



Department of Health
Government of Western Australia

**Terms and Conditions of the
INDEMNITY
for
NON-SALARIED MEDICAL PRACTITIONERS**

effective from 1 August 2013

QUESTIONS AND ANSWERS

LEGAL & LEGISLATIVE SERVICES

The current version of this document and other information is available at our website: <http://www.health.wa.gov.au/indemnity/>

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DEFINITIONS

For the purpose of this document:

Application means the application for the Medical Services Contract.

Board means the Minister for Health in his incorporated capacity as,

- a) the board of the hospitals formerly comprised in the Metropolitan Health Service Board;
 - b) the board of the hospitals formerly comprised in the Peel Health Service;
 - c) the WA Country Health Service,
- under section 7 of the *Hospitals and Health Services Act 1927* (WA).

Hospital means a public hospital or public health care institution or any other place where medical services are provided with the express permission of the Board.

Indemnity means the indemnity as set out in the “Terms and Conditions of the Indemnity for Non-Salaried Medical Practitioners effective from 1 August 2013”.

MDO means a Medical Defence Organisation.

Medical Services Contract means a Medical Services Agreement, a Radiology contract or a General Medical Services contract under which medical services are to be delivered to a public hospital or health service.

Non-Salaried Medical Practitioners (NSMPs) means an independent medical practitioner working under a Medical Services Contract and holding current Clinical Privileges (‘Scope of Clinical Practice’) with a public hospital or health service. NSMPs include:

- Visiting Medical Practitioners (VMPs) paid on a fee-for-service basis and working as a Nominated Medical Practitioner under a Medical Service Agreement;
- Medical Practitioners paid on a daily/Sessional or other (non-salaried) arrangement who are working as a Nominated Medical Practitioner under a Medical Service Agreement;
- Medical Practitioners working under a contract or tender specifying ‘General Medical Services and who are paid on a daily/Sessional or other arrangement, and
- Radiologists working under contract to a health service.

Terms and Conditions means the “Terms and Conditions of the Indemnity for Non-Salaried Medical Practitioners effective from 1 August 2013” which can be found at <http://www.health.wa.gov.au/indemnity/>.

WACHS means WA Country Health Service.

CHANGES

1. *Have the 'Terms and Conditions' changed from the 2010 version?*

Answer:

Yes, two material changes have been made to the Indemnity:

- As a NSMP you do not need to make an application in order to be covered by the Indemnity, and
- the Indemnity is linked to your Medical Services Contract and covers the same period as that Contract.

If you have not previously worked as a NSMP in WA Health your Indemnity cover is effective from the date your application for, or under, a Medical Services Contract is approved.

If you are already working as a NSMP you will have applied for cover under the "*Terms and Conditions of the Indemnity for Non-Salaried Medical Practitioners, effective from 1 July 2010*". That indemnity ceases on 30 September 2013 and is replaced by the new version. Your Indemnity will continue seamlessly and there is no need for you to take any action.

Other than removing the previous need to apply for the indemnity, and linking its duration to your Medical Services Contract, no material changes have been made to the terms and conditions.

As in previous years, unless you are engaged under a current and valid Medical Services Contract the Indemnity is void and of no force and effect.

2. *What specific changes have been made to the 'Terms and Conditions' of the Indemnity?*

The changes made to the Terms and Conditions are as follows:

- cover page, "July 2010 - 30 September 2013" changed to "1 August 2013"
- page 1, "July 2010" changed to "August 2013"
- page 1, clause 1.2, the sentence

"The Indemnity further does not apply where you deliberately provided materially false or misleading information in any Application for this indemnity"

is replaced by

"The Indemnity further does not apply where you deliberately provided materially false or misleading information in your Application"

- page 2, clause 3, "**Condition Precedent**", the sentence

"Notwithstanding that the Application for the Non-Salaried Medical Practitioners' Indemnity" is signed by both Parties, unless you are providing Medical Services under a current and valid Contract for Medical Services then the Indemnity is void and of no force and effect."

is replaced by

"Unless you are providing Medical Services under a current and valid Contract for Medical Services then the Indemnity is void and of no force and effect"

- page 4, clause 11, “**Notices**”, the words
“set out on the “Application for the Non-Salaried Medical Practitioners’ Indemnity”, or such other addresses or facsimile numbers notified by the Parties from time to time.”
are replaced by
“set out in your Application or such other addresses or facsimile numbers notified by the Parties from time to time.”
- page 4, clause 18 “**Costs**” is deleted in its entirety
- page 6, clause 22 (previously clause 23) “**Holding Over**”, all the text in the clause is replaced with the following
“Where, in accordance with the “Holding Over” provisions of the MSA or any other valid Contract for Medical Services you continue to provide Medical Services with the consent of the Board, these Terms and Conditions will continue to operate except that the Indemnity may be terminated at any time by either party in accordance with the provisions of the MSA or any other Contract for Medical Services, or otherwise by the Minister giving you 3 month’s written notice. “
- page 7 clause 23 “**Definitions**”, the following text has been inserted:

