



Department of Health
Government of Western Australia

SALARIED MEDICAL OFFICERS

MEDICAL INDEMNITY

- effective 28 January 2011 -

QUESTIONS & ANSWERS

LEGAL AND LEGISLATIVE SERVICES

NOTE:

- Please return the signed Application Form to the appropriate senior officer at your health service as listed on the Application. The health service will then return an executed copy of the Indemnity for your records.

- This document and other information is available at our website: https://ww2.health.wa.gov.au/Articles/J_M/Medical-indemnity

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DEFINITIONS

For the purpose of this document:

Application means the specified application form for the Salaried Medical Officers' Indemnity.

DoH means the Department of Health.

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

IBNR means 'Incurred But Not Reported' and refers to a liability that may arise from an incident which has already occurred but which has not yet been notified to a MDO or RiskCover.

Indemnity means the indemnity as set out in the "Terms & Conditions of the Indemnity for Salaried Medical Officers effective from 28 January 2011".

MTL means medical treatment liability.

MDO means a Medical Defence Organisation.

Private Patient includes patients who are treated as compensable patients (eg. workers' compensation, motor vehicle - MVIT), or Department of Veteran Affairs' patients, or ineligible patients.

Terms & Conditions means the "Terms and Conditions of the Indemnity for Salaried Medical Officers" which can be found on the DoH website at https://ww2.health.wa.gov.au/Articles/J_M/Medical-indemnity.

CHANGES

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

Answer:

Under the AMA Industrial Agreement 2011, medical practitioners employed on a salaried sessional basis exercise rights of private practice under Arrangement A or Arrangement B under the same terms as full-time or part-time practitioners. Prior to that agreement, salaried sessional doctors were not eligible to elect to be employed under Arrangement A. As a consequence, some references to "salaried sessional" in the Terms and Conditions have been amended. Specifically, clauses 1.2 (b) and 5(d) are amended by inserting two subclauses respectively.

The other changes are:

- (i) clause 10(c); reference to "Financial Administration and Audit Act 1985" is replaced by "Financial Management Act 2006";
- (ii) clause 23; under the definition of "Medical Board", the "Medical Board of Western Australia" is replaced by "Medical Board of Australia".

THE INDEMNITY

2. *What is the contractual Indemnity?*

Answer:

The contractual Indemnity is a formal contract between the Minister for Health (or Board) and you as a salaried medical officer providing medical services on behalf of the WA public sector health system.

Subject to the Terms & Conditions of the Indemnity, the Minister undertakes to indemnify against:

- claims of negligence, omission or trespass that may arise from the treatment of public and, depending on your conditions of employment, private patients, in public hospitals and other agreed health care institutions; and
- claims in relation to the Quality and Safety activities undertaken by you.

In return, and formalising arrangements already occurring, the Indemnity requires full and open support for quality improvement practices such as medical audit and the reporting and investigation of adverse events.

If you are treating patients who do not fall within the scope of the Indemnity then you may need to continue to purchase medical indemnity cover from a MDO. Should your MDO also offer insurance against general legal costs (eg advice and representation at inquiries) you may also wish to purchase this cover as these fall outside the scope of the Indemnity.

3. Who is eligible to sign the Application for Indemnity?

Answer:

Salaried medical officers employed within the Minister for Health's portfolio, including those under the following industrial agreements and their successor agreements, are eligible to apply for the Indemnity:

- *DoH Medical Practitioners (Director General) AMA Industrial Agreement 2011*
- *DoH Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2011*
- *DoH Medical Practitioners (WA Country Health Services) AMA Industrial Agreement 2011*
- *DoH Medical Practitioners (Drug and Alcohol Office) AMA Industrial Agreement 2011*
- *DoH Medical Practitioners (Clinical Academics) AMA Industrial Agreement 2011*

4. When does the Indemnity commence?

Answer:

The Indemnity takes effect from the date on which it is formally executed (ie. signed by both you and a nominated representative of the Minister for Health).

Once executed, the Indemnity:

- will cover claims arising from patients treated in your official capacity during your employment, regardless of when the claims arise;
- applies retrospectively to any previous periods where you were employed in the WA public sector health system;
- provides death, disablement and retirement cover.

