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### **Reforms to foster an honest and open culture in health services**

AMA Victoria welcomes the opportunity to provide feedback on the Victorian Candour and Open Disclosure Guidelines and the proposed model for clinical incident review protections.

We support open disclosure and the introduction of duty of candour laws in principle. However, there must be appropriate assurances and safeguards in place for clinicians to ensure that they are not used as a scapegoat(s) for systemic errors. It is also essential that effective and efficient training is provided to ensure that the duty is discharged appropriately. Moreover, we are concerned that one of the "protections for clinical incident reviews", namely that unredacted reports can be released to patients and/or their families, with nothing in place to prevent either from subsequently releasing the details into the public domain.

As the Department notes, under the proposed law, hospitals will have an obligation to:

- apologise to any person seriously harmed while receiving care (noting that saying sorry will not be an admission of fault relevant to court determinations);
- explain what went wrong; and
- describe what action will be taken and what improvements will be put in place.

We appreciate that the intention is for the statutory duty to not apply to individual clinicians and practitioners, but rather to the hospitals that manage and oversee the delivery of care. Nevertheless, AMA Victoria notes that medical practitioners will often be relied upon and/or expected to discharge such a duty on behalf of hospitals, including related to serious incidents caused by other registered healthcare practitioners. In this context, a critical concern for doctors is the threat of personal disciplinary action, as patients and even other healthcare practitioners may view adverse clinical incidents as evidence of breaches of professional standards.

Furthermore, we are concerned that medical practitioners may not necessarily express an apology correctly, particularly in situations of considerable stress and pressure. Medical practitioners are deeply concerned, that if not worded correctly, an apology or expression of regret could be interpreted as an admission of fault, either systemic (at the organisational level) or individual, notwithstanding that under the proposed law, an apology is not such an admission for legal purposes.

Thus, some of the challenges associated with adherence to the proposed statutory obligation are in part a reflection of the tension between informing patients and the perceived risk that disclosure could give rise to a potential (implied) liability.

Accordingly, AMA Victoria considers it is essential for the Department to develop appropriate training to provide legal clarity on the issue of liability, and help medical practitioners and other staff feel more at ease with the process. AMA Victoria acknowledges the challenge of providing engaging and relevant training to all medical staff across a health service, considering factors such as junior medical practitioners on short employment rotations, fractional appointments of senior medical staff and Visiting Medical Officers. Equity in access to education, training and mentoring must be provided to all staff (clinical and non-clinical), including contractors, if an organisation is to satisfy its obligation of candour, and staff must be appropriately remunerated to undertake such training. Equally, while online training resources should be made available to all staff (to facilitate equity in access to training and education modules), more senior and experienced staff members would preferably be engaged in all open disclosure processes. The Department should also provide an education package to health services on compliance with the open disclosure framework and the proposed statutory duty.

Medical Practitioners must be supported to understand how their own professional obligation of open disclosure interacts with a statutory duty of candour and the differences between them, noting all medical practitioners must have a relationship with a medical defence organisation. Health services must have clear policies and procedures about open disclosure and the statutory duty of candour, which should be consistent with existing clinical governance frameworks, quality and safety policies, professional indemnity requirements, and employment obligations.

If statutory candour disclosure is to become a routine part of medical practice, law reform is needed in the form of stronger protections under Victorian apology laws and to make the protection consistent in respect of apologies under the disclosure standards, the *Wrongs Act 1958* (Vic) and the statutory candour obligations. AMA Victoria considers that individual medical practitioners must be indemnified against any disciplinary action or litigation which arises out of such candour obligations.

AMA Victoria considers that in relation to "protections for clinical incident reviews", the proposed model is flawed. If the review documents and reports are not subject to Freedom of Information requests and cannot be called upon in court, it is contradictory to suggest that the reports should be offered to patients and/or their families. If a report is offered to patients and families, it is in effect released to any interested member of the public because there is no mechanism to prevent the patient from sharing it with the public. If clinicians and administrators are aware of the distinct possibility that the documents and reports could be expressed in the public domain, the clinical incident review process will likely be compromised in its quality. One method to overcome the above issues would be for the review reports to have a "for the consumer" section, in which the case findings are summarised in appropriate language for external readers, and it is only this section that is offered to patients and families. Relevant penalties should apply for any breach of non-publication undertakings by the various parties.

AMA Victoria thanks the Government for the opportunity to contribute to this important reform.

For further information on this submission, please contact Communication and Advocacy Officer, Lewis Horton, on 0432 593 124 or [LewisH@amavic.com.au](mailto:LewisH@amavic.com.au).

Yours sincerely,

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**AMA VICTORIA PRESIDENT**