Application means the application for the Contract for Medical Services

Board means the Minister for Health in his incorporated capacity as,

- d) the board of the hospitals formerly comprised in the Metropolitan Health Service Board;
- e) the board of the hospitals formerly comprised in the Peel Health Service;
- f) the WA Country Health Service,
under section 7 of the *Hospitals and Health Services Act 1927* (WA)

The definition of “**Cessation Date**” is amended by replacing
“30 September 2013”

with the words

“the date on which you cease to provide Medical Services under the Contract for Medical Services”

The definition of “**Effective Date**” is amended by replacing the words

“means the later of 1 July 2010 or the date of signing of the Application by the Minister”

with the words

“means the date on which you commence to provide Medical Services under the Contract for Medical Services”

The definition of “**Hospital**” is amended by inserting the words “under the control or direction of the Board” immediately following the words “health care institution”. The word “Minister” is replaced by the word “Board”.

The definition of “**Medical Board**” is amended by replacing all the words with
“**Medical Board** means the Medical Board of Australia and State Administrative Tribunal.”

The definition of “Minister” is amended to read: “**Minister** means the Minister for Health and, where the context requires, the Minister for Health in his incorporated capacity as the Board.”

The following text is inserted following the definition of “Minister”:

“MSA means

- (a) the Metropolitan Health Services Medical Services Agreement 2013, or its replacement; or
- (b) the WA Country Health Service Medical Services Agreement 2013, or its replacement.”

APPLYING FOR THE INDEMNITY

3. *Who is eligible for the Indemnity?*

Answer:

Medical practitioners who are nominated under a current and valid contract to supply medical services at a public hospital or health service are eligible for the Indemnity.

The medical services contract may take the form of a:

- Medical Services Agreement (MSA) under which a fee-for-service doctor (VMP) is engaged;
- Radiology contract covering the provision of radiology and imaging services; or
- General Medical Services contract covering the provision of specified medical services.

4. *When does the Indemnity take effect?*

Answer:

The Indemnity comes into effect when you commence providing medical services under your Medical Services Contract and terminates when you cease to provide medical services under that Contract.

5. *Do I have to complete and sign an application form for the Indemnity to apply?*

Answer:

No. Refer to Question 1.

6. *Can I temporarily assign the Indemnity to another medical practitioner?*

Answer:

No. Your Indemnity is linked to your Medical Services Contract and cannot be transferred or assigned. Each Nominated Medical Practitioner (ie working under a MSA) and holding Clinical Privileges is automatically covered by the Indemnity. There are no circumstances under which the Indemnity can be assigned to another medical practitioner.

If you have another person assisting you in providing medical services (as an assistant or for periods of absence) then each of these individuals must have Clinical Privileges and be working under their Medical Services Contract.

SCOPE OF INDEMNITY

7. *What is the Indemnity?*

Answer:

The Indemnity is a formal contract between the health service and an eligible medical practitioner, whereby and subject to the Terms and Conditions the Minister undertakes to indemnify the eligible medical practitioner for any claims of negligence, omission or trespass that may arise from the treatment of public and, in country areas, private patients, in public hospitals or other agreed health care institutions.

8. *Can the terms and conditions of the Indemnity be varied?*

Answer:

Yes, there are three ways in which the terms and conditions can be varied:

(i) Clause 16 “Supervening Legislation” states that

Any present or future legislation which operates to vary an obligation, right, power or remedy of any Party or any person in connection with these Terms and Conditions is excluded except to the extent that its exclusion is prohibited or rendered ineffective at law.

This clause looks to quarantine the Indemnity from future legislation that may effect its operation. However, the clause acknowledges that, although extremely unlikely, future legislation may override that protection.

(ii) Clause 17 “Variation” states that

No modification, amendment or other variation of these Terms and Conditions shall be valid or binding unless made in writing duly executed by both Parties.

In other words, the Indemnity that applies to your current Medical Services Contract cannot be changed unless you and the Minister for Health (or delegate) agree to the proposed change.

(iii) Finally, the terms and conditions of the Indemnity apply to your Medical Services Contract through to the cessation date of that Contract. If you commence working under a new or subsequent Contract, a new Indemnity will come into effect and the terms and conditions of that new Indemnity may vary from those applying to your current Contract.

9. *Does the Indemnity meet the Medical Board of Australia’s Professional Indemnity Insurance Arrangements Registration Standard?*

Answer:

Yes. Under your Medical Services Contract you are indemnified by the Minister for Health in accordance with the “*Terms and Conditions of the Indemnity for Nominated Medical Practitioners, effective from 1 August 2013*”. The Indemnity satisfies the Professional Indemnity Insurance Arrangements Registration Standard of the Medical Board and applies to the Medical Services you provide to the Board.

