)

PREBBLE, Jeffrey J

Toowoomba Specialist Centre
9 Scott St
TOOWOOMBA 4350
Ph: 07 -4632-8888
Fax: 07 -4639-4116
Mob: 040-8717-192
A/H: 07 -4635-6440
prebblej@bigpond.com

(Sl: Medico-legal, General
Paediatrics)

ROYLANCE, Richard F

Logan Hospital
Cnr Armstrong & Loganlea Rds
MEADOWBROOK 4131
Ph: 07 -3299-8561
Fax: 07 -3299-8754
Mob: 041-1601-681
richard_roylance@health.qld.gov.au

(Sl: Child Protection, Medico-
legal)

MEDICO-LEGAL LISTING

PAEDIATRICS

WITHERS, Stephen J

RPP
Genesis Clinical Genetics
Service
Specialist Ctr-Pacific Private
Clinic
Suite 2 Level 5 123 Nerang St
SOUTHPORT 4215
Ph: 07 -5532-7655
Fax: 07 -5591-9183
S.Withers@griffith.edu.au
(SI: Genetics, Medico-legal)

PATHOLOGY

FAOAGALI, Joan L*

RPP
QHPS - Microbiology
Royal Brisbane Hospital
Herston Rd
HERSTON 4029
Ph: 07 -3636-8050
Fax: 07 -3636-1336
joan_faoagali@health.qld.gov.au
RCH Travel Vaccination Clinic
C/ RCH Private Practice
RCH Herston Rd
HERSTON 4029
Ph: 07 -3636-7000
Fax: 07 -3636-1336
(SI: Medico-legal, Travel
Medicine, Microbiology,
Infection Control)

NAYLOR, Charles PE

Qld Health Scientific Services
PO Box 594
ARCHERFIELD 4108
Ph: 07 -3274-9051
Fax: 07 -3274-9201
Mob: 041-4747-602
Charles_Naylor@health.qld.gov.au
(SI: Medico-legal, Anatomical
Pathology, Forensic Pathology)
(Lang: French, German)

TANNENBERG, Anthony EG

QML
60 Ferry Rd
WEST END 4101
Ph: 07 -3840-4015
Fax: 07 -3840-4476
Mob: 040-9484-525
A/H: 07 -3356-9072
anthonytannenberg@qml.com.au
(SI: Medico-legal,
Neuropathology)

WILLIAMS, David J

Pathology Department
The Townsville Hospital
GPO Box 670
TOWNSVILLE 4810
Ph: 07 -4796-2470
Fax: 07 -4796-2468
david_williams@health.qld.gov.au
(SI: Medico-legal, Anatomical
Pathology, Forensic Pathology)
(Lang: French)

PLASTIC & RECONSTRUCTIVE SURGERY

BELT, Paul

Pacific Plastic Surgery Clinic
Level 1
38 Misterton St
FORTITUDE VALLEY 4006
Ph: 07 -3852-6800
Fax: 07 -3852-6802
paul@paulbelt.com.au
(SI: Skin Malignancy, Medico-
legal, Aesthetic Surgery, Hand
Surgery, Head & Neck Surgery,
Lower Limb Reconstruction,
Reconstructive Breast Surgery)

HARRIS, Trevor J

(Prac Res to Plastic &
Reconstructive)
Morris Towers
149 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-3072
Fax: 07 -3831-6163
Mob: 041-6190-131
A/H: 07 -3857-4844
trevorjharris@optusnet.com.au
(SI: Medico-legal)

MCGOVERN, Mark

Level 3 "Esplanade & Second"
Cnr Esplanade & Second Ave
MAROOCHYDORE 4558
Ph: 1-8000-8000-1
Fax: 07 -5443-4292
Mob: 040-7128-815
mark@plasticsurgeon.net.au
(SI: Medico-legal, Breast
Augmentation, Cosmetic
Surgery, Skincare, Botox,
Collagen)

THEILE, David RB

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-8161
Fax: 07 -3835-1125
(SI: Medico-legal, Plastic
& Reconst. Surgery,
Reconstructive Microsurgery)

MEDICO-LEGAL LISTING

PSYCHIATRY

ANDERSON, Bob

Suite 1 The Sunshine Coast
Private Hospital Medical Ctr
12 Elsa Wilson Dve
BUDERIM 4556
Ph: 07 -5452-6366
Fax: 07 -5452-6377
Mob: 043-8526-366
drbobanderson@bigpond.com.au

(Sl: Child Psychiatry, Forensic
Psychiatry, Post Traumatic Stress
Disorder, Medico-legal)

APEL, Gregory RK

Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-9977
Fax: 07 -3831-9944
Mob: 041-4383-199
gregapel@aapt.net.au

(Sl: Alcohol & Drug
Dependency, Medico-legal)

APEL, Roderick HG

Suite 95 Level 9
Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-2342
Fax: 07 -3839-0880
Mob: 040-7024-986
apel@hypermax.net.au

(Sl: Medico-legal, Occupational
Medicine, Superannuation)

BEECH, Michael J

Toowong Private Hospital
496 Milton Rd
TOOWONG 4066
Ph: 07 -3721-8092
Fax: 07 -3821-8095

(Sl: Adolescent Psychiatry, Adult
Psychiatry, Child Psychiatry,
Obsessive Disorders, Medico-
legal)

BELL, Tom

Suite 75
Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-4796
Fax: 07 -3832-7169
tombell@ozemail.com.au