5. Are the Terms & Conditions of the Indemnity negotiable?

Answer:

No. As set out in a letter signed by the Minister for Health and the President of the AMA (WA), the Indemnity was prepared following representation by and extensive discussions with the AMA (WA). In that process the AMA (WA) consistently sought to enhance the rights of medical practitioners by maximising the quality and scope of the indemnity. The AMA (WA) has confirmed their support for the resulting scheme and has commended it to medical practitioners.

6. Do I have any obligations under the Indemnity?

Answer:

Yes. The Terms & Conditions specify your obligations. Amongst other things, the Indemnity requires full and open support for quality improvement practices. You are required to promptly report any incident that could reasonably be expected to lead to a claim for indemnity under this contract. You must report such incidents according to the procedures established in the health service where you are employed and where the incident occurred.

You also must cooperate with and participate in any clinical quality assurance, quality improvement or risk management process, project or activities as reasonably required by your employer. This may include incident monitoring, participation in open disclosure,

sentinel event management and the use of clinical indicators for the purpose of improving clinical practice.

Particular note is made of the need to:

- notify the hospital as soon as reasonably practicable after a potential claim arises or a claim is made against you;
- provide any information which may potentially be relevant to any claim or potential claim; and
- act in good faith in your dealings with us.

You must fully co-operate with your employer, RiskCover and legal service providers appointed for the purpose of managing and conducting the claim. (The Indemnity provides that the management and conduct of any claim passes to your employer and RiskCover subject to your rights to submit that there is a conflict of interest.) You are free to seek private advice to assist you in this process. The cost of such advice is not covered by the Indemnity.

The Indemnity also requires that you must, within 40 business days of receiving a written request from your employer, provide to your employer your record of health care claims history for the past 6 year period.

SCOPE OF INDEMNITY

7. *What are the main features of the Indemnity?*

Answer:

Amongst other things, the contractual Indemnity provides:

- A legally enforceable contract backed by the State.
- Cover for MTL claims arising from the treatment of public patients.
- Cover for MTL claims arising from private patients treated in hospitals and health care facilities administered by the WA Country Health Service from 1 July 2003.
- Cover for MTL claims arising from your current and any previous or future employment periods within the WA public sector health system.
- Cover for MTL claims arising during secondments and training rotations from public hospitals or health care institutions, including private and not-for-profit hospitals and other private health care facilities.
- Effectively unlimited cover.
- Full death, disability and retirement cover.
- Indemnity for participating in authorised clinical governance activities including clinical audit, open disclosure, reporting and investigation of adverse events (including sentinel events), participation in quality improvement committees such as Morbidity and Mortality, Medical Advisory and Credentialing/Appointment Committees.
- A review mechanism that can be activated by you should a withdrawal of the Indemnity be sought by the DoH.
- Separate legal representation may be provided to you in a case where there is a perceived conflict of interest between you and the hospital in the defence of a claim.

- Where practicable, you will be consulted before a claim involving an admission of liability in respect of your conduct is settled.

8. Am I covered for all patients?

Answer:

The Indemnity provides cover for you while you are working at a public hospital or health care facility as well as while you are seconded or on rotation to a private hospital or health care facility according to your category of employment at the time of the incident. For example:

- Junior practitioners working under the direction or supervision of a consultant or senior doctor are covered for all patients.
- Senior doctors / specialists not employed under Arrangement B are covered for all patients.
- Senior doctors / specialists employed by WA Country Health Service under Arrangement B are covered for all patients.
- Senior doctors / specialists employed in the Perth metropolitan area under Arrangement B are covered for public patients only.

The Indemnity does not cover private patients treated in Perth metropolitan public hospitals where the salaried doctor renders accounts directly to private patients, or to insurers, and retains the income.

Table 1 below summarises the categories of patients covered by the Indemnity.

Patient categories covered by the Indemnity		
Area	Metro	Country
Junior doctors	<i>all patients</i>	<i>all patients</i>
Senior medical officers (not having rights of private practice)	<i>all patients</i>	<i>all patients</i>
Consultants / medical officers with rights of private practice and employed under Arrangement A	<i>all patients</i>	<i>all patients</i>
Consultants / medical officers with rights of private practice and employed under Arrangement B	public only*	<i>all patients</i>
Medical Officers employed on a sessional basis	public only until 28/01/2011, then as for Arrangement A and B above*	<i>all patients</i>
Radiologists	<i>all patients</i>	<i>all patients</i>

Table 1

* Note that under Clause 1.2(b) of the Terms & Conditions if you do not receive private practice income or you have assigned your private practice income or billing rights for the treatment of patients to the Hospital, then all patients will be covered under the Indemnity.