10. Am I indemnified for services other than those set out in my Medical Services Contract?

Yes. The definition of “Medical Services” in Clause 23 “Definitions and Interpretation” of the Indemnity sets out the various services covered. In addition to services provided in accordance with your Medical Services Contract the Indemnity covers, amongst other things, participation in authorised clinical governance activities such as medical management committees, medical advisory committees, clinical credentialing/apPOINTMENTS processes and clinical performance disciplinary/apPEAL processes.

Note also that Clause 7 of the Indemnity “1990 Guidelines” states:

The Guidelines relevant to Ministers and Officers involved in legal proceedings tableD in the Legislative Council on 10 July 1990 continue to apply in respect of legal proceedings, enquiries etc. not the subject of these Terms and Conditions.

In essence, the 1990 Guidelines provides that persons who are subjected to a liability in consequence of their performing a function on behalf of government will be indemnified if their conduct was in good faith and reasonable and in the discharge of a function or task requested by the Minister for Health or the public authority.

If you provide the Board with services (other than those set out in your Medical Services Contract) you may qualify for an indemnity in accordance with the 1990 Guidelines. Each application for an indemnity under the Guidelines is assessed and determined on a case-by-case basis. That said, it is to be emphasised that the issue of indemnification is approached in a common sense, practical way, recognising the need to provide the fullest appropriate support and protection to persons discharging government functions - including, of course, medical practitioners working in good faith to enhance the safety and quality of the State’s health services.

11. Will the Indemnity specify what procedures I am covered for?

Answer:

No. The Indemnity provides medical indemnity cover for all procedures approved under your Clinical Privileges or Medical Services Contract.

You will also have medical indemnity cover for the procedures which in your clinical judgement are necessary when responding to an emergency even though they may not be within the scope of your Clinical Privileges or Medical Services Contract.

12. Does the Indemnity cover pre-operative anaesthetic examination of patients in my rooms?

Answer:

Generally pre-operative anaesthetic examinations are to be performed in the hospital.

Where clinically required and you have approval from the health service to perform pre-operative anaesthetic examinations in your rooms, and you are entitled to receive payment from the health service for the examination, then you will be covered under the Indemnity.

13. What happens if a patient being treated in a public hospital changes their status - for example, from public to private?

Answer:

If the incident giving rise to the claim occurred whilst the patient was a public patient in a public hospital, then the Indemnity will provide you with medical indemnity cover.

NSMPs working in country areas are covered by the Indemnity regardless of whether the patient is public or private. However, if you are working in a metropolitan public hospital and an incident giving rise to a claim occurred when the patient was not a public patient, then the Indemnity does not apply.

In complex circumstances where the status of the patient is problematic the Department of Health and your MDO or Insurer will determine an apportionment of cover.

14. Does the Indemnity cover medical practitioners for the inpatient component of obstetrics cases only?

Answer:

Yes. In general, the Indemnity covers only the period the patient is admitted to the public hospital. One exception, as set out in Question 19 is that the Indemnity covers obtaining consent regardless of where this occurs. In terms of pre-admission antenatal and post-discharge postnatal care, it is recommended that the medical practitioner maintain his or her own private cover.

15. Does the Indemnity cover me for advice I give over the telephone?

Answer

Yes, provided that:

- you hold appropriate Clinical Privileges to provide medical services at the hospital to which you are providing advice, and
- that you have approval to provide telephone advice, and
- your conduct does not fall within the exclusions set out in the Terms and Conditions of the Indemnity (Clause 1.2).

16. Am I covered if I treat a patient in an emergency?

Answer:

Yes, if you are in a public hospital or health service or other approved location and provide treatment in an emergency the Indemnity provides medical indemnity cover to you. Note that the *Civil Liability Amendment Act 2003* provides protection for 'good samaritan' acts undertaken in emergency situations, including outside of the hospital.

17. Can I say sorry without being in breach of the Indemnity?

Answer:

Yes, Clause 4.4(a)(i) of the Indemnity states that "... you may make a statement of regret or sorrow". Hence, the Indemnity allows you to say sorry to a patient or a person who has submitted a complaint, or may submit a complaint and who may or may not intend to take legal action.

A distinction is made between an apology and an admission of liability. The act of saying sorry or expressing regret does not in and of itself constitute an admission of liability. The *Civil Liability Amendment Act 2003* provides that an apology by or on behalf of a person will not constitute an admission of fault or liability, and will not be relevant to the determination of liability, in connection with civil liability of any kind.

Consistent with clauses in insurance policies, an admission of liability is not permitted under the terms of the Indemnity. Clause 4.4(a)(i) provides that “you ... must not make any admission of liability in respect of any Claim of Potential Claim ...” and that if you breach this requirement “... the Indemnity may be withdrawn by the Minister ...”. The exercise of that authority is subject to Clause 21 which sets out the review protocol to be followed in such a circumstance.

