



Australian  
College of  
**Nursing**

ACN submission to Victorian Government  
Statutory Duty of Candour consultation

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# ACN submission to Victorian Government Statutory Duty of Candour consultation

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## CONSULTATION QUESTIONS

Q1. Do you agree that the statutory duty of candour should apply to the set of health services [regulated by the Health Services Act 1988] including private sector organisations?

*The Australian College of Nursing (ACN) agrees that the statutory duty of candour should apply to the set of health services [regulated by the Health Services Act 1988] including private sector organisations.*

Q2. Which, if any, other healthcare providers should be in scope for the statutory duty of candour?

*Aged care providers, ambulance services.*

Q3. Do you believe the statutory obligation should apply to individuals instead of, or as well as, organisations?

*No – ACN agrees with ‘obligation on individual practitioners’ as outlined in 4.1 Scope of this consultation paper which states “Although the act of being candid – or not – belongs to individual health professionals, the statutory duty of candour proposed by Targeting Zero would apply to organisations. Individual health professionals already have professional and ethical obligations to be open and honest with patients when things go wrong... it is worth noting that the evolving nature of health care service provision means that it is no longer an ‘individual craft.’ Health care is usually delivered by teams of professionals. This might add complexity to the practice of open disclosure... Furthermore, the application of an individual obligation would do little to address the cultural issues, identified in Targeting Zero, which might act to limit the practice of open disclosure.”*

*Principle 3 of this consultation paper states – “Implementation of the statutory duty of candour should aim to assist healthcare workers to manage these difficult situations when they arise, rather than add to their burden”. – If it were to apply to individuals then it would be an added burden.*

*Also refer to open disclosure framework which states:*

- *Staff support - health services are to create an environment in which all staff are able and encouraged to recognise and report adverse events, and are supported through the open disclosure process.*
- *Confidentiality - health services are to develop policies and procedures with full consideration of consumer and staff privacy and confidentiality, and in compliance with relevant law, including Commonwealth and state or territory privacy  and health records legislation.*

*Health-care workers acting in good faith and in the best interests of their patients should work in an environment that supports open disclosure, not in an environment where they could be ‘thrown under the bus’ by the organisation they work for.*

Q4. At what threshold of harm and/or for what type of incidents should the statutory duty of candour apply?

*The Open Disclosure Framework defines ‘adverse events’ as ‘an incident in which a person receiving healthcare was harmed’. Recommendation 5.3 of this consultation paper states; “any person harmed while receiving care”. For a statutory duty of candour to work alongside the Open Disclosure Framework as is the intention then there must be consistency with those documents the threshold should be any adverse event as defined by the Open Disclosure Framework.*

Q5. Should the statutory duty of candour apply to instances of psychological harm as well as physical harm?

*The World Health Organization states that harm – “...may be physical, social or psychological” – Therefore to align with recommendation 5.3 psychological harm would need to be included.*

Q6. Should the statutory duty of candour apply to near misses and/or complications of treatment that result in no harm and/or no lasting harm? Should it apply where the wrong treatment was given or non-evidence-based treatment was given if there is no harm as a result?

*Under recommendation 5.3, that states “any person harmed while receiving care” near misses would not be included as no harm has occurred. However, there is a grey area here. E.g. – If a person is given a wrong medication that resulted in no harm. This should absolutely be disclosed to the patient, and while this could come under the Open Disclosure Framework, the fact of knowing that this happened could potentially lead to the patient suffering psychological or social harm which would then trigger the statutory duty of candour.*

*Risks of complications of treatment should be disclosed prior to treatment as part of informed consent. If harm arises from these complications, then that indeed should be discussed openly with the patient, and the statutory duty of candour would be triggered.*

Q7. Do you agree that there should be provision for ‘consumer declared harm’ as a trigger for the statutory duty of candour to apply?