See also Question 12

9. What does the Indemnity cover me for?

Answer:

The contractual Indemnity provides:

- Cover for MTL claims for all public patients.
- Cover for MTL claims relating to private patients treated in hospitals and health care facilities administered by the WA Country Health Service from 1 July 2003.
- Cover for MTL claims that occur in your current *and* any previous employment periods within the WA public sector health system.
- Cover for secondments and training rotations from public hospitals or health care institutions to private or not-for-profit hospitals and other private health care facilities.
- Effectively unlimited ('blue sky') cover.
- Cover for MTL claims that may be made after your death, disablement or retirement that relate to an incident that occurred during your employment.

10. What costs does the Indemnity cover?

Answer:

Your employer will, on your behalf, meet all costs associated with defending and / or settling claims, including any damages awarded or negotiated in respect of those claims.

It is a condition of coverage that the conduct of a claim rests entirely with your employer and its insurance fund manager, RiskCover, subject to the rights and processes specified in the Indemnity. This includes decisions on legal representation, expenses, settlements and all other aspects of claims management.

The Indemnity does provide that:

- you will be advised on the progress of a claim / potential claim;
- we will use our best endeavours to consult with you before settling any claim where you are a named defendant in any writ and which involves an admission of liability in respect of your specific conduct;
- the Minister may provide you with separate legal representation if the Minister determines there is a conflict of interest.

11. What isn't covered by the Indemnity?

Answer:

The Indemnity provides cover for civil liability claims relating to medical treatment. The Terms & Conditions do not provide cover for activities including:

- Criminal behaviour.
- Representation or provision of advice for Boards of Inquiry such as the Medical Board of Australia, Coronial Inquiries, Disciplinary Tribunals, Royal Commissions and Professional Bodies.
- Professional liability that is not associated with the medical treatment of a patient.
- Medical treatment incidents which occur outside of a WA public hospital or health care facility unless the incident occurred while you were:

- Seconded to the facility. Salaried medical officers employed under Arrangement B will not be covered for the treatment of private patients in a private hospital or health care facility where they bill the patient or an insurer.
- On a training rotation to the facility.
- Directed or authorised to deliver medical treatment at that facility.
- MTL claims relating to incidents that occurred while you were not an employee of the WA public health system.
- The cost of advice provided by advisers who are not appointed by DoH or RiskCover.

[As noted in Clause 7 of the Terms & Conditions, 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., that fall outside the scope of the Indemnity.]

12. Does the Indemnity cover me for previous periods of employment?

Answer:

Yes. The Indemnity covers all categories of salaried medical officers for both their current and previous employment periods within the WA public sector health system, for MTL claims arising from the treatment of public patients.

Where a claim relates to a private patient, the Indemnity covers current and previous employment periods except where you are employed under Arrangement B or, for medical officers employed on a sessional basis, for claims relating to incidents that occurred prior 28 January 2011.

If you are employed by the WA Country Health Service under Arrangement B you will be covered for private patient MTL claims relating to incidents which occurred on or after 1 July 2003. It is recommended that you talk to your MDO about ‘tail cover’ for incidents that may have occurred before 1 July 2003.

These cover details are outlined in Table 2 below.

INDEMNITY: EMPLOYMENT PERIODS COVERED				
Area	Metro		Country	
Patient type	public	private	public	private
Junior doctors	<i>all</i>	<i>all</i>	<i>all</i>	<i>all</i>
Senior medical officers	<i>all</i>	<i>all</i>	<i>all</i>	<i>all</i>
Arrangement A	<i>all</i>	<i>all</i>	<i>all</i>	<i>all</i>
Arrangement B	<i>all</i>	<i>none*</i>	<i>all</i>	<i>from 1/7/03</i>
Sessional	<i>all</i>	<i>none until 28/01/2011, then as for either Arrangement A or B above*</i>	<i>all</i>	<i>from 1/7/03</i>
Radiologists	<i>all</i>	<i>all</i>	<i>all</i>	<i>all</i>

Table 2

* See note to Table 1, Question 7

13. Does the Indemnity cover me for incidents that happened before I started as a salaried employee?

Answer:

No. Claims that relate to incidents that occurred before you became a salaried employee are not covered by the Indemnity.