Importantly, possible misconceptions concerning the potential to breach Clause 4.4.(a)(i) in the context of clinical incident reporting and investigation (such as AIMS), or open disclosure to the patient’s family, are responded to in a letter, dated 16 November 2012, from the Minister to Health to the President of the AMA (WA). The letter can be accessed on the website <http://www.health.wa.gov.au/indemnity/nonsalaried/index.cfm>. In that letter, the Minister states that “the State’s medical indemnity cover will not be jeopardised by statements made by a doctor in the course of reporting activities, nor where the doctor has in good faith, acted in accordance with open disclosure principles”.

18. I hold non-procedural private medical indemnity cover only. Will I be covered for treating MVIT and workers’ compensation cases in a public hospital?

Answer:

If you are working in country public hospitals, the Indemnity applies to all categories of patients that you are eligible to treat. If you are working in metropolitan public hospital then, unless you have assigned your private practice income or billing rights for the treatment of those non-public patients to the hospital, you are covered for public patients only.

19. Does the Indemnity cover me for obtaining ‘consent’ in my private rooms?

Answer

Yes. The Indemnity covers obtaining the consent to any treatment or procedural intervention provided to patients subsequently admitted to a public hospital as a public patient (and private patients in WACHS). Hence the Indemnity applies (subject to the specified exclusions) in situations where a patient is treated in a public hospital and that patient makes a claim alleging that, when seeing the patient in a private capacity prior to treatment, the medical practitioner:

- failed to obtain the patient’s consent to the treatment; and/or
- failed to advise the patient appropriately as to the risks associated with the treatment.

The consent process can take place in the public hospital setting, the private rooms of the practitioner or elsewhere. The Indemnity applies regardless of whether the only allegation made against the medical practitioner is that of ‘failure to warn’ or ‘failure to obtain consent’.

In relation to obtaining consent, Clause 8(c)(v) of the Indemnity requires you to:

“provide patients with an explanation of the proposed or planned treatment or procedure including material risks and obtain written or other patient consent prior to any treatment or procedural intervention in accordance with Hospital policies and procedures. As part of the process key points of the consent discussion must be documented in accordance with the Hospital's policies and/or guidelines.”

20. Do consent forms have to be completed before a procedure is undertaken in an emergency situation?

Answer:

No. The definition of 'Medical Services' in the Indemnity allows that in emergency situations you can make clinical judgement decisions that are in the best interests of the patient without obtaining formal consent if the patient is unable to provide formal consent.

If you are unable to obtain formal consent in an emergency situation then the emergency will supersede other specified terms and conditions in the Indemnity in relation to consent.

21. Will I be able to seek indemnity cover for my incorporated practice?

Answer:

Yes provided that your incorporated practice is a sole practitioner body corporate or sole practitioner and partner (or similar) body corporate. If your incorporated practice meets this test then you can make a request for indemnity in respect of the conduct of a director or medical practitioner employed by your practice. The Minister for Health will recommend to Cabinet that the request be considered in the same manner and subject to the same conditions as if the Application for Indemnity had been signed by that body corporate. Such a request for indemnity will be dealt with on an ex-gratia basis.

The possibility of a medical negligence action against an incorporated practice is considered remote.

22. Am I eligible for the Indemnity if I am working in a private hospital?

Answer:

The Indemnity does not apply to private hospitals. If you are providing services in a private hospital you may need to maintain your own indemnity cover for that work. You should discuss the matter with the hospital concerned.

23. Will MDOs provide medical indemnity cover to medical practitioners treating public patients at hospitals managed by private or not-for-profit operators. For example the new Midland Health Campus (due to open in late 2015), and the existing Joondalup and Peel Health Campuses ?

Answer:

To the best of our knowledge MDOs will continue to offer cover to medical practitioners treating public patients at hospitals that are not operated by WA Health. It is recommended that you confirm this understanding with your MDO.

24. Who provides cover for medical practitioners treating patients at Silver Chain Nursing Posts where the medical practitioner bills the patient?

Answer:

It is our understanding that MDOs will continue to offer medical indemnity cover to medical practitioners treating and billing patients at Silver Chain Nursing Posts. It is recommended that you confirm this understanding with your MDO.

25. Who provides cover for private practitioners treating patients at DoH Nursing Posts and the medical practitioner bills the patient?

Answer:

Practitioners must maintain appropriate indemnity cover with their MDO. It is our understanding that MDOs will continue to offer medical indemnity cover to medical practitioners treating and billing patients at DoH Nursing Posts.

26. Will my Indemnity cover my practice staff?

Answer:

No. The Indemnity only applies to the person providing medical services under a Medical Services Contract.

27. What types of claims are excluded in the Indemnity?

Answer:

The Indemnity applies only to “any negligent act or omission; or trespass against the person, by you occurring whilst actually providing Medical Services.”