*No – The statutory duty of candour as worded in this document refers to incidents where harm has occurred. In this question it is not clear that this has been established therefore the statute has not been triggered. However, if someone believes they have been harmed then they should expect a transparent investigation. This is a grey area as if the ‘consumer declared harm’ is psychological in nature then there could be grounds for the statute to apply.*

*In addition, as evidence shows that acknowledgement and apologies reduce the amount of litigation, then there is scope for consumer declared harm to be included. However, there must be strong legal protections*

*for situations where the organisation has already apologised and/or admitted fault and then subsequently cleared of fault by an investigation into a consumer's claim.*

Q8. Which, if any, of the matters [identified in the paper] should be included within the statutory requirements for the duty of candour?

*All of the matters identified in the paper should be included within the statutory requirements for the duty of candour.*

Q9. Are there other matters that should be included within the statutory requirements or encouraged through other means?

Q10. Do you agree with the key barriers and enablers identified [in the paper]?

*Yes, ACN agrees with the key barriers and enablers identified in the paper.*

Q11. What are the most important factors to ensure the statutory duty of candour achieves its intended aims?

*Healthcare workers need to feel safe and supported through the process. Having clear lines of responsibility and supportive leadership.*

Q12. How can the necessary training best be delivered?

*Training could best be delivered through a designated person within the organisation leading the entire process.*

Q13. Do you agree with the support requirements identified [in the paper]? What other actions might be needed?

*No – There is little in the paper about requirements for support – “have a role in....” is not a requirement. Solid support systems embedded in organisations should be mandated.*

Q14. Is there a need to strengthen Victoria's apology laws?

*It would appear that this is necessary. Victoria lags behind most of the other states with regard to apology laws. We would support an amendment to Part IIC of the Wrongs Act 1958 (Vic) as suggested by the Victorian Ombudsman in the Apologies Review and outlined in this consultation paper.*

*The following paragraph appeared in The Age newspaper on May 2 2017:*

*“Victorian Ombudsman Deborah Glass is calling on the government to amend the state's apology laws..... afraid of litigation, and insurance policies, which are a barrier because they contain clauses requiring an insurer's consent before any admission is made..... Victoria's apology law is*

*backwards. It's the only state in the country where an apology can be admitted as evidence of fault or liability. "The fact is, the law doesn't help and the reason I recommend a change to the law is that it would take away the excuse," Ms Glass said. Victorian legislation protects apologies in proceedings involving death or serious injury, but they do not protect apologies for other bumbles. - This is why people receive the partial apologies..."<sup>1</sup>*

Q15. Do you think there is merit in including statutory protections for open disclosure alongside the statutory duty of candour?

*In NSW, ACT, and QLD the law protects 'full' apologies from being admissible in civil proceedings.<sup>2</sup> Clearly, a unified approach across Australia is favourable.*

*For a safe and supported environment for disclosure then ".....we need to recognise and admit our mistakes, to authorise people within an organisation to admit mistakes and to take responsibility for corrective action, and to remove any actual or perceived legal impediments to the making of full apologies."<sup>3</sup>*

*"It is also important to note that where action is taken to rectify a problem, for example as part of a package of measures in a 'full' apology, in proceedings relating to liability or negligence "...the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk""<sup>4</sup>*

*Note - 15 per cent of authorities said they do not admit fault or responsibility when they apologise. This is despite research showing that people may not accept these 'partial' apologies as genuine. This includes health providers, who follow national open disclosure standards designed to encourage open communication with patients and families following adverse events.<sup>5</sup> The standards advise health professionals to apologise without admitting fault, in case they open themselves to legal liability<sup>6</sup>*

*The Australian Commission on Safety and Quality in Health Care (ACSQHC) Open Disclosure Framework 2013 states – "It is not intended that legal considerations should inhibit implementation and practice of open disclosure. However, uncertainty surrounding the medico-legal aspects of open disclosure is a known barrier to its practice. Clarification is therefore needed to facilitate open disclosure."*

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<sup>1</sup> Mills, T 2 May 2017, 'Sorry is the hardest word: why our authorities don't apologise for stuff-ups', *The Age, Fairfax Media*, <<http://www.theage.com.au/victoria/sorry-is-the-hardest-word-why-our-authorities-dont-apologise-for-stuffups-20170502-gvxdyn.html>>.