Sandcastles
River Esplanade
MOOLOOLABA 4557
Ph: 07 -5478-0888
Fax: 07 -5478-0511

(Sl: Occupational Psychiatry,
Insurance Assessments,
Medico-legal, Workcover Claim
Management)

PSYCHIATRY

BOULNOIS, Julian DH

(Prac Res to Psychiatry)
9 Gillian Lane
SOUTHPORT 4215
Ph: 07 -5571-1133
Fax: 07 -5571-1149
Mob: 043-9711-133
julian.boulnois@bigpond.com

(Sl: Adult Psychiatry,
Community Psychiatry, Medico-
legal)

BRENNAN, Colin K

RPP
Rossett & Gresford Sts
WEST CHERMSIDE 4032
Ph: 07 -3359-4686
A/H: 07 -3359-4686

Alexandra
201 Wickham Tce
BRISBANE 4000

(Sl: Forensic Psychiatry, General
Adult Psychiatry, Insurance
Psychiatry, Child Protection,
Medico-legal, Workers'
Compensation, Superannuation)

BURKETT, Eileen M*

Mater Medical Centre
293 Vulture St
SOUTH BRISBANE 4101
Ph: 07 -3217-2211
Fax: 07 -3846-1743
A/H: 07 -3309-2328

(Sl: Adult Psychiatry, Geriatric
Psychiatry, Medico-legal)

BYTH, Andrew L

Wesley Medical Centre
40 Chasely St
AUCHENFLOWER 4066
Ph: 07 -3870-4325

Fax: 07 -3870-7557
andrew.byth@wesley.com.au

(Sl: General Psychiatry, Medico-
legal)

CANTOR, Christopher H

Noosa Junction Specialist Ctr
PO Box 1216
NOOSA HEADS 4567
Ph: 07 -5455-4533
Fax: 07 -5455-4633
Mob: 041-7789-960
A/H: 07 -5449-2992
cantor98@powerup.com.au

(Sl: Depression, Post Traumatic
Stress Disorder, Medico-legal)

PSYCHIATRY

CHALK, John N

Ballow Chambers
121 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-4156
Fax: 07 -3839-6164
Pgr: 07 -3835-9257

(Sl: Medico-legal)

CHITTENDEN, Judith IM*

35 Seashell Ave
MERMAID BEACH 4218
Ph: 07 -5575-5500
Fax: 07 -5526-1738

(Sl: Adolescent Psychiatry, Adult
Psychiatry, Child Psychiatry,
Psychotherapy, Post Traumatic
Stress Disorder, Medico-legal)

CURSON, Catherine J*

Toowong Specialist Centre
496 Milton Rd
TOOWONG 4066
Ph: 07 -3721-8011
Fax: 07 -3721-8015
Pgr: 07 -3636-8111 Ext: 59067

(Sl: Adult Psychiatry,
Depression, Medico-legal)

DAVISON, Andrew SB

Oasis Specialist Centre
106 Station Rd
SUNNYBANK 4109
Ph: 07 -3216-9033
Fax: 07 -3216-9183
oasis@uq.net.au

The Park
Centre for Mental Health
Orford Dr
WACOL 4076
Ph: 07 -3271-8222
Fax: 07 -3271-8448

The Jamboree Centre
50 Sumners Rd
SUMNER PARK 4074
Ph: 07 -3376-3600
Fax: 07 -3376-3652

(Sl: Forensic Psychiatry, General
Adult Psychiatry, Medico-legal)

DEGOTARDI, Vicki A*

PO Box 1053
TOOWOOMBA 4350
Mob: 041-9652-277
A/H: 07 -4698-7064
vad@dawbs.org

(Sl: Adolescent Psychiatry, Child
Psychiatry, Medico-legal)

MEDICO-LEGAL LISTING

PSYCHIATRY

EVANS, Alexandra M*

6th Floor Suite 68
Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-6076
Fax: 07 -3832-3993
Mob: 040-8833-021
alex@webevans.com

(SI: Adolescent Psychiatry, Child Psychiatry, Medico-legal)

FLANAGAN, John E

Hillcrest Psychiatric &
Psychological Services
Talford Lane
ROCKHAMPTON 4700
Ph: 07 -4921-0470
Fax: 07 -4921-0289
Mob: 040-7378-936
A/H: 07 -4934-4349
flanagan@cyberinternet.com.au

(SI: Psychotherapy,
Psychogeriatrics, Post Traumatic
Stress Disorder, Medico-legal)

FUTTER, Graham

(Prac Res to Psychiatry)
Suite 6
Willetts Centre
87 Willetts Rd
NORTH MACKAY 4740
Ph: 07 -4942-0694
Fax: 07 -4942-0698

(SI: Mood Disorders, Panic
Disorders, Post Traumatic Stress
Disorder, Medico-legal)

GRANT, Donald A

Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-0378
Fax: 07 -3832-0898

(SI: Adult Psychiatry, Medico-
legal)

GRAY, Curtis R

Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-0378
Fax: 07 -3832-0898
Mob: 041-1470-017
A/H: 041-1470-017

(SI: Anxiety Disorders, Geriatric
Psychiatry, Liaison Psychiatry,
Sleep Disorders, Medico-legal)

PSYCHIATRY

GUNN, Jennifer A*

Ballow Chambers
121 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-3766
Fax: 07 -3832-8861

