



Department of Health
Government of Western Australia

**PROTOCOL APPLYING TO
MEDICAL PRACTITIONERS PARTICIPATING IN THE
AMBULATORY SURGERY INITIATIVE
AND THE
PRIVATELY REFERRED NON-INPATIENTS MODEL**

QUESTIONS AND ANSWERS

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Introduction

The State Government is confident that the Ambulatory Surgery Initiative (ASI) and the Privately Referred Non-Inpatient model (PRNI) model are consistent with the requirements of the *Health Insurance Act 1973* (Cth) and, in particular, lawfully permit the claiming of Medicare benefits. The State's confidence in the ASI and the PRNI and its commitment to participating practitioners is reflected in the formal Protocol approved by Cabinet last year.

In June 2006, several important improvements were made to the Protocol following consultations with the Australian Medical Association. Of particular note are:

- in respect of compliance with the Health Insurance Act, the scope of the Protocol now explicitly covers investigations or inquiries conducted by any government body; and
- a formal review mechanism, incorporated into the Protocol, is available to medical practitioners in the event that, in a particular case, the protection afforded by the Protocol is denied.

We are confident that the Protocol provides the certainty sought and encourage medical practitioners to take advantage of the opportunities presented by the ASI and the PRNI.

More information on the policies and procedures applying to the ASI and the PRNI can be obtained from the relevant authority at the participating hospital. The Protocol, business rules and ASI and PRNI registration forms are available on the Department of Health's website <http://www.health.wa.gov.au/indemnity/>

QUESTIONS AND ANSWERS

1. *Why is the State providing the Protocol?*

Answer:

The State appreciates that some medical practitioners, mindful of the investigations and inquiries of recent years, have concerns as to the potential for a legal exposure consequential upon their participation in the ASI and/or PRNI. The Protocol evidences the Government's confidence in the initiatives and provides a strong measure of protection for participating medical practitioners.

2. *Are the ASI and PRNI different from the activities criticised by the Public Accounts Committee in 2003?*

Answer:

Yes. The relevant findings of the Public Accounts Committee¹ were that:

"unlike the privatised clinics operating in other states, the privatised clinics ... did not operate at 'arms length'. There was no clear separation between the employment of the doctors and their role in operating the privatised clinics, and no controls to ensure patient referrals were not being manipulated" (Finding 26).

The Committee also found that there was

"an uncoordinated and fragmented approach to establishing privatised clinics and a failure ... to adequately monitor the operation of these clinics..." (Finding 41)

Any examination of the processes underpinning the ASI and PRNI will reveal that they bear no relation to the activities reviewed by the Public Accounts Committee. The initiatives are consistent with the *Health Insurance Act*, uphold the State's obligations under the Australian Health Care Agreement and reflect the experiences of other States.

Under the Protocol, processes will be put in place to safeguard the integrity of the ASI and PRNI. This and the other assurances given are evidence of the government's support for, and confidence in, these important initiatives.

3. *Do the ASI or the PRNI contravene the "cost-shifting" provisions of the Australian Health Care Agreement?*

Answer:

No. The Australian Health Care Agreement, consistently with the *Health Insurance Act 1973* and the Health Insurance (General Medical Services Table) Regulations 2005, explicitly permits patients to choose to be treated as a private patient through referral to a named medical practitioner exercising a right of private practice at a public hospital outpatient department.

Medicare Australia has a legitimate interest in ensuring that Medicare funds are properly incurred. Western Australia is fully within its rights to seek the correct funding outcome for patients who are properly classed as privately referred, non-inpatients. Unlike other States and Territories, WA has made minimal use of the

¹ Public Accounts Committee "Inquiry into Hospital Trust Accounts", Report No.5, 2003

provisions in the Agreement that permits the private referral of patients. The ASI and PRNI will improve patient access to non-admitted procedures and increase the level of patient choice in health care.

4. *Is there a risk of an "arrangement" which may breach the section 19(2) of the Health Insurance Act 1973 (Cth)?*

Answer:

No. Section 19(2) of the Act provides for circumstances in which Medicare benefit is not payable. Specifically, it states that, unless the Commonwealth Minister provides an exemption, Medicare benefits are not payable for professional services rendered by, or on behalf of, or under an arrangement with, a State.

As set out in the Business Rules applying to the ASI and PRNI, patients must be privately referred by a doctor working in a private capacity to a named medical practitioner. In this context, the potential for an 'arrangement', as per section 19(2), does not arise. It is of note that the ASI and PRNI operate according to a process that is well established in other States.

5. *Has the State sought an exemption from the Commonwealth Minister?*

Answer:

No. An exemption under 19(2) would be granted only if the Commonwealth Minister determined, on policy grounds, that Medicare benefits which would otherwise be precluded, ought in particular circumstances be payable. The question of an exemption being sought does not arise as the ASI and the PRNI do not breach section 19(2) of the Health Insurance Act. Our legal advice confirms that there is no reason for an exemption to be sought.

6. *Who prepared and authorised the Protocol?*

Answer:

The Protocol was prepared by the Department of Health with legal assistance from the State Solicitor's Office. Cabinet endorsed the Protocol last year and the Minister for Health approved the recent improvements made following discussions with the AMA.

7. *Was legal advice provided on the ASI and the PRNI?*

Answer:

Yes. Advice was received from the Solicitor General and the State Solicitor's Office.