14. What are the exclusions in the Indemnity?

Answer:

As set out in the Terms & Conditions, the Indemnity excludes, or may exclude, cover by way of the following clauses:

Clause	Reason for potential exclusion
Clause 1.2(a)	You behave in a manner that is specifically excluded under the clause.
Clause 1.2(b)	(i) You treated private patients in the Perth metropolitan area when employed under Arrangement B. (ii) The private patients were treated prior to 28 January 2011 in the Perth metropolitan area and you were employed under salaried sessional arrangements.
Clause 1.2(c)	Medical services provided while engaged as a non-salaried medical practitioner. A separate indemnity must be applied for to cover medical services provided by non-salaried medical practitioners.
Clause 1.2	You deliberately provide false or misleading information in applying for the Indemnity.
Clause 2(a)	You don't notify the hospital as soon as reasonably practicable of a potential or actual claim and this materially prejudices our ability to deal with the claim.
Clause 2(b)	You don't provide potentially relevant information or documents at the time you notify the hospital of a potential or actual claim and this materially prejudices our ability to deal with the claim.
Clause 2(c)	You don't act in good faith and this materially prejudices our ability to deal with the claim.
Clause 3	At the time of the incident giving rise to the claim or potential claim you were not working under a current and valid contract of employment.
Clause 4.4(a)	You make an admission of liability or a payment in settlement of a potential or actual claim.
Clause 4.4 (b)	You do something, or fail to do something, which materially prejudices our ability to deal with the claim.
Clause 4.5(a)	You: <ul style="list-style-type: none"> ▪ don't make full and frank disclosure of relevant information, or ▪ don't cooperate fully, or

Clause	Reason for potential exclusion
	<ul style="list-style-type: none"> ▪ disclose information improperly and this materially prejudices our ability to deal with the claim.
Clause 5(a)	An incident occurred outside of your period of employment.

You have the right to request that a Review Panel be convened in any circumstance where we might seek to withdraw indemnity from you. Clause 22 of the Terms & Conditions sets out the process to be followed by the review panel - see Questions 65 and 66.

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

Answer:

No. The Indemnity provides MTL cover for all procedures for which you have approval under your employment contract. You are also covered for the procedures that in your clinical judgement are necessary when responding to an emergency even though they may not be within the scope of your official employment.

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

Answer:

No. The Indemnity covers pre-operative anaesthetic examinations conducted in the hospital only.

17. 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 contract provides medical indemnity cover to you. Note that the *Civil Liability Act 2002* provides protection for ‘Good Samaritan’ acts undertaken in emergency situations, including outside of the hospital.

18. Am I covered for Good Samaritan acts?

Answer:

The Indemnity provides cover for treatment you may provide to a patient in an emergency situation in a public hospital, health care facility or other approved location.

The *Civil Liability Act 2002* provides protection for ‘Good Samaritan’ acts undertaken in emergency situations, including outside of the hospital.

19. Does the Indemnity apply to the hospital’s Open Disclosure policy?

Answer:

Yes. The Indemnity covers you for participation in authorised clinical governance activities including those referred to in Clause 8 “Safety & Quality Requirements” of the Terms & Conditions. Clause 8(c)(iii) refers explicitly to “participating in approved open disclosure activities”.

In respect of statements made in the context of Open Disclosure, clarification of “admission of liability” was provided in a letter, dated 16 November 2012, from the Minister for Health to the President of the AMA (WA). The letter is available on the website: https://ww2.health.wa.gov.au/Articles/J_M/Medical-indemnity

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

Answer:

Yes. The Indemnity does allow 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.

21. What is the difference between saying sorry and admitting negligence or liability?

The act of saying sorry or expressing regret does not in and of itself constitute an admission of liability. The *Civil Liability Act 2002* defines “apology” as “an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person”.

Part 5AH “Effect of apology on liability” states:

- (1) An apology made by or on behalf of a person in connection with any incident giving rise to a claim for damages –
 - (a) does not constitute an express or implied admission of fault or liability by the person in connection with that incident; and
 - (b) is not relevant to the determination of fault or liability in connection with that incident.
- (2) Evidence of an apology made by or on behalf of a person in connection with any incident alleged to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident.