(SI: Acute Adult Psychiatry,
Psychotherapy, Psychological
Trauma, Medico-legal)

HARDEN, Scott J

Bardon Specialist Centre
64 MacGregor Tce
BARDON 4065
Ph: 07 -3876-3333
Fax: 07 -3876-3533
Mob: 041-3990-084
hardensm@optusnet.com.au

(SI: Adolescent Psychiatry, Child
Psychiatry, Medico-legal)

HEFFERNAN, Edward B

Royal Brisbane Hospital
Herston Rd
HERSTON 4029
Ph: 07 -3636-8111
Ed_Heffernan@health.qld.gov.au
Toowong Specialist Centre
Toowong Private Hospital
496 Milton Rd
TOOWONG 4066
Ph: 07 -3721-8011

(SI: General Adult Psychiatry,
Medico-legal)

JAMES, Basil

PO Box 1005
TOWNSVILLE 4810
Ph: 07 -4724-4122
Fax: 07 -4724-4358
Mob: 041-0563-169

(SI: Medico-legal)

JENSEN, Graeme R

Suite 24
Kay Plaza Suites
33 Scarborough St
SOUTHPORT 4215
Ph: 07 -5588-0425
Fax: 07 -5591-2583

(SI: Old Age Psychiatry, Post
Traumatic Stress Disorder, War
Veteran Psychiatry, Medico-
legal)

KAR, Prabal

Oasis Specialist Centre
106 Station Rd
SUNNYBANK 4109
Ph: 07 -3216-9033
Fax: 07 -3216-9183
Mob: 042-2661-991
Pgr: 07 -3830-5930
drkar@optusnet.com.au

PSYCHIATRY

Antenor House
16 South St
IPSWICH 4305
Ph: 07 -3281-4211
Fax: 07 -3271-1483

(SI: Adult Psychiatry, Medico-
legal)

(Lang: Hindi, Bengali)

KLUG, Bartholomew

Watkins Medical Centre
225 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-3535
Fax: 07 -3832-7167
A/H: 07 -3870-0177
bklug@bigpond.net.au

(SI: Adult Psychiatry, Forensic
Psychiatry, Medico-legal)

(Lang: Czech, German, Slovak)

LANGE, Diana*

RPP
Prince Charles Hospital
Mental Health Service
Rode Rd
CHERMSIDE 4032
Ph: 07 -3212-5706
Fax: 07 -3212-5707
Mob: 042-2000-969
Pgr: 1300-133-585 Ext: 77462
diana_lange@health.qld.gov.au

Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07 -3240-5656
Fax: 07 -3240-5657

(SI: Forensic Psychiatry,
Doctors' Health, Medical Ethics,
Medico-legal)

LARDER, Gary

Alexandra
Level 2 Suite 7
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-6450
Fax: 07 -3832-7016
Pgr: 1300-555-555 Ext: 23508
info@drgarylarder.com.au

(SI: Mood Disorders, Medico-
legal, Occupational Health &
Safety)

LAWRENCE AM, Joan M*

Watkins Medical Centre
225 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-6868
Fax: 07 -3832-1176
A/H: 07 -3202-6511
joanal@uq.edu.au

(SI: Doctors' Health, Medico-
legal)

MEDICO-LEGAL LISTING

PSYCHIATRY

LEONG, Michael G
Suite 10 2nd Floor
245 McCullough St
SUNNYBANK 4109
Ph: 07-3344-5588
Fax: 07-3344-1611
Mob: 040-2485-167
leongm1@bigpond.net.au

Medical Consultants Australia
Suite 26
101 Wickham Tce
BRISBANE 4000
Ph: 07-3839-4788
Fax: 07-3832-1629

(Sl: Alzheimer's/other
Dementia, General Psychiatry,
Geriatric Psychiatry, Medico-
legal)

(Lang: Cantonese)

LIKELY, Michael J

65 Eyre St
NORTH WARD 4810
Ph: 07-4772-2711
Fax: 07-4772-2834
mlikely@dodo.com.au

(Sl: Work Place Health & Safety,
Psychological Trauma, Medico-
legal)

LOVELL, Derek

Level 23
127 Creek Street
BRISBANE 4000
Ph: 07-3218-2716
(Sl: Medico-legal)

LJUBISAVLJEVIC, Vladan

New Farm Clinic
22 Sargent St
NEW FARM 4005
Ph: 07-3254-0639
Fax: 07-3254-0067
Mob: 042-2806-225

(Sl: Anxiety Disorders,
Depression, Medico-legal)

(Lang: Serbo-croatian)

MOYLE, Robert J

Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07-3832-6027
Fax: 07-3831-3404
Mob: 040-2237-391
Pgr: 1300-555-555 Ext: 21112
r.moyle@mailbox.uq.edu.au

University of Qld Health
Service
ST LUCIA 4067
Ph: 07-3365-6210
Fax: 07-3365-6222

PSYCHIATRY

Griffith Uni Health Services
Level 1 University House
Nathan Campus
NATHAN 4111
Ph: 07-3875-7299
Fax: 07-3875-6595

(Sl: Forensic Psychiatry, Major
Mental Disorders, Medico-legal)

MULHOLLAND, Peter J

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07-3832-5977
Fax: 07-3831-4156
Mob: 041-9684-160
A/H: 07-3300-5631
peterm@ecn.net.au

(Sl: Medico-legal)