Clause 1.2 “Exclusions” states that the indemnity does not extend to:

- “(a) any Loss arising from Claims or Potential Claims in respect of acts or omissions by you which are:
 - (i) reckless, malicious, or carried out with wilful or intentional disregard to the consequences;
 - (ii) criminal;
 - (iii) defamatory;
 - (iv) discriminatory (whether sexual, racial or otherwise) or otherwise constitute harassment;
 - (v) done or omitted to be done as a consequence of being under the influence of alcohol or illicit drugs, or inappropriate use of prescription or over the counter drugs including if you knew or reasonably ought to have known that those drugs would have an effect that caused or materially contributed to the Claim or Potential Claim;
 - (vi) done or omitted to be done whilst you are not registered with the Medical Board;
 - (vii) done or omitted to be done contrary to any restrictions or conditions placed on you by the Medical Board; or
 - (viii) done or omitted to be done in breach of your Employment Contract, the Contract for Medical Services, or your Clinical Privileges Conditions (as the case may require); or
- (b) the provision of Medical Services by you to private patients at a Hospital within the Perth metropolitan area while engaged as a Non-Salaried Medical Practitioner provided that for the purpose of these Terms and Conditions private patients do not include patients where you have assigned your private practice income or billing rights for the treatment of those patients to the Hospital.

The Indemnity further does not apply where you deliberately provided materially false or misleading information in your Application.”

28. Can the Indemnity be withdrawn if I don't comply with the hospital's policies or guidelines?

Answer:

Clause 8 (Quality and Safety Requirement) of the Terms and Conditions sets out your obligations under the Indemnity. In effect it is what you agree to do in return for being provided with the Indemnity. If you do not comply with Clause 8 there is no direct provision in the Indemnity for it to be withdrawn. However, with regard to compliance with hospital policies and guidelines, the potential does exist for the Indemnity not to apply to a specific claim where it can be shown that you contravened your Clinical Privileges. As stated in Clause 1.2 (Exclusions) the Indemnity “does not extend to any Loss arising from Claims or Potential Claims in respect of acts or omissions by you which are

done or omitted to be done in breach of your Contract for Medical Services or your Clinical Privileges Conditions”.

29. Will I need to take out any cover with a MDO?

Answer:

If you are treating patients who do not fall within the scope of the Indemnity you will need to ensure that you hold appropriate medical indemnity cover. Should MDOs also offer insurance against general legal costs (e.g. advice and representation at inquiries) you may also wish to purchase this cover as these fall outside the scope of the Indemnity.

30. How will this system work with any private indemnity insurance I maintain?

Answer:

The Indemnity only provides cover for the treatment of public patients (and private patients in country areas) in public hospitals. If you provide services to other patients or other hospitals then you will need to obtain separate cover for that work. The two systems complement each other but function, for most part, independently.

31. Why can't I get the one policy to cover all my indemnity needs?

Answer:

In response to the reforms introduced by the Commonwealth Government in 2002-03, MDOs ceased offering cover for the treatment of public patients in public hospitals. As a result, the State Government was obliged to establish a medical indemnity scheme covering NSMPs treating public patients in public hospitals.

DEATH, DISABILITY & RETIREMENT COVER

32. Does the Indemnity cover me for claims that arise after I retire or cease providing medical services to the Board ?

Answer:

Yes you are covered for claims that relate to incidents that occur during the term of your Indemnity.

You are provided with run-off cover which means that it does not matter when the claim is made. If an incident occurred during the term of your Indemnity you are covered for any claim whenever it may be made.

You are also provided with public patient IBNR cover (see Questions 35, 36 and 37).

If the incident related to the treatment of a private patient then you may need to discuss your retirement cover with your MDO or Insurer. The Indemnity covers private patients treated in hospitals administered by the WACHS for claims arising from incidents that occurred after 1 July 2003.

33. Is my estate covered by the Indemnity in the event of my death?

Answer:

Yes your estate will be covered for all claims made relating to any public patient incident that occurred during the term of your Indemnity.

Your estate will also be provided with IBNR cover (see Questions 35, 36 and 37).

If the incident related to the treatment of a private patient then you may need to discuss your retirement cover with your MDO or Insurer. Medical practitioners treating private patients in country public hospitals are covered by the Indemnity for claims arising from incidents that occurred after 30 June 2003 providing that you have not reported the incident to your MDO/Insurer and that your MDO/Insurer does not provide cover.

34. Does the Indemnity cover me if I move interstate or overseas?

Answer:

You will be covered for claims which relate to incidents that occurred in Western Australia during the term of your Indemnity. The cover does not extend to any work you might undertake interstate or overseas.

INCURRED BUT NOT REPORTED (IBNR) CLAIMS

35. Does the Indemnity cover me for an incident that occurred prior to the start of the Indemnity?

Answer:

The Indemnity provides IBNR cover for incidents relating to public patients in public hospitals which occurred in the period after your MDO or Insurer changed to 'claims made' cover and before 1 July 2003, and:

- for which your MDO or Insurer does not provide cover; or
- which have not been reported to your MDO or Insurer.

Where the indemnity extends to private patients (ie. those treated in a WACHS hospital), the Indemnity covers claims arising from incidents which occurred after 1 July 2003, subject to the same qualifications noted above.