8. *What protections does the Protocol provide?*

Answer:

Under the Protocol, medical practitioners participating in the ASI and the PRNI will be supported and protected by the State in the event that Medicare Australia or some person or other body exercising powers for public purposes inquires into or investigates the validity, or seeks to assert the invalidity, of either model's

compliance with the Health Insurance Act. The specific support and protections given are set out in the Protocol.

9. *Why will the State Solicitor's Office provide or arrange legal representation in the event of an investigation or civil action?*

Answer:

Under the Protocol the State accepts liability in relation to the compliance of the ASI and the PRNI with the Health Insurance Act. It is appropriate that the State assumes responsibility for managing the response to any such action.

10. *Can I engage my own legal representation?*

Answer:

At all times you are free to engage your own legal counsel. However the associated costs may not always be covered by the State. The Protocol does provide that, in relation to an investigation or civil claim, if the interests of the Minister and the medical practitioner's differ and the medical practitioner ought to be represented in their own right then the Minister will consider an application for reimbursement of reasonable legal expenses.

Should Medicare Australia bring a civil claim against a medical practitioner on the basis that the ASI or the PRNI does not comply with the Health Insurance Act then the medical practitioner should engage his or her own legal representation. In this situation, the State will meet all reasonable legal costs and any fines and other liabilities of the practitioner.

11. *Do I have any obligations under the Protocol?*

Answer:

Yes. The Protocol applies to all medical practitioners who, in good faith, participate in the ASI and/or PRNI. Medical practitioners must comply with the policy and processes that describe the relevant initiative. If you have any questions about the ASI and/or PRNI processes please contact the relevant authority at the participating hospital.

12. *Will the ASI and the PRNI be monitored to ensure ongoing compliance?*

Answer:

Yes. As noted in the Protocol, the integrity of the ASI and the PRNI will be safeguarded by the following means:

- the Minister will commission annual audits to monitor compliance with the specifications, policies and processes of the model; and
- the Minister will, through the Department of Health, liaise with Medicare Australia as appropriate in relation to any concerns which arise regarding consistency between the operation of the PRNI and the *Health Insurance Act*.

It is to be noted that the public sector health system is working cooperatively with Medicare Australia. Officers from that agency have assisted in the implementation of billing arrangements and conducted education sessions for clerical staff at several sites. This will also take place at other hospitals.

13. *Will the patient be given genuine choice to elect to be treated as a public patient?*

Answer:

Yes. The decision whether to refer to a named practitioner or to a public outpatient clinic is a matter for the patient and the referring practitioner. The advent of the PRNI and ASI simply gives effect to the pre-existing option of a practitioner being able to refer a patient to a named medical practitioner at a public hospital. The choice whether to be treated at a hospital and, if at the hospital, whether to be treated as a public or private patient remains a decision for the patient.

For patients to be treated under both ASI and PRNI initiatives, patients must have a referral to a named medical practitioner. Patients will have indicated an intention to elect to be treated privately prior to the time they attend the clinic. On attendance they will have the opportunity to confirm, or change, their election to be treated as a private patient.

14. *Will the ASI or PRNI adversely affect access to medical services by patients who wish to be treated as public patients?*

No. Whether a patient elects to be treated as a private patient will be immaterial in terms of how patients are categorised for clinical purposes and patients will continue to be seen on the basis of clinical need.

15. *Will separate outpatient facilities be established for the ASI or PRNI?*

There are no plans to establish physically separate facilities. Separate facilities are seen to be a retrograde step and one which may increase the risk of a two-tier system. Patients will continue to be seen on the basis of clinical need.

16. *Will the ASI affect current referral patterns to the detriment of Visiting Medical Practitioners?*

Answer:

No. The ASI will increase access to elective, non-admitted surgery and other procedures by targeting public waitlists. In generating additional patient throughput the ASI provides doctors with referral opportunities that would not otherwise be available. The ASI will not reduce the health system's reliance on Visiting Medical Practitioners (VMPs) nor is it intended to undermine current arrangements. The Department will be closely monitoring ASI activity and any collateral impact on other services.

Unlike the ASI, the PRNI will not generate additional patient throughput. The only change is that some patients will choose to be treated as a private patient through referral to a named medical practitioner exercising a right of private practice at a public hospital outpatient department.

17. Will there be any impact on the teaching and training of medical practitioners?

We do not anticipate any diminution of the teaching and training opportunities. The obligation to maintain and in the near future to expand teaching and training opportunities is well understood by the Department and will remain a key priority.

18. Why has the Department established a registration system for the Protocol?

The Department considers that it is in the interests of both medical practitioners and the Department that there be a separate registration process for the Protocol, ensuring a centralised, independent, long-term record of all medical practitioners who participate in the ASI and/or PRNI.

19. Will the Department provide participating Doctors with a regular statement as to monies raised in their name?

Answer:

Yes. The hospitals have billing software (compliant with the Department of Health and Ageing's requirements) that is capable of reporting this information on a daily basis. Each medical practitioner will be provided with the information as requested or, as a minimum, quarterly.

20. Should I obtain legal advice in deciding whether to participate?

Answer:

The decision whether to obtain your own legal advice rests with you. The State has full confidence in the legitimacy of the ASI and the PRNI. This confidence is amply demonstrated in the provision of the Protocol.

21. Who can I contact for more information regarding the ASI and/or PRNI?

Answer:

In the first instance, you should contact the senior medical or clinical director or administrator at the relevant hospital. Information is also available on our website: <http://www.health.wa.gov.au/indemnity/>