MUNGOMERY, Quentin

Suite 5
Lyrebird Specialist Centre
Lyrebird St
BUDERIM 4556
Ph: 07-5477-6970
Fax: 07-5477-6378

(Sl: Occupational Psychiatry,
Post Traumatic Stress Disorder,
Rehabilitation Psychiatry,
Medico-legal)

NEW, Frank J

15 Wallace St
CHERMSIDE 4032
Ph: 07-3350-3633
Fax: 07-3256-4960
A/H: 07-3263-3277

VMO
Multi Disciplinary Pain Centre
Royal Brisbane Hospital
HERSTON 4029
(Sl: Doctors' Health, Medico-
legal, Pain Management)

O'CONNOR, Neville J

Retired
Ph: 07-4696-6399
Fax: 07-4696-6115
A/H: 07-4696-6399

(Sl: Child Psychiatry, Alcohol
& Drug Dep'd'cy/rehab,
Hypnotherapy, Medico-legal)

PERSLEY, Gary V

Level 3 Wesley Medical Centre
40 Chasely St
AUCHENFLOWER 4066
Ph: 07-3371-6534
Fax: 07-3870-5385
Mob: 041-9729-238
A/H: 07-3371-6534
gary_persley@nass.com.au

(Sl: General Psychiatry,
Psychotherapy, Medico-legal)

PSYCHIATRY

PRIOR, Nigel L

Suite 68 Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07-3832-6076
Fax: 07-3832-3993
A/H: 07-3835-9615
DRNPRIOR@bigpond.net.au

(Sl: Anxiety Disorders, Mood
Disorders, Alcohol & Other
Drug Problems, Medico-legal)

PURSSEY, Robert JS

Suite 26 - 29 / 2nd Floor
Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07-3839-4788
Fax: 07-3832-1629
rpurssey@bigpond.net.au

(Sl: Adult Psychiatry,
Psychotherapy, Medico-legal)

REDDAN, Jill G*

Suite 26 - 29
Silverton Place
101 Wickham Tce
BRISBANE 4000
Ph: 07-3831-7822
Fax: 07-3832-1629
jreddan@medconsultants.com.au

10 / 151 Cotlew St
ASHMORE 4214
Ph: 07-5539-4090

(Sl: Psychotherapy, Medico-
legal)

RICE, Graham I

Floor 10
Watkins Medical Centre
225 Wickham Tce
BRISBANE 4000
Ph: 07-3832-1920
Fax: 07-3832-1913
Mob: 041-6170-249
A/H: 07-3371-3146
riceonboyd@bigpond.com.au

(Sl: General Psychiatry, Medico-
legal, Pain Medicine, Pain
Management)

RICHARDS, Wilfred D

Room 205 Level 2
Northtown on the Mall
280 Flinders Mall
TOWNSVILLE 4810
Ph: 07-4771-2362
Fax: 07-4772-2359
psychrich@bigpond.com

Spring St
WEST END 4101
Ph: 07-3844-6355
Fax: 07-3844-6580

(Sl: Forensic Psychiatry, Medico-
legal)

MEDICO-LEGAL LISTING

PSYCHIATRY

ROGERS, John

Halberstater House
39 Fulham Rd
PIMLICO 4812
Ph: 07 -4725-7003
Fax: 07 -4725-7004
jrogers@austarnet.com.au

(SI: Psychosomatic Medicine,
Post-trauma Psychiatry, Medico-
legal)

ROWE, William SG

4611 The Parkway
SANCTUARY COVE 4212
Ph: 07 -5577-8895
Fax: 07 -5577-9438
Mob: 041-2977-693
A/H: 07 -5577-8895
billrowe@etiquette.com.au

(SI: Medico-legal)

SEKKAR, Chandran KP

Pine Rivers Private Hospital
Dixon St
STRATHPINE 4500
Ph: 07 -3881-7222
Fax: 07 -3881-0122
chandra_segkar@yahoo.com.au

(SI: Adult Psychiatry,
Neuropsychiatry, Medico-legal)

(Lang: Malayalam, Hindi)

STONES, Charles Michael

On Bundock
61 Bundock St
BELGIAN GARDENS 4810
Ph: 07 -4721-4847
Fax: 07 -4724-0872
drmichaelstones@bigpond.com

(SI: Medico-legal)

SUNDIN, Josephine J*

Coronation Place Specialist Ct
Suite 26
10 Benson St
TOOWONG 4066
Ph: 07 -3870-5700
Fax: 07 -3870-2469
Mob: 041-1692-304
A/H: 07 -3870-5700

(SI: Mood Disorders,
Psychotherapy, Postpartum
Disorders, Medico-legal)

THOMPSON, Jeffery D

RPP
Baillie Henderson Hospital
Hogg St
TOOWOOMBA 4350
Ph: 07 -4699-8635

PSYCHIATRY

Armstrong Clinic
Toowoomba Base Hospital
TOOWOOMBA 4350
Ph: 07 -4616-6287

(SI: Forensic Medicine, Medico-
legal)

UNWIN, Alston M

The Conolly Clinic
1220 Creek Rd
CARINA 4152
Ph: 07 -3843-5430
Fax: 07 -3843-5460
A/H: 07 -3371-1531
Pgr: 1300-555-555 Ext: 236
alston.unwin@affinityhealth.com.au

(SI: Psychotherapy, Psychiatry,
Post-trauma Psychiatry, Medico-
legal)