In respect of admissions of liability, the Australian Open Disclosure Framework (2013) states

“Health service organisation staff need to be aware of the risk of making an admission of liability during open disclosure. In any discussion with the patient, their family and carers during the open disclosure process, the clinician should take care not to speculate on the causes of an incident or pre-empt the results of any investigations. They must not apportion blame, or state or agree that they, other clinicians or the health service organisations are liable for the harm caused to the patient. These restrictions should not impede open disclosure or the benefits that a genuine and sincere apology or expression of regret can provide to both patient and clinician.” (p 62)

As noted in Question 20, clarification of “admission of liability” was provided in a letter from the Minister for Health to the President of the AMA (WA). See https://ww2.health.wa.gov.au/Articles/J_M/Medical-indemnity

22. Does the Indemnity cover me for medico-legal reports that I might prepare? For example Treating Doctor Reports, Aviation reports, Diving reports, Workers' Compensation reports and/or Insurance Assessment reports.

Answer:

You are covered by the Indemnity for the provision of general medico-legal reports **except** where you work under Arrangement B or Sessional arrangement in the Perth metropolitan area and you bill for the report and retain the income. (See also Question 23)

23. Does the Indemnity cover me for the provision of expert opinion or medico-legal reports to a Court?

Answer

In all cases where the salaried medical officer charges and/or retains a fee for the service, the Indemnity would not apply.

In some specific circumstances assistance may be granted. Where such assistance is provided it is done so independently of this Indemnity and the prior approval of the DoH would be required.

24. 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 and the prior approval of the DoH would be required. (See Question 11)

Your MDO or Insurer may offer insurance cover for legal and other expenses associated with such matters.

25. Am I covered for telephone consultations?

Answer:

Yes. You are covered by the Indemnity for telephone consultations provided as part of the scope of your employment. The cover applies:

- whether or not you are on call, and
- regardless of whether the call is made by a private medical practitioner or originates from a private or public health care facility.

26. Am I covered for work I do when on "leave-without-pay"?

Answer:

No. However, if when on leave-without-pay, you were working as a non-salaried medical practitioner at a public hospital or health care facility you would be eligible to apply for the

Indemnity applying to that category of doctors. Refer to Question 41 which describes the types of non-salaried medical practitioners.

27. *Does the Indemnity cover me if I am working on secondment at a private hospital in Western Australia?*

Answer:

If you are working on secondment from a public hospital to a private hospital the Indemnity provides the same cover as that applying to your work in a public hospital. In other words, the scope of the cover will depend on your employment category and the category of patient being treated. Refer to Question 8 for the cover provided to the different employment categories and patient types.

Under the Deed of Indemnity between the Minister and private hospital operators, the operators are responsible for MTL claims where a seconded salaried medical officer is named as a respondent to that claim. Salaried medical officers on secondment should, in the first instance, contact the legal office in the private hospital in the event of a claim or potential claim.

28. *Am I covered for training rotations I do in a private hospital or private practice?*

Answer:

Yes. You are covered for all MTL claims, whether public or private patient, which may occur while you are on a training rotation from a public hospital or health care institution to a private hospital or other health care facility in WA - including radiology, pathology and GP practices. Refer also to Question 27 in relation to the management of MTL claims or potential claims.

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

Answer:

The Indemnity covers claims arising from incidents that occurred during the term (or terms) of your employment with the WA public sector health system. These incidents are covered whether or not you are still working or living in WA.

30. *Am I covered if a public patient is transported to a private facility for treatment and then returned to the public hospital?*

Answer:

Yes, provided that you do not bill the patient for the treatment in the private health care facility.

31. *Does the Indemnity cover salaried medical officers in country areas for the inpatient and outpatient components of private obstetric cases?*

Answer:

Yes. If you work in the WA Country Health Service the Indemnity provides cover for treatment provided to private obstetric cases before admission, during admission and post discharge. For doctors engaged under Arrangement B or sessional arrangements, IBNR cover

for private patients is provided back to 1 July 2003. For all other categories of employment the Indemnity provides 'tail cover' back to the date employment commenced.

32. *Am I covered for any pre-admission services?*

Answer:

Yes, you are covered for:

- obtaining consent to any procedural intervention or treatment in accordance with the requirements set out in Clause 8 of the Terms & Conditions (See Questions 33 and 34).
- pre-admission obstetrics cases as outlined in Question 31.

33. *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 hospital. (Refer to Question 7 for details of which patients are covered under the Indemnity.) Hence the Indemnity applies (subject to the exclusions specified in the Indemnity) 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 or other 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."

34. *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 informed consent.

