



OPEN DISCLOSURE

Frequently asked questions

What is VMIA's position on open disclosure?

VMIA supports open disclosure. We recommend you refer to the guidelines provided by the Department of Health and Human Services. *Open disclosure for Victorian health services – A guidebook* is available from the health.vic website, together with other resources.

When do I contact VMIA?

You will contact VMIA as part of your organisation's normal clinical incident management and clinical governance process. This process should include consideration of open disclosure.

What is the difference between an apology/ expression of regret and an admission of liability?

You may be concerned that undertaking open disclosure might constitute an admission of liability and therefore impact on your insurance cover.

An 'admission of liability' is defined in the Department of Health and Human Services guidelines as "the assumption of legal responsibility (either verbally or in writing) by the health service or one of its employees or agents for the harm or injury to a patient arising as a result of an adverse event".

Carrying out open disclosure in accordance with the guidelines does not imply an admission of liability or prejudicial conduct against an insurer's interests.

The assumption of responsibility for fault is the crucial difference between an 'admission of liability' and an 'apology'.

The crucial difference between an 'admission of liability' and an 'apology' is assuming responsibility for fault. Thus, the statements "I sincerely regret that you underwent this experience" and "I regret that this has happened to you" contain no acknowledgement of fault and constitute apologies, whereas the statement "I am sorry that my mistake has caused your injury" is likely to be interpreted as an 'admission of liability'.

Why should you avoid making 'admissions of liability'?

Your organisation insured with VMIA has an obligation not to act in a way that prejudices the rights or interests of VMIA. An 'admission of liability' could create prejudice and result in loss of coverage under the insurance policy.

What should the open disclosure discussion with the patient include?

VMIA recommends that health services and healthcare professionals refer to the information and resources on open disclosure produced by the Department of Health and Human Services.

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How should documentation be managed following an adverse event?

A health service or healthcare professional may have to produce documentation created or used during the open disclosure process to the patient (or to lawyers acting for the patient in a legal claim). Such documentation may include:

- the patient's medical record
- email correspondence
- statements by hospital staff members
- minutes of meetings of the open disclosure team
- the results of investigations of the adverse event. Such documents may have to be produced during legal proceedings (usually through the process of discovery) or pursuant to legislation such as the *Freedom of Information Act* and the *Health Records Act*, or in response to a subpoena.

It is therefore very important to be careful to document *only* facts which have been verified as accurate (as far as is possible), to avoid recording opinions (these may later be shown to be misleading or based on erroneous information) and to avoid defamatory statements and attributing blame.

If lawyers are involved in the investigation of an adverse event, some of the documentation may be protected from disclosure by way of legal professional privilege. Please refer to the Department of Health and Human Services Guidelines for further information regarding legal professional privilege.

For an action of defamation to arise, it is sufficient if the defamatory statement is communicated to just one other person, whether verbally or in writing.

What is a defamatory statement?

A defamatory statement is one which tends to lower a person in the estimation of others by making them think less of him or her. For an action of defamation to arise, it is sufficient if the defamatory statement is communicated to just one other person, whether verbally or in writing. Such an action could therefore arise by a healthcare professional alleging that another is incompetent.

It is important to take care during the open disclosure process (including in discussions with the patient and other staff and in documentation) to avoid making defamatory statements. You must be careful about what is said to and about others during this process.

What about privacy and confidentiality?

Health services and healthcare professionals owe a duty of confidentiality to patients at common law and under legislation. Patients also have rights to privacy of personal and health information, pursuant to legislation. Health services and healthcare professionals must have regard to these rights and to their duty of confidentiality during the open disclosure process.

A patient should be given the option of having a support person present during the open disclosure discussion and sufficient time to make arrangements for the support person to attend.

Providing information about the patient to others without the patient's consent may constitute a breach of the patient's privacy and of the duty of confidentiality owed to the patient.

According to the *Australian Open Disclosure Framework* (released in 2013), the safest way to avoid breaching a patient's privacy or the duty of confidentiality is to obtain the patient's consent to disclose specified information to nominated persons.

Health services and healthcare professionals must also consider the privacy rights of staff when investigating adverse events and conducting the open disclosure process.

If a patient is deceased, what privacy obligations should be considered?

After a patient is deceased there are a number of privacy obligations that remain with a healthcare provider. Your organisation should seek legal advice regarding privacy concerns during open disclosure in this context.

Who do I contact for assistance?

Any queries about the open disclosure process, including requests for assistance regarding the implementation of open disclosure by a health service, should be directed to the

Department of Health and Human Services:

Quality and Safety Branch
GPO Box 4541
Melbourne VIC 3001
+61 3 9096 7258

You can contact **VMIA** at:
+61 3 9270 6900
contact@vmia.vic.gov.au

Where can I go for further resources?

The Australian Commission on Quality and Safety in Health Care produce an Australian Open Disclosure Framework. As well as the Department of Health and Human Services resource material, VMIA has published two case studies on open disclosure.

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