**VENUGOPALAN,
Vadakkemangalam**

6 / 9 Scott St
TOOWOOMBA 4350
Ph: 07 -4632-2800
Fax: 07 -4632-3941

(SI: Brain Injury, Medico-legal)

(Lang: Malayalam)

WHITEFORD, Harvey A

RPP
The University of Queensland
Toowong Private Hospital
PO Box 822
TOOWONG 4066
Ph: 07 -3871-1037
Fax: 07 -3371-1289
harveyw@
toowongprivatehospital.com.au

(SI: Psychiatry, Medico-legal)

WOOLRIDGE, James B

PO Box 155
ATHERTON 4883
Ph: 07 -4091-7355
Fax: 07 -4091-7455
Mob: 040-8799-378
tabpsych@cyberwizards.com.au

(SI: Cross Cultural Psychiatry,
Forensic Psychiatry, Medico-
legal)

PUBLIC HEALTH

LANGE, Diana*

RPP
Prince Charles Hospital
Mental Health Service
Rode Rd
CHERMSIDE 4032
Ph: 07 -3212-5706
Fax: 07 -3212-5707
Mob: 042-2000-969
Pgr: 1300-133-585 Ext: 77462
diana_lange@health.qld.gov.au

Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07 -3240-5656
Fax: 07 -3240-5657

(SI: Forensic Psychiatry,
Doctors' Health, Medical Ethics,
Medico-legal)

MEDICO-LEGAL LISTING

REHABILITATION MEDICINE

CHAN, Wilbur

RPP
Prince Charles Hospital
Dept of Geriatric & Rehab Med
Rode Rd
CHERMESIDE 4032
Ph: 07-3212-5846
Fax: 07-3212-5565
Mob: 042-2002-439
A/H: 07-3350-8111
wilbur_chan@health.qld.gov.au

Multidisciplinary Pain Centre
Royal Brisbane Hospital
Herston Rd
HERSTON 4006
Ph: 07-3636-8111

Rehabilitation Unit
Canossa Private Hospital
169 Seventeen Mile Rocks Rd
OXLEY 4075
Ph: 07-3717-5555
Fax: 07-3375-3860

(Sl: Amputee Rehabilitation,
Medico-legal, Musculoskeletal
Medicine, Neurorehabilitation,
Occupational Rehabilitation,
Pain Medicine)

(Lang: Cantonese, Mandarin)

HILL, Vernon

Retired
Eden Private Health Care
50 Maple St
COOROY 4563
Ph: 07-5447-6022
Fax: 07-5447-7592
Mob: 040-5134-078
vhill@tpg.com.au

(Sl: Medico-legal, Spinal Injuries)

HIRSCHFELD, Keith E

Ballou Chambers
121 Wickham Tce
BRISBANE 4000
Ph: 07-3831-1449
Mob: 041-9781-778

(Sl: Geriatrics, Medico-legal,
Rehabilitation Medicine)

MONRO, John D

RPP
11 Fulham Rd
PIMLICO 4812
Ph: 07-4775-3655
Fax: 07-4775-6155
A/H: 07-4775-2334
dr_j_monro@bigpond.com

(Sl: Cardiovascular Physiology,
Medico-legal, Occupational
Rehabilitation, Physical
Medicine)

REHABILITATION MEDICINE

POWELL, Glenda J*

RPP
Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07-3240-2312
Fax: 07-3240-2900
A/H: 07-3848-1976
(Sl: Alzheimer's/other Dementia,
Geriatrics, Medico-legal, Stroke
Illness Management)

WATSON, Richard RD

105 Bundock St
BELGIAN GARDENS 4810
Ph: 07-4771-3084
Fax: 07-4772-3228
A/H: 07-4778-5238

(Sl: Medico-legal,
Musculoskeletal Medicine, Pain
Management)

RENAL MEDICINE

ROW, P Graham

Watkins Medical Centre
225 Wickham Tce
BRISBANE 4000
Ph: 07-3839-6721
Fax: 07-3832-6116
Pgr: 07-3830-0181
grahamrow@bigpond.com

(Sl: Medico-legal)

MEDICO-LEGAL LISTING

RHEUMATOLOGY

DE JAGER, Julien P

22 Spendelove Ave
SOUTHPORT 4215
Ph: 07 -5532-9666
Fax: 07 -5532-3211
Mob: 041-8987-917
A/H: 07 -5530-5530
dejager@ozemail.com.au
(SI: Medico-legal)
(Lang: Afrikaans, Dutch)

DOUGLAS, William AC

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-2437
Fax: 07 -3831-4207
A/H: 07 -3378-6522
w_b_doug@bigpond.net.au
(SI: Diving Medicine, Medico-legal)
(Lang: French)

KEVAT, Sumant G

Suite 12
Strathpine Specialist Centre
28 Dixon St
STRATHPINE 4500
Ph: 07 -3889-7990
Fax: 07 -3889-7991
Mob: 041-8939-053
A/H: 07 -3378-7385
sumant_kevat@health.qld.gov.au
Caboolture Private Hospital
McKean St
CABOOLTURE 4510
Ph: 07 -3889-7990
North West Medical Centre
125 Flockton St
EVERTON PARK 4053
Ph: 07 -3353-3311
Fax: 07 -3353-0790