35. Will I be covered under the Indemnity for compensable or ineligible patients? for example Motor Vehicle (MVIT), Workers' Compensation, Department of Veteran's Affairs (DVA)

Answer:

For the purpose of the Indemnity, patients who are treated as compensable, DVA or ineligible are treated in exactly the same way as private patients. Please refer to Questions 8 and 12 for the cover provided to the different employment categories and patient types.

36. I am employed under Arrangement B. If I hold non-procedural private medical indemnity cover will the Indemnity cover me for procedural work I might undertake in treating Motor Vehicle (MVIT) and workers compensation cases?

Answer:

If you work in the WA Country Health Service you will be covered by the Indemnity. You will also have 'tail cover' for incidents that occurred after 30 June 2003.

If you work in the Perth metropolitan area you will be covered by the Indemnity provided that you do not raise an account against the patient, or an insurer, and keep the fee. The indemnity will however apply if you raise a fee against the patient, or an insurer and assign the income to the health service.

**37. Am I covered for treating patients at other hospitals or health care facilities in WA where I have been directed / approved to provide treatment?
For examples Community clinics (including remote areas) and Nursing Posts.**

Answer:

You will be covered under the same conditions as when you treat patients in a public hospital provided you do not bill the patient. Refer to Question 8 for the cover provided to the different employment categories and patient types.

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

Answer:

The cover is based on the status of the patient at the time of the incident. Refer to Question 8 for the cover provided to the different employment categories and patient types. 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.

39. 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 legal representation and all damages against you that are covered by the Indemnity.

40. Does the Indemnity cover my practice staff?

Answer:

No. The Indemnity only applies to you.

SIGNING

41. Do I need to sign a new Application each time I switch to another hospital or health care facility on my training rotation?

Answer:

No. By signing the Indemnity you are covered for all public and private hospitals and health care facilities in WA as the Indemnity is between you and the Minister rather than a particular health service.

42. I work as a salaried medical officer at a number of public health services. Will I have to apply for the Indemnity more than once?

Answer:

No. Regardless of the number of separate public sector employment arrangements you may be working under, you will need to make only single Application for Indemnity.

43. Having signed the Indemnity as a salaried medical practitioner do I need to apply for a separate Indemnity to cover my non-salaried work?

For example:

- *I work as a salaried medical officer (typically on a sessional arrangement) at (one or more) public hospital and also as a VMP at another (one or more) public hospital.*
- *I work as a visiting specialist at a (one or more) country public hospital and as a salaried medical officer (typically on a sessional arrangement) at a (one or more) Perth metropolitan public hospital.*

Answer:

No. Provided that you are engaged under a valid contract, for VMPs this will be the Medical Services Agreement, you will be indemnified under the “Terms and Conditions of the Indemnity for Non-Salaried Medical Practitioners” effective from 1 August 2013.

DEATH, DISABILITY & RETIREMENT COVER

44. Does the Indemnity cover me for claims that arise after I retire?

Answer:

Yes. The Indemnity provides retirement cover for claims that relate to all public patient incidents, and those private patient incidents as outlined in Table 1 (Question 8), that occurred during the term (or terms) of your employment.

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

Answer:

Yes. Your estate will be covered under the same terms and conditions applicable to your retirement as summarised in Question 44 above. The cover does not extend to any claims that might arise from interstate or overseas work you undertake.

QUALITY AND SAFETY REQUIREMENTS

46. *Can the Indemnity be revoked if I don't comply with the Quality and Safety requirements?*

The 'Terms & Conditions' does not contain a clause which automatically voids (or withdraws) the Indemnity in circumstances where a salaried medical officer does not act in accordance with the hospital's policies and guidelines.

The potential does exist for the Indemnity not to apply to a specific claim where it is shown that the salaried medical officer acted in breach of his or her employment contract in respect of the medical services provided in relation to that claim - see Clause 1.2 (a)(viii).

In application, this means that if a claim were brought against the doctor which resulted in a Loss (as defined in the Indemnity) and if it were shown that the doctor had acted in a manner contrary to the requirements of his or her Employment Contract, then the Indemnity would not apply to that claim. As with other exclusions, the review panel (as per Clause 22 of the agreement) could be activated by the doctor.

Consistent failure by a doctor to comply with hospital policies would be a serious matter, leading to consideration as to whether his or her employment contract should be terminated regardless of any matters relating to indemnity.

47. *Am I indemnified for my participation in clinical governance activities specified in the Terms & Conditions?*

Answer:

Yes. 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.

