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Duty of candour consultation – member briefing

In December 2020, the Victorian Government announced the launch of a [community consultation](#) on a proposed duty of candour law and related proposals aimed at further strengthening the culture of health services. The proposed law is the first of its kind in Australia.

Background

A duty of candour requirement was first recommended in *Targeting Zero*, the final report of the Review of Hospital Safety and Quality Assurance in Victoria, which was published in 2016. An Expert Working Group, including some VHA members, was appointed in 2017 to provide advice on legislative reforms arising from the report and recommendation. They submitted a report to the Victorian Government in 2018 with 27 recommendations to support the introduction of a duty of candour law and related reforms. The Expert Working Group [report](#) and [government response](#) have been released publicly alongside the consultation. The Victorian Government has accepted in principle all recommendations made by the report and is undertaking further consultation to ‘rigorously test’ the proposals.

Summary

The government intends to create a new statutory duty of candour, which would require specified health service entities to apologise to consumers impacted by a serious adverse healthcare incident. The duty would initially apply to hospitals (public and private), public health services, multi-purpose services and day procedure centres regulated under the *Health Services Act 1988*, Ambulance Services and the Victorian Institute of Forensic Mental Health. Other entities, such as residential aged care facilities and community health centres, were not recommended for inclusion by the Expert Working Group but may become within scope over time.

Under the proposed duty of candour law, hospitals will have an obligation to:

- apologise to any person seriously harmed while receiving care
- the facts about what occurred, explaining what went wrong
- describe what action will be taken and what improvements will be put in place.

The statutory duty of candour will:

- apply to incidents of a high severity rating (Incident Severity Rating 1 and 2)
- complement existing obligations under the Australian Open Disclosure Framework
- be high level and supported by the *Victorian candour and open disclosure guidelines*.

The Victorian Government has proposed that the *Victorian candour and open disclosure guidelines* will offer:

- detailed instructions to health services on apologies, explanations, and details of preventative action
- minimum requirements for compliance with the statutory duty of candour and open disclosure obligations
- guidance and information to support best practice.

The consultation is clear that apologising will not be an admission of fault relevant to court determinations. The Victorian Government intends to legislate protections for apologies provided by a health service entity in connection with the provision of a health service. As a result, an apology, such as an expression of sympathy, regret or compassion, will not constitute an admission of fault or liability and will not be relevant to any determination of fault or liability in civil or disciplinary proceedings. However, factual descriptions of what has occurred, which services will be required to provide to consumers through a statutory obligation under the duty, will not be protected and can be used as evidence in legal proceedings.

In addition to establishing the statutory duty of candour, the Victorian Government intends to introduce legislative reforms to establish protections for conduct of serious incident review processes by health service entities. This is intended to support an organisational and system-wide culture where errors and harm are effectively identified, discussed and reviewed and consumers are kept informed. The proposed model for the protections for clinical incident reviews outlines that:

- those involved in the clinical incident review and the commissioning health service entity are under a confidentiality obligation in relation to the clinical incident review
- the report and working papers from the clinical incident review are exempt from Freedom of Information requests and are not admissible in court
- those involved in the clinical incident review cannot be required to give evidence about review documents and deliberations (e.g. interviews, discussions)
- disclosure of the review report to specified third parties is allowed, including disclosure to a person whom the commissioning health service entity considers has a sufficient personal and professional interest
- permitted disclosure does not make the report admissible in court or available under the Freedom of Information Act 1982
- providing information to a review in good faith would not breach any professional ethics nor give rise to personal liability
- health service entities are obligated to offer the clinical incident review report to consumers and to provide the report when consumers accept that offer. This aligns with duty of candour and mitigates against restrictions on consumer use of information.

The consultation questions focus on ascertaining any potential impacts, unintended consequences, missing areas, improved processes, and general sentiment towards the proposed guidelines and protections. The official government response signals that they 'do not expect that the requirements for health service entities will be substantially different, in terms of burden, than existing and ongoing obligations for open disclosure and incident review. Rather, the reforms are designed to support and encourage improvements to maximise the quality and safety. The benefits identified are anticipated to flow from improvements in practice, for example open disclosure conducted with greater openness and compassion, and incident reviews conducted with increased frankness and rigour.'

Next steps

The VHA is in the process of developing a submission for the consultation and will keep members informed of how they can contribute. Members are encouraged to get in contact to share any insights they have.

The Victorian Government has signalled it intends to release an exposure draft of the bill and/or the guidelines before they are introduced, providing further opportunities to influence the legislative process in 2021. The VHA will continue to monitor development of the legislation.



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