Claims which relate to incidents which occurred before your MDO or Insurer changed to 'claims made' cover are not covered as they would be eligible for cover through your MDO or Insurer. Similarly, incidents that you reported to your MDO or Insurer before 1 July 2003 are not covered, as they would be eligible for cover through your MDO or Insurer.

As an example, if you are a member of MDA National the Indemnity will provide 'tail cover' for incidents relating to the treatment of public patients in public hospitals in the period 1 July 1997 to 30 June 2003.

36. What happens if an IBNR claim arises from a period at a hospital where I no longer work?

Answer:

In conjunction with the answer to Question 32, the terms and conditions of the Indemnity will apply to IBNR claims arising at a WA public hospital where you previously provided medical services.

37. Will I need to purchase any IBNR cover from my MDO?

Answer:

The Indemnity provides IBNR cover for incidents relating to the treatment of public patients in public hospitals back to the point where your MDO or Insurer changed from 'claims incurred' to 'claims made' cover provided:

- the claim has not been notified to your MDO or Insurer and there are reasonable grounds that the incident was not reported; and
- you are not entitled to cover by your MDO or Insurer.

You should consult your MDO or Insurer concerning the requirement for IBNR cover in respect of the treatment of private patients. The Indemnity does provide IBNR cover, back to 1 July 2003, for private patients treated in WACHS hospitals.

CLAIMS

38. Why is the reporting of potential claims required?

Answer:

As has been the practice with MDOs, you are required to report all potential claims which you can reasonably be expected to have known may result in a claim.

Similarly, we require that reporting of potential claims occur as soon as practicable after the event. This allows us to ensure that we are in the best position to assist you if an incident should turn into a claim at a later date.

Claims often don't arise until years after an incident so it is important to capture all relevant information as soon as possible while the details are more easily collected. The more we have to rely on undocumented memories of an incident the more difficult it is to assist you.

Early reporting of claims and potential claims is an important and effective risk management technique. It allows an incident to be investigated, reports to be gathered and facts obtained and placed on file so that any future claim may be defended or settled in an efficient manner (rather than seek information years or months later when a claim is received).

Information from reports of claims and potential claims will also be collated to assess areas for improvements in clinical management and to help the process of learning from experience. Reporting is confidential and solely for the purpose of this Indemnity.

39. What information are you going to want to know about a potential claim?

Answer:

Please contact your hospital/health service for assistance in reporting a potential claim. The hospital will provide advice and appropriate forms to record the details of the incident. You may also wish to seek advice from your MDO.

The Indemnity requires that you notify the hospital "as soon as reasonably practicable" of a claim or potential claim. Potential claims involving private patients treated in WACHS hospitals must also be advised to the relevant hospital.

Where the potential claim relates to a private patient treated in a metropolitan public hospital you should contact your MDO or Insurer.

40. What information do you need from me if I am served with a claim?

Answer:

As with potential claims, you will be assisted in completing the details by the hospital/health service. You may also wish to seek advice from your MDO.

If the claim relates to a private patient who you treated in a metropolitan public hospital then you should contact your MDO or Insurer. If the private patient was treated in a WACHS hospital then you should follow the same procedure as set out for public patients.

41. *When, and to whom, do I have to advise the hospital about a potential or actual claim against me?*

Answer:

In summary, you must:

- where served with an actual claim, made by or on behalf of a patient, notify the relevant medical treatment liability (MTL) Claims' Manager of that claim as a matter of urgency;
- notify the relevant MTL Claims' Manager as soon as reasonably practicable of all clinical incidents with the potential to result in a MTL claim.

(The MTL Claims' Manager is the Director of Medical Services, the General Manager or Health Service Manager or their equivalent / delegate).

42. *What if I have already notified my MDO about a potential claim against me?*

Answer:

If the potential claim falls within the WA Health Indemnity your MDO will advise you to report the matter to the public hospital concerned.

43. *What happens after I inform you about a potential or actual claim?*

Answer:

The Department of Health's Legal & Legislative Services coordinates the claims management process for medical treatment liability claims on behalf of non-teaching hospitals. In this role, it liaises between the non-teaching hospitals, RiskCover and any appointed solicitors in all aspects of the claim notification and management process.

For historical reasons, teaching hospitals liaise directly with RiskCover and any appointed solicitors in respect of claims against those hospitals.

RiskCover is the agency which manages and administers insurance and risk management arrangements on behalf of WA Health and other public authorities.

44. *What is the difference between a claim and a potential claim?*

Answer:

A **claim** occurs when a person (e.g. a patient or financially dependent relative of the patient such as a child or a spouse) formally commences legal action in relation to a clinical incident. A claim can also arise where a letter, or other document is received from a patient or other claimant (or person acting on their behalf) seeking monetary compensation or expressing an intention to commence legal proceedings.

A **potential claim** is an event that occurs during the patient's treatment cycle which the medical practitioner reasonably believes could give rise to a possible MTL claim. It includes actual or alleged matters such as:

- failure to adequately warn of risk,
- incorrect surgical procedure,
- incorrect drug treatment program,
- complications of post-operative infections, or

- poor obstetric or surgical outcomes.