48. *Will you impose onerous requirements on me in relation to safety and quality 'procedures and protocols'?*

Answer:

No. The mechanism for developing and introducing the procedures and protocols referred to in Clause 8 and Clause 21(b) will continue to be by way of the hospital or health service seeking advice from the relevant Medical Advisory Committee or equivalent.

It is not intended that these requirements will be used to place unduly onerous obligations on doctors. Clause 8(b) explicitly notes that your participation in clinical governance activities must be a 'reasonable' requirement. The relevant, local medical committee will provide advice on any policies and procedures requiring implementation.

49. *Am I obliged to participate in clinical governance activities?*

Answer:

Yes. Clause 8 of the Terms & 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 participating in quality improvement and other activities as required by the hospital.

50. *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.

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

Answer:

Broadly yes. 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 employment conditions. However, the Indemnity provides a greater level of detail regarding the specific requirements relating to quality and safety.

52. *Does reporting under the Indemnity replace other reporting requirements?*

Answer:

No. Not all adverse events become claims, although all could be considered potential claims. The obligation to notify the Hospital of claims and/or potential claims is in addition to the requirement to report those claims or potential claim on the Hospital's incident reporting system.

CLAIMS

53. *Why is the reporting of potential claims required?*

As has been the practice with MDOs, you are required to report all potential claims against you 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 potential claims (and actual 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 Potential Claim (and actual claim) notification forms 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 agreement.

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

Answer:

A **claim** occurs where a plaintiff (eg. 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 Doctor 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 Doctor either during or after the treatment cycle that is of such a nature as to reasonably suggest that a claim may be made.

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

Answer:

The information we require is set out on a Medical Treatment Liability Notification form held by the hospital/health service and you will be assisted in completing the details by the hospital/health service.

You may wish to seek advice from your Professional Association, MDO or Insurer. You may wish to retain private indemnity cover so that such advisers can assist you in providing the required information.

Note 1:

If you are employed under Arrangement B and the claim or potential relates to a private patient you treated in a Perth metropolitan public hospital then you should contact your MDO or Insurer.

Note 2:

If you are seconded or on rotation to a private hospital you should advise the hospital's legal office of any claims or potential claims in accordance with that hospital's policy.

56. *When do I have to advise the hospital about a potential or actual claim against me?*

Answer:

You must provide notification as soon as reasonably practicable in circumstances where:

- an incident has occurred that has the potential to lead to a claim, or
- an actual claim has been made against you.

If the matter is urgent or a claim has been made against you, you must, as soon as reasonably practicable, advise the designated Medico-Legal Claims Manager (for Teaching Hospitals) or the Director of Medical Services or equivalent (for all non-Teaching hospitals and other health services). To assist you, you have the right to seek advice from your professional advisers, representative body and/or your MDO or Insurer.

57. *Who do I advise?*

Answer:

You should advise the officer designated as your hospital's contact point for medico-legal issues:

- for Teaching Hospitals - the Medico-Legal Claims Manager,
- for non-teaching hospitals and other health services - the Director of Medical Services or equivalent.

The hospital or health service will provide advice and appropriate forms to record the details of the incident. Provision of information will be confidential and used solely for the purpose of resolving the potential or actual claim. You also have the right to seek advice from your professional advisers, representative body and / or your MDO or Insurer.

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

Answer:

The matter, subject to the possible appointment of separate legal representation where the Minister agrees there is a conflict of interest, is referred to RiskCover, which oversees management of the claim or potential claim as required.

59. *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 of which you should have reasonably been aware as soon as possible.

Sometimes, you may not be aware that a potential claim existed until an actual claim is made. This type of claim is usually referred to as an 'Incurred But Not Reported' (IBNR) claim. In such cases, 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.

60. Why might you ask about my past claims history?

Answer:

This information is required as one element of a program of managing risk. It is the same requirement that is made by MDOs and for any commercial insurance.

LEGAL REPRESENTATION

61. Who will choose my legal counsel?

Answer:

RiskCover, which manages the Government's self-insurance fund, will appoint a legal firm with the appropriate experience. RiskCover maintains a 'panel' of legal firms, including the State Solicitor's Office, which it draws upon to represent its clients.

Note also that under Clause 4.3 'Separate Representation ...' there are some limited circumstances where you may be provided with separate legal representation.

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

Answer:

You may engage your own legal counsel but the costs will not be met under the Indemnity.

You may wish to check with your MDO or Insurer to see whether they are able to provide an insurance policy covering this circumstance.

63. 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.