Peninsula Specialist Centre
George St
KIPPA-RING 4021
Ph: 07 -3889-7990

Ballou Chambers
121 Wickham Tce
BRISBANE 4000
Ph: 07 -3889-7990

Aspley Specialist Centre
Gympie & Zillmere Rds
ASPLEY 4034
Ph: 07 -3263-5844
Fax: 07 -3263-6451

(SI: Medico-legal,
Rheumatology)
(Lang: Gujarati, Hindi)

RHEUMATOLOGY

KLESTOV, Alexander C

RPP
Rheumatology
Royal Brisbane Hospital
Herston Rd
HERSTON 4029
Ph: 07 -3636-7893
Fax: 07 -3636-1474
Mob: 041-9709-317
Pgr: 07 -3636-8111 Ext: 58914
alex_klestov@health.qld.gov.au
Bundaberg Base Hospital
Bourbon St
BUNDABERG 4670
Ph: 07 -4150-2120
Fax: 07 -4150-2129
Rockhampton Base Hospital
Canning St
ROCKHAMPTON 4700
Ph: 07 -4920-6330
Fax: 07 -4920-6301

Private Practice Specialist Cl.
Royal Brisbane Hospital
Herston Rd
HERSTON 4029
Ph: 07 -3253-8346

(SI: In'flmtry Connect. Tissue
Dis, Medico-legal, General
Rheumatology)
(Lang: Russian)

VECCHIO, Phillip C

RPP
Director of Rheumatology
Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07 -3240-2296
Fax: 07 -3240-7131
Pgr: 07 -3240-2111 Ext: 346
(SI: Medico-legal)

WEBB, John

Pacific Private Clinic
5th Floor
123 Nerang St
SOUTHPORT 4215
Ph: 07 -5545-3677
Fax: 07 -5545-3699
Mob: 041-9656-693
A/H: 07 -5545-3677
rheumatic@bigpond.com

QML Rooms
Hornsby Rd
BRIBIE ISLAND 4507
Ph: 07 -5545-3677
Fax: 07 -5545-3699

Grand Plaza Specialist Centre
S+N Rooms 4/1 Grand Plaza Dr
BROWNS PLAINS 4118
Ph: 07 -5545-3677
Fax: 07 -5545-3699

RHEUMATOLOGY

Specialist Centre
105-107 City Rd
BEENLEIGH 4207
Ph: 07 -5545-3677
Fax: 07 -5545-3699

Mermaid Central Medical
Centre
2431 Gold Coast Highway
Cnr William St
MERMAID BEACH 4218
Ph: 07 -5545-3677
Fax: 07 -5545-3699
(SI: Medico-legal,
Rheumatology)

MEDICO-LEGAL LISTING

SLEEP MEDICINE

ALLEN, Roger KA

Suite 46 Level 4
Wesley Medical Centre
40 Chasely St
AUCHENFLOWER 4066
Ph: 07 -3719-5577
Fax: 07 -3719-5177
Mob: 041-7629-816
A/H: 041-7629-816
rogerallen@internode.on.net
www.sarcoidosis.com.au

(Sl: Sleep Disorders, Asbestos
Related Lung Diseases,
Interstitial Lung Disease,
Medico-legal, Sarcoidosis)
(Lang: French)

BROWN, Ian G

Ballou Chambers
121 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-1717
Fax: 07 -3832-1070
Mob: 041-1517-513
igbrown@powerup.com.au

Strathpine Medical Centre
Dixon St
STRATHPINE 4500
Ph: 07 -3881-0144
Fax: 07 -3881-0411

Aspley Specialist Centre
Cnr Zillmere & Gympie Rds
ASPLEY 4034
Ph: 07 -3263-5844
Fax: 07 -3263-6451

North West Specialist Centre
125 Flockton St
EVERTON PARK 4053
Ph: 07 -3353-3311
Fax: 07 -3353-0790

Flinders Place
14 Brisbane St
IPSWICH 4305
Ph: 07 -3812-5166
Fax: 07 -3282-7440

(Sl: Asthma, Bronchoscopy,
Medico-legal, Sleep Medicine)

CORBETT, John L

Consultant Neurologist
Credentialled Sleep Physician

SNORE AUSTRALIA
Diagnostic Polysomnography
and CPAP Titration Studies
Locations: Caboolture, City,
Cleveland, Ipswich, Logan,
Tweed opening soon.
Phones 5557 0055, 1800 0
SNORE
www.snore.net.au to download
referral form

SLEEP MEDICINE

GOLD COAST SLEEP
DISORDERS CENTRE
Diagnostic Polysomnography
and CPAP Titration Studies
Video and long term monitor
EEG in conjunction with sleep
study
159 Nerang Street, Southport
Phone 5527 0555
Fax 5531 1277
www.corbett.com.au to
download referral form.