A potential claim also includes an allegation made by a patient, or other potential claimant, against the medical practitioner either during or after the treatment cycle that is of such a nature as to reasonably suggest that a claim may be made.

45. *Will I be covered if I have not reported an incident that subsequently results in a claim being made?*

Answer:

The Indemnity requires you to report all potential claims to the hospital as soon as possible. Sometimes you may not be aware of these until an actual claim is made. Provided you have acted in good faith and the incident was not of a nature where you could reasonably be expected to have known that it would give rise to a claim, you will be covered.

46. *Why might you ask about my past claims history?*

Answer:

The WA Health requires this information as one element in its program of managing risk.

It is the same requirement that is made of you by your MDO or Insurer and for any commercial insurance. For example if you want to insure your car you are required to provide the insurance company with a record of past claims and driving convictions

47. *Does the Indemnity have a maximum cover limit?*

Answer:

There is no maximum cover limit. The Indemnity is provided with the full financial backing of the State Government and it will meet the cost of all damages against you covered by the Indemnity.

LEGAL REPRESENTATION

48. *Am I covered for costs associated with inquiries by the Medical Board, Coroner or other tribunals or bodies?*

Answer:

No. The Indemnity does not extend to providing legal representation or costs for Medical Board or other inquiries.

In some specific circumstances assistance may be granted for coronial inquiries and other tribunals and bodies. Where such assistance is provided it is done so independently of this Indemnity. The prior approval of the Department of Health would be required. Your MDO may offer insurance cover for legal and other expenses associated with such matters.

49. *Who will choose my legal counsel?*

Answer:

RiskCover, which manages the Government's self-insurance fund, will engage either the State Solicitor's Office or one of the law firms on its panel. Note also Clause 4.3 'Separate Representation ...' in the Terms and Conditions.

50. *What if I want to engage my own legal counsel?*

Answer:

You may engage your own legal counsel but the costs will not be covered under the Indemnity. Again, you may wish to check with your MDO to see whether they are able to provide an insurance policy covering this circumstance.

51. *Will defensible cases always be defended?*

Answer:

Current practice will continue, if a case is defensible it will generally be defended vigorously. However, there are times when a commercial decision may be made to settle a matter with or without the admission of liability. [Clause 4 of the Terms and Conditions provides for you to be consulted in the defence of a claim and also for circumstances in which the Minister recognises a conflict of interest.]

QUALITY AND SAFETY REQUIREMENTS

52. *Am I indemnified for my participation in clinical governance activities, such as clinical quality assurance, specified in the Terms and Conditions?*

Answer:

Yes, the Indemnity formalises the government's longstanding policy to provide adequate support to persons who become the subject of legal proceedings as a consequence of their carrying out responsibilities of a public nature. The Indemnity specifically covers participation in authorised clinical governance activities such as medical management committees, medical advisory committees, clinical credentialing/appointments processes and clinical performance disciplinary/appeal processes. The tail cover conditions applying to other medical services covered by this Indemnity also apply to this aspect of the indemnity.

53. *Will the Minister impose onerous requirements on me in relation to Clause 8 'Safety and Quality' and Clause 20(b) 'procedures and protocols for the handling of claims and potential claims'?*

Answer:

No. The mechanism for developing and introducing the procedures and protocols referred to in Clause 8 and Clause 20(b) will continue to be by way of the hospital seeking advice from the relevant Medical Advisory Committee. It is not intended that these requirements will be used to place unduly onerous obligations on the medical practitioner in their own time. Clause 8(b) explicitly notes that your participation in clinical governance activities must be a 'reasonable' requirement. The local Medical Advisory Committee will provide advice on any policies and procedures requiring implementation.

For more information, please refer to the document "*Policy: Quality & Safety Requirements Applying to the Indemnity for Non-Salaried Medical Practitioners*" available on the website <http://www.health.wa.gov.au/indemnity/nonsalaried/index.cfm>

54. Am I obliged to participate in clinical governance activities?

Answer:

Yes, Clause 8 of the Terms and Conditions “Quality and Safety Requirements” specifically provides that you participate in clinical governance activities as reasonably required. By way of example, this would include reporting to the Western Australian Audit of Surgical Mortality and participate in quality improvement and other activities as required by the hospital.

55. Why am I required to participate in the quality and safety requirements?

Answer:

The specified quality and safety requirements are aimed at improving patient care and reducing the incidence of adverse events and claims for damages.

These requirements are part of our risk management program and are similar to the standards in place in all other States. Risk management has benefits for everyone. The processes of identifying and monitoring incidents and developing strategies for eliminating them are a key component in reducing risk, cost and adverse outcomes.

56. Aren't all the requirements about quality the same as those already in place?

Answer:

It is appreciated that you will already be complying with all hospital codes, policies, procedures, protocols and standards as part of the conditions of your Clinical Privileges. However, the Indemnity provides a greater level of detail regarding the specific requirements relating to quality and safety.