<sup>2</sup> Deputy Ombudsman - Speech – Open disclosure and apology – time for a unified approach - National Administrative Law Conference - Canberra - 19 July 2013 [https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0012/10470/Open-disclosure-and-apology-Nat-Admin-Law-Conference-19-July.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0012/10470/Open-disclosure-and-apology-Nat-Admin-Law-Conference-19-July.pdf)

<sup>3</sup> Deputy Ombudsman - Speech – Open disclosure and apology – time for a unified approach - National Administrative Law Conference - Canberra - 19 July 2013 [https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0012/10470/Open-disclosure-and-apology-Nat-Admin-Law-Conference-19-July.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0012/10470/Open-disclosure-and-apology-Nat-Admin-Law-Conference-19-July.pdf)

<sup>4</sup> s.5C, Civil Liability Act 2002. Cited in 1,2.

<sup>5</sup> <https://www.ombudsman.vic.gov.au/getattachment/6adb9870-d976-443a-9087-e926b9ba746e//publications/parliamentary-reports/apologies.aspx>

<sup>6</sup> Australian Commission on Safety and Quality in Health Care, Australian Open Disclosure Framework (2013). See also Department of Human Services, Victoria, Open disclosure for Victorian health services: A guidebook (2008). Cited in <https://www.ombudsman.vic.gov.au/getattachment/6adb9870-d976-443a-9087-e926b9ba746e//publications/parliamentary-reports/apologies.aspx>



ACN believes that statutory protections for open disclosure should absolutely be included alongside the statutory duty of candour to provide a safe, supported environment, which would then promote a culture of open disclosure.

Q16. Is there a need to clarify, in legislation or through supporting materials, the relationship between open disclosure and qualified privilege?

*The defence of qualified privilege is defined as allows free communication in certain relationships without the risk of an action for defamation – generally, where the person communicating the statement has a legal, moral or social duty to make it and the recipient has a corresponding interest in receiving it. The defence of qualified privilege cannot be used if it can be proved that the defamation was motivated by malice.<sup>7</sup>*

*The Australian Open Disclosure Framework by Australian Commission on Safety and Quality in Health Care states –“Qualified privilege legislation varies between jurisdictions but generally protects the confidentiality of individually identified information that became known solely as a result of a declared safety and quality activity. Certain conditions apply to the dissemination of information under qualified privilege.”<sup>8</sup>*

ACN believes there is a need to clarify this relationship.

Q17. Are other statutory protections required?

*There needs to be sufficient protections to promote a culture of open disclosure within health organisations. This consultation paper at 4.6 states that “The purpose of a statutory duty of candour is to improve practice in services and to promote honest, open and just cultures.” For this to be achievable, strong protections are needed to promote a workplace where health-care workers can feel safe and supported.*

Q18. How should failures to comply with a statutory duty of candour be identified?

*This consultation paper states “...assessing services against National Standards.” The national regulator of health practitioners in AHPRA. It could make sense to have another national organisation such as the Australian Commission on Safety and Quality in Health Care involved. If the current arrangements mentioned in the paper are not sufficient, should the Victorian Health Complaints Commissioner be able to have an active auditing role? – It could be considered that the Commissioner have an auditing role – could the national regulator perhaps the ACSQH be the auditor of the Commissioner?*

ACN strongly agrees that there should be no barriers to such agencies sharing information when they become aware of failures to comply with the duty.

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<sup>7</sup> <http://www.lawhandbook.sa.gov.au/ch16s05s05.php>

<sup>8</sup> Australian Commission on Safety and Quality in Health Care (2013), Australian Open Disclosure Framework. ACSQHC, Sydney.

Q19. What consequences or sanctions should be available in response to identified breaches of the statutory duty of candour?

*ACN believes it would be appropriate for individuals to be referred to AHPRA for further investigation and action in accordance to registration standards.*

*Other sanctions outlined in the consultation paper appear appropriate.*

Q20. Are there other issues, not covered in this paper that should be addressed, or considered as part of the introduction of a statutory duty of candour?

*ACN supports in principle a statutory duty of candour. However, there must be a clear line of responsibility within the healthcare organisation with a dedicated senior executive responsible for overseeing the entire process. In addition, there must be appropriate protections in place providing a safe and supported environment for health-care workers who are acting in good faith and in the best interests of their patients. This is vital in promoting a culture of open disclosure.*