HUNDLOE, Justin

Level 3
Sandford Jackson Building
30 Chasely St
AUCHENFLOWER 4066
Ph: 07 -3870-4133
Fax: 07 -3870-3212
Mob: 041-8796-975
A/H: 07 -3862-1946

Moreton Centre
5 Violet St
REDCLIFFE 4020
Ph: 07 -3870-4133
Fax: 07 -3284-3820

Caboolture Specialist Centre
15 Hasking St
CABOOLTURE 4510
Ph: 07 -5495-2077
Fax: 07 -5498-9618

(Sl: Medico-legal, Pulmonary
Malignancy, Respiratory
Medicine, Sleep Apnoea, Sleep
Medicine)

MCKEON, James L

RPP
Suite 17 Level 1 Medical Centre
Holy Spirit Northside Hospital
627 Rode Rd
CHERMSIDE 4032
Ph: 07 -3350-4111
Fax: 07 -3350-5100
Mob: 041-2045-193
A/H: 07 -3216-4378
Pgr: 07 -3309-1175
mckeonjl@bigpond.com

(Sl: Sleep Disorders,
Bronchoscopy, Medico-legal,
Thoracic Medicine)

RICE-MCDONALD, Glenn G

Mater Medical Centre
Suite 22 Level 6
293 Vulture St
SOUTH BRISBANE 4101
Ph: 07 -3844-9176
Fax: 07 -3844-5624

(Sl: Sleep Disorders, Asthma
During Pregnancy, Lung Cancer,
Medico-legal)

SPORTS PHYSICIAN

LOCKE, Austin S

Sunnybank Sports Medicine Ctr
6 Woodsiana St
ROBERTSON 4109
Ph: 07 -3345-5777
Fax: 07 -3345-2374
sbsmc@bigpond.net.au

Dynamic Physiotherapy
Cnr Shore & Wynards Sts
CLEVELAND 4163
Ph: 07 -3286-9444

Chandler Sport & Rehab
Sleeman Complex
Tilley Rd
CHANDLER 4155
Ph: 07 -3823-2400

(Sl: Medico-legal, Sports Injuries)

MEDICO-LEGAL LISTING

THORACIC MEDICINE

ALLEN, Roger KA

Suite 46 Level 4
Wesley Medical Centre
40 Chasely St
AUCHENFLOWER 4066
Ph: 07-3719-5577
Fax: 07-3719-5177
Mob: 041-7629-816
A/H: 041-7629-816
rogerallen@internode.on.net
(Sl: Sleep Disorders, Asbestos
Related Lung Diseases,
Interstitial Lung Disease,
Medico-legal, Sarcoidosis)
(Lang: French)

ARMSTRONG, John G

RPP
Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Ph: 07-3240-2712
Fax: 07-3240-6170
john_armstrong@health.qld.gov.au
Qld Sleep Disorders Unit
Mater Medical Centre
SOUTH BRISBANE 4101
Ph: 07-3846-7955
Fax: 07-3217-2523
49 Laurel Ave
CHELMER 4068
Ph: 07-3240-2111
Fax: 07-3240-5899
(Sl: Sleep Disorders, Asthma,
Medico-legal)

BROWN, Ian G

Ballow Chambers
121 Wickham Tce
BRISBANE 4000
Ph: 07-3832-1717
Fax: 07-3832-1070
Mob: 041-1517-513
igbrown@powerup.com.au
Strathpine Medical Centre
Dixon St
STRATHPINE 4500
Ph: 07-3881-0144
Fax: 07-3881-0411
Aspley Specialist Centre
Cnr Zillmere & Gympie Rds
ASPLEY 4034
Ph: 07-3263-5844
Fax: 07-3263-6451
North West Specialist Centre
125 Flockton St
EVERTON PARK 4053
Ph: 07-3353-3311
Fax: 07-3353-0790

THORACIC MEDICINE

Flinders Place
14 Brisbane St
IPSWICH 4305
Ph: 07-3812-5166
Fax: 07-3282-7440
(Sl: Asthma, Bronchoscopy,
Medico-legal, Sleep Medicine)

EDWARDS, Robert L

Wesley Medical Centre
40 Chasely St
AUCHENFLOWER 4066
Ph: 07-3870-4511
Fax: 07-3371-3677
Mob: 040-7190-779
A/H: 07-3289-1384
Pgr: 07-3862-1946

Pioneer Valley Hospital
Norris Rd
MACKAY NORTH 4740
Ph: 07-4942-1144
91 Clara St
WYNNUM 4178
Ph: 07-3396-1177

Caboolture Specialist Centre
15 Hasking St
CABOOLTURE 4510
Ph: 07-5495-2077
(Sl: Sleep Disorders, Chronic
Airflow Limitation, Medico-legal,
Lung Malignancy, Occupational
Lung Disease)

HUNDLOE, Justin

Level 3
Sandford Jackson Building
30 Chasely St
AUCHENFLOWER 4066
Ph: 07-3870-4133
Fax: 07-3870-3212
Mob: 041-8796-975
A/H: 07-3862-1946
Moreton Centre
5 Violet St
REDCLIFFE 4020
Ph: 07-3870-4133
Fax: 07-3284-3820
Caboolture Specialist Centre
15 Hasking St
CABOOLTURE 4510
Ph: 07-5495-2077
Fax: 07-5498-9618
(Sl: Medico-legal, Pulmonary
Malignancy, Respiratory
Medicine, Sleep Apnoea, Sleep
Medicine)

THORACIC MEDICINE

MCKEON, James L

RPP
Suite 17 Level 1 Medical Centre
Holy Spirit Northside Hospital
627 Rode Rd
CHERMESIDE 4032
Ph: 07-3350-4111
Fax: 07-3350-5100
Mob: 041-2045-193
A/H: 07-3216-4378
Pgr: 07-3309-1175
mckeonjl@bigpond.com
(Sl: Sleep Disorders,
Bronchoscopy, Medico-legal,
Thoracic Medicine)