57. Am I going to be paid extra to do the quality and safety work required under the Indemnity?

Answer:

For general requirements, no. There may be situations where health services may contract for additional services in this area or NSMPs may be engaged on specific quality related projects. It is vital that all parties participate in identifying problems in patient care and assist in carrying out appropriate strategies to improve the delivery of patient care and to reduce the occurrence of adverse events. This work is considered an integral part of your responsibility in return for receiving cover under the Indemnity.

COST OF THE INDEMNITY

58. How much will this indemnity cost me?

Answer:

The State's hospitals and health services meet the cost of the indemnity cover. There is no direct cost to you.

59. Will there be any charge for my retirement cover?

Answer:

No. Hospitals and health services will meet the cost of providing the medical indemnity scheme, which includes retirement cover.

60. Who will pay for the scheme?

Answer:

The hospitals and health services at which you work meet the cost of the indemnity cover from their budgets.

PATIENTS TREATED IN PRIVATE FACILITIES

61. Will the Indemnity cover arrangements for public inpatients being treated offsite by private medical practitioners where no private billing occurs?

Examples:

- A public inpatient at Swan District hospital is transferred to Perth Radiological Clinic (PRC) in Midland for an urgent CT scan.
- A Fremantle public inpatient is sent to SKG at St. John of God Murdoch for an urgent MRI scan.

Answer:

The medical practitioner at the private facility must be working under a Medical Services Contract and must not raise a bill against the patient in order to obtain cover for the treatment of the public patient.

62. Will the Indemnity cover a private practitioner treating patients at a private facility where the medical service is billed to a public hospital?

Examples:

- A rural public hospital refers a public patient to PRC Midland for a scan and PRC bills the hospital (but not the patient).
- A psychiatrist treats a patient and raises an account on a public hospital. The treatment is provided at, for example:
 - A Community Mental Health facility (not owned by the DoH);
 - A Silver Chain Nursing Post; or
 - An Aboriginal Medical Service Clinic.
- A visiting specialist engaged by the DoH treats patients at an Aboriginal Medical Service Clinic or Aboriginal Community Service and raises an account on a public hospital.

Answer:

The medical practitioner treating patients at the private facility must be working under a Medical Services Contract and only bill the public hospital/health service in order to obtain cover for the treatment of the patient.

REVIEW PROCESS

63. If I am advised that the Minister is seeking to decline or withdraw the cover provided under Indemnity, is there a process by which I can contest such a decision?

Answer:

Yes. The Terms and Conditions of the Indemnity allow you to request that a review panel be convened in any circumstance where the Minister might seek to withdraw indemnity. Clause 21 of the Terms and Conditions sets out the membership and process to be followed by the review panel.

The review panel will view the circumstances of the case, accept and review submissions and then advise the Minister who will decide whether or not to continue to indemnify the medical practitioner.

Since the inception of the Indemnity in 2003/04 there have been no instances in which the Indemnity has been withdrawn. Based on this experience, the likelihood of cover being

denied is extremely remote and would occur only in the most exceptional of circumstances.

It is emphasised that this process does not preclude you from exercising your legal rights if you feel the Minister has wrongfully withdrawn the indemnity. In that event, it would be for the Minister to substantiate in a court of law why he or she had legal grounds for having done so.

64. *Can I seek application of the review process in respect to other areas of the Indemnity?*

Answer:

Yes. The Indemnity allows you to request that a review panel be convened:

- where the Minister might seek to withdraw indemnity (Clause 1.2)
- where the Minister declines to provide separate legal representation (Clause 4.3)
- where a dispute arises concerning the intentions or actions of the Minister when acting as your agent (Clause 4.6)
- where you dispute a decision of the Minister to require, should the Indemnity be lawfully withdrawn, repayment of moneys (Clause 6).

PREVIOUS INDEMNITIES

65. *Does the new Indemnity displace the one dated “effective from 1 July 2010 - 30 September 2013”?*

Answer:

No. This Indemnity follows on from the previous Indemnity. The previous Indemnity applied until 30 September 2013 and this Indemnity will take effect when that Indemnity ceases.

If this is your first Medical Services Contract, the Indemnity will take effect when you commence providing medical services under that Contract.

66. *I applied for the Indemnity in previous years. Should I retain those indemnities?*

Answer:

Yes. As the period of cover in this Indemnity does not overlap on the previous Indemnities we recommend that you retain a copy of that Indemnity. It is an important record of the medical indemnity cover that you had for the period stated in the Indemnity.

MORE INFORMATION

67. *Who can I contact for more information regarding the Indemnity?*

Answer:

In the first instance, you should contact the senior medical or clinical director or administrator of the hospital where you are delivering medical services. You may also wish to contact your MDO, legal adviser, the AMA (WA) or other professional association.

Information is also available on our website: <http://www.health.wa.gov.au/indemnity/>