

9 April 2021

Consultation response: Reforms to foster an honest and open culture in health services

About the Victorian Healthcare Association

The Victorian Healthcare Association (VHA) is the not-for-profit peak body supporting public and community health services to deliver high quality care in Victoria. The VHA represents Victorian public hospitals, registered community health services, Multi-Purpose Services (MPS) and bush nursing services.

Introduction

The VHA supports the proposed duty of candour law but has concerns around its implementation. The duty should lead to positive outcomes that do not result in an increased administrative burden on health services and their clinical staff. This is especially important following the pressures on the Victorian health system due to the COVID-19 pandemic.

This submission is based on consultation with legal advisors from VHA member services and is structured around three key topics:

- Victorian candour and open disclosure guidelines
- Protections for clinical incident reviews - proposed model
- Wider feedback

Submission

Victorian candour and open disclosure guidelines

Do you support the proposed content and format of the Victorian candour and open disclosure guidelines (noting they are a detailed legislative instrument underpinning high level primary legislation)?

While the proposed content and format of the Victorian candour and open disclosure guidelines are reasonable, further clarity is required around the relationship with existing obligations while tools are necessary to support services.

Are there any matters which should be included or removed from the proposed content of the guidelines?

In addition to the proposed content of the guidelines, the VHA urges the development of templates for these required documents. The duty of candour, and its requirements, will increase demands on health services and their workforce. Health services have a mobile workforce, so a consistent approach is required across the state. This would support implementation and reduce the burden on health professionals. If only the guidance is provided, services will need to generate their own resources and templates, which lead to duplication of effort and different outcomes at each service. Having a standardised approach allows services to focus on patient care. HealthShare Victoria supported services similarly to respond to requirements regarding modern slavery, which demonstrates how this can be achieved.

Recommendation 1: The Victorian Government should develop templates, and other supporting documents and/or resources, as part of these guidelines to ensure consistency across the Victorian health system.

It is important that guidelines provide clear and accurate information for services. These guidelines will be the basis for services to develop policies and procedures. The guidelines must have a clear scope and appropriate definition of terms is important. A lack of clarity risks further issues for services and patients when the duty is implemented.

Recommendation 2: The Victorian Government should ensure that the guidelines provide clear and emphatic direction to health services.

Are there other issues or unintended consequences that should be addressed or considered as part of the development of the guidelines? Please note a draft of the guidelines will be released with the exposure draft of the legislation (anticipated in 2021).

The guidelines should provide further information to services on the relationship between these two processes. The proposed duty of candour legislation will supposedly 'complement' the Australian Open Disclosure Framework, but there is lack of detail on how these processes will interact. Services and staff already have obligations around incident reporting and patient communication under the standards for open disclosure. The two processes should be mutually exclusive to avoid duplication of processes.

Recommendation 3: The Victorian Government should provide further information on the relationship between the duty of candour and open disclosure obligations.

The guidelines should be informed by the expertise and experience of services. Yet, Victorian health services have reported to the VHA and the Victorian Government that they are under pressure due to the deferred lockdown demand, vaccine delivery, gender equality obligations, the upcoming Peoples Matters Survey and family violence (MARAM) requirements. The Victorian Government is targeting implementation of the legislation in 2021, so it needs to ensure that the duty of candour requirements do not create additional burden on health services. This complicates capturing the perspective of the sector and its workforce to inform the duty. The Victorian Government must work with the sector if it wants to achieve the aims of the duty of candour legislation. A comprehensive consultation process that involves services and their staff would ensure that their perspectives are appropriately captured and represented in the guidelines. Any consultation should ensure the process is easy for services to engage. The VHA has expertise in facilitating engagement with public health services and can assist with the consultation process.

Recommendation 4: The Victorian Government should develop a comprehensive process to support health services, and their staff, to engage in the forthcoming consultation on the draft guidelines.

Protections for clinical incident reviews - proposed model

Do you support the proposed model for clinical incident reviews?

While the proposed model is largely appropriate, there are concerns around the lack of protections for health services and staff.

Are there any unintended consequences or issues with the model that should be addressed or considered?

There is concern from services around the impact that the clinical incident review model will have on clinical reviews. While the model contains protections around FOI and the use of these clinical reviews in litigation, the reviews are still discoverable and likely to be provided to the affected patients. Clinicians may become reticent to fully engage with the process due to the potential for this information to become available. There is concern that this model will lead to the dilution of clinical reviews, as clinicians may become cautious to engage, which would mitigate the value of the reviews. This could limit the capacity of the health system to learn from its mistakes. The Victorian Government must ensure that the health workforce is protected and that the proposed model does not hinder the clinical incident review process.

Recommendation 5: The Victorian Governments should consider the potential impact that the proposed model will have on clinicians and the value of clinical incident reviews.

Should there be a mechanism to disseminate learnings and/or recommendations from incident review processes for quality and safety improvement purposes, including to those involved in the relevant case (although only relevant information may be provided to individual clinicians involved in the case)?

The Victorian Government should create a mechanism to facilitate the sharing of learnings from these clinical incident reviews. Sharing this information across health services and health professionals would help to improve outcomes and performance across the state. However, any process should be focused on performance improvement, and not be

a process to shame services. The VHA recommends creating a Community of Practice, which we recently successfully delivered and facilitated in support of the High-Risk Accommodation Response.

Recommendation 6: The Victorian Government should create a mechanism to share learnings and/or recommendations from clinical incident reviews

Should incident review protections include personal protections for those conducting or participating in a statutory incident review process in good faith?

Comprehensive protections for those involved in the incident review process is essential. As highlighted in **Recommendation 5**, the risk of litigation may impact the value of clinical incident reviews and increases pressure on clinicians. The duty of candour should not come at the expense of clinical learning and clinician wellbeing.

Recommendation 7: The Victorian Government should ensure incident review protections include personal protections for those conducting or participating in a statutory incident review process in good faith.

Wider feedback

The introduction of the duty of candour will result in an increased legal and administrative workload for health services, which must be properly resourced. The duty process is also being implemented during a period of pressure for Victorian health services, as they continue to respond to the pandemic and implementing other reform or regulatory processes with the Victorian Government. In response to the duty and its requirements, Victorian health services would need to develop a health queries plan, have an effective compliance process and establish auditing processes, as well as monitoring and reporting requirements. Furthermore, not all health services have their own in-house legal counsel, and the proposed duty of candour will increase legal costs for services that do not have this capability, particularly small rural health services. The duty of candour requirements will be a major demand on services, so the Victorian Government should properly resource services to implement the proposed duty of candour. This resourcing should include appropriate funding as well as the development of standardised state-wide resources, such as consistent training for services and relevant staff across Victoria.

Recommendation 8: The Victorian Government should consider the potential financial and resourcing impact on Victorian health services.

The Victorian Government needs to ensure that the duty of candour does not come at the expense of the duty of care. The duty of candour can cause harm for consumers – people may experience mental distress if they do not understand the information presented to them under the duty. Services need to be supported to ensure they can provide the considerations, support and information that patients need to understand the situation. The Victorian Government should explore the concept of an exemption or adjusted process, if a judgement can be made that disclosure will lead to more harm than good for the patient, whilst still providing transparency.

Recommendation 9: The Victorian Government should ensure that the duty of candour is focused on improving outcomes for patients.



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