MORRISON, Stephen C

RPP
Royal Brisbane Hospital
Herston Rd
HERSTON 4029
Ph: 07-3636-7631
Fax: 07-3636-5651
Mob: 041-9720-719
A/H: 07-3202-6095
Pgr: 07-3636-8111 Ext: 59359
stephen_morrison@health.qld.gov.au
(Sl: Sleep Disorders,
Breathalyser Testing, Medico-
legal, Hyperbaric/underwater
Medicine)

OLIVER, William A

Brisbane Clinic
79 Wickham Tce
BRISBANE 4000
Ph: 07-3270-4580
Fax: 07-3270-4559
Mob: 041-1235-518
A/H: 07-3862-1946
Pgr: 1300-555-555 Ext: 45920
w.a.oliver@bigpond.com
(Sl: Asthma, Medico-legal,
Occupational Medicine)

RICE-MCDONALD, Glenn G

Mater Medical Centre
Suite 22 Level 6
293 Vulture St
SOUTH BRISBANE 4101
Ph: 07-3844-9176
Fax: 07-3844-5624
(Sl: Sleep Disorders, Asthma
During Pregnancy, Lung Cancer,
Medico-legal)

MEDICO-LEGAL LISTING

UROLOGY

CARTMILL, Ross A

Morris Towers
149 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-0895
Fax: 07 -3832-2557
Mob: 041-2756-299
r.cartmill@mailbox.uq.edu.au

William St
BEAUDESERT 4285

Corinda Specialist Centre
667 Oxley Rd
CORINDA 4075

Belmont Specialist Centre
1202 Creek Rd
CARINA HEIGHTS 4152

Professional Centre
686 Sherwood Rd
SHERWOOD 4075

Kenmore Specialist Centre
2081 Moggill Rd
KENMORE 4069

(Sl: Calculus Disease,
Impotence, Medico-legal,
Incontinence)

HEATHCOTE, Peter S

Morris Towers
149 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-1484
Fax: 07 -3832-2557
Mob: 041-1472-846
A/H: 07 -3397-3188
cotesp@bigpond.net.au

Greenslopes Private Hospital
Newdegate St
GREENSLOPES 4120
Ph: 07 -3832-1484

Gap Village Spec. Centre
Waterworks Rd
THE GAP 4061
Ph: 07 -3832-1484

(Sl: Medico-legal, Prostate
Disease, Stones)

STENING, Stephen G

Suite 4b Level 7
Brisbane Private Hospital
259 Wickham Tce
BRISBANE 4000
Ph: 07 -3831-5964
Fax: 07 -3834-6268
Mob: 040-9500-921
A/H: 07 -3268-3421
sstening@bigpond.net.au

Holy Spirit Hospital Northside
Rode Rd
CHERMSIDE 4032
Ph: 07 -3831-5964

UROLOGY

Cadogan House
1382 Sandgate Rd
NUNDAH 4012
Ph: 07 -3266-1172

(Sl: Medico-legal, Percutaneous
Renal Surgery)

VASCULAR SURGERY

BLACKFORD, John

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3839-3152
Fax: 07 -3839-0710
A/H: 07 -3356-8013

(Sl: Medico-legal, Vascular
Surgery)

LOVE, Arthur

Greenslopes Private Hospital
Newdegate St
GREENSLOPES 4120
Ph: 07 -3343-5593
Fax: 07 -3349-6385
A/H: 07 -3343-5593

Level 3 Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3343-5593

91 Clara St
WYNNUM 4178
Ph: 07 -3343-5593

McCullough Specialist Centre
259 McCullough St
SUNNYBANK 4109
Ph: 07 -3343-5593

45 Wynyard St
CLEVELAND 4163
Ph: 07 -3286-2160

(Sl: Medico-legal)

MAGEE, H Reginald

Retired
63 Buena Vista Ave
CORPAROO 4151
Mob: 041-0605-231
A/H: 07 -3398-7589
reginaldm@bigpond.com

(Sl: Medico-legal, Vascular
Surgery)

MELLICK, Selim A

Retired
Lindismead
34 Towers St
ASCOT 4007
Mob: 041-1842-366
mellick@optustnet.com.au

(Sl: Medico-legal, Vascular
Surgery)

QUINN, John M

Alexandra
201 Wickham Tce
BRISBANE 4000
Ph: 07 -3832-4629
Fax: 07 -3832-4130
A/H: 07 -3262-2798
Pgr: 1300-555-555 Ext: 18618
drjquinn@bigpond.net.au

VASCULAR SURGERY

Wesley Vascular Centre Level 2
Sandford Jackson Building
Chasely St
AUCHENFLOWER 4066
Ph: 07 -3377-5900
Fax: 07 -3377-5901

Mater Medical Centre
Jessie St
ROCKHAMPTON 4700
Ph: 07 -3832-4629
Fax: 07 -3832-4130

(SI: Medico-legal, Carotid Artery
Surgery, Endovascular Surgery,
Lower Limb Revascularization)

WOODRUFF, Peter WH
Dept of Vascular Surgery
Princess Alexandra Hospital
Ipswich Rd
WOOLLOONGABBA 4102
Mob: 041-8871-244
A/H: 07 -3379-8791
peter.woodruff@surgeons.org
(SI: Medico-legal)



AMA Queensland
88 L'Estrange Terrace, Red Hill Qld 4059
PO Box 123, Red Hill Qld 4059
Tel (07) 3872 2222 • Fax (07) 3856 4727
www.amaq.com.au