64. What are my rights in respect to representation, advice on the management of a claim and consultation?

Answer:

Clause 4 of the Terms & Conditions of the Indemnity provides that:

- the Minister will provide you with legal representation for any claim or potential claim. The Minister may provide you with separate legal representation if the Minister determines there is a conflict of interest.
- you will be advised on the progress of a claim / potential claim.
- we will use our best endeavours to consult with you before settling any claim where you are a named defendant in any writ and which involves an admission of liability in respect of your specific conduct.

REVIEW PROCESS

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

Answer:

Yes. Under the Terms & Conditions, you can request that a Review Panel be convened in situations where we seek to withdraw indemnity. Clause 22 of the Terms & 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 have regard for the outcome of the review in determining whether or not to continue to indemnify you.

Based on our experience to date with salaried doctors involved in MTL claims, the probability 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 we have wrongfully withdrawn the Indemnity. In that event, it would be for us to substantiate in a court of law why we had legal grounds for having done so.

66. *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:

- we might seek to withdraw indemnity (as set out in Question 14);
- the Minister declines to provide separate legal representation (Clause 4.3);
- a dispute arises concerning our intentions or actions when acting as your agent (Clause 4.6); and/or
- you dispute a decision by us to require repayment of moneys, should the Indemnity be lawfully withdrawn (Clause 6).

RELATIONSHIP WITH MDOs INSURANCE

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

Answer:

The principal focus of the Indemnity is on MTL claims in public hospitals and health care facilities and this may not cover all of your activities. In addition the Indemnity includes a number of exclusions (refer to Question 10) and does not provide access to independent legal advice. You may also provide services to patients not covered by the Indemnity.

We would recommend that you discuss with your MDO whether they offer cover for those activities not covered by the Indemnity.

68. *Will I need to purchase any ‘tail cover’ from my MDO?*

Answer:

The Indemnity provides ‘tail cover’ for claims that relate to all public patient incidents, and those private patient incidents as set out in Table 2, Question 12, that occurred during the term (or terms) of your employment.

You should consult your MDO or Insurer concerning the requirement for ‘tail cover’ in respect of the treatment of private patients not covered by the Indemnity.

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

Answer:

The Indemnity provides cover for the treatment of the patient types outlined in Question 8. If you provide services to other patients or other hospitals then you will need to obtain separate cover for that work. Although the two systems complement one another, they are largely separate.

ALTERNATIVE TO APPLYING FOR THE INDEMNITY

70. What is my position if I don’t apply for Indemnity?

Answer:

Prior to 2004 the arrangements for indemnifying salaried medical officers named in MTL claims were based on:

- (a) The Government’s longstanding policy on indemnity as set out in the “1990 Guidelines relevant to Ministers and Officers involved in Legal Proceedings”.
- (b) The “1994 Protocol for Cooperation in Litigation and Potential Litigation”.
- (c) The process for authorising access to indemnity cover that has applied since the inception of the RiskCover scheme in 1997.
- (d) Department of Health Operational Circulars (all of which have been rescinded)
 - “Indemnification of Employed Medical Practitioners” (A7319, 20 December 1989);
 - “Indemnification of Hospital Officers” (A7380, 21 February 1990);
 - “Indemnification of Employed Medical Practitioners” (A7452, 23 May 1990);
 - “Medical Indemnity for Seconded Doctors” (A7514, 8 August 1990).
- (e) There may also be some salaried medical officers who were issued letters of indemnity provided by their employing health service.

The Indemnity superseded (b) and (d) above. Individual letters of indemnity, (e) above, cannot be issued by hospitals or health services. Hence, salaried medical officers who choose not to apply for the Indemnity will continue to be covered under the arrangements provided by (a), (c) and, potentially, (e).

71. The hospital where I work provided me with a letter stating that I am indemnified. Can I continue to rely on that advice?

Answer:

A number of salaried medical officers may hold ‘letters of indemnity’ issued by their employing health service. When the Indemnity was introduced in 2004, hospitals and health services were directed not to issue such letters. If you hold such a letter you will need to consider whether or not to replace it with the contractual Indemnity. In coming to this determination you may wish to obtain independent legal advice.

72. What cover will I have if I don't sign the Application for Indemnity?

Answer:

See Questions 70 and 71.

FURTHER QUERIES

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

Answer:

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

Information is also available on our website:
https://ww2.health.wa.gov.au/Articles/J_M/Medical-indemnity