

# Open Disclosure

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# Australian Open Disclosure Framework

Better communication,  
a better way to care





## Appendix 1

### 1 Apology, expression of regret and open disclosure

Apology and/or expressions of regret are central to open disclosure (see Section 1.5). All Australian jurisdictions have enacted laws that are designed to protect statements of apology or regret made after 'incidents' from subsequent use in certain legal settings. These laws are listed in **Table A1** below.

For example, in NSW, an "apology" means an expression of sympathy or regret, or of a general sense of benevolence or compassion, whether or not the apology admits or implies an admission of fault. An apology is not considered to be an admission of fault or liability and is not taken into account in determining fault or liability.

It should be noted that most of these laws were enacted without open disclosure in mind, and all relate to a wide range of situations and legal contexts.

Health service organisations must consider the legislation in force in the state or territory in which they work when developing open disclosure policies and procedures and training staff.

At the time of the publication of this document, these statutory provisions are relatively new and there is little case law that guides their operation and effect.

The *Open Disclosure Standard Review Report* contains more information in this regard.<sup>6</sup> The report can be accessed at [www.safetyandquality.gov.au/opendisclosure](http://www.safetyandquality.gov.au/opendisclosure)

#### 1a Admission of liability

Health service organisation staff need to be aware of the risk of making an admission of liability during open disclosure. In any discussion with the patient, their family and carers during the open disclosure process, the clinician should take care not to speculate on the causes of an incident or pre-empt the results of any investigations. They must not apportion blame, or state or agree that they, other clinicians or the health service organisations are liable for the harm caused to the patient.

These restrictions should not impede open disclosure or the benefits that a genuine and sincere apology or expression of regret can provide to both patient and clinician.



**Tort 101**



**A fine balance**

I am the beginning of sorrow, and the end of sickness. You cannot express happiness without me, yet I am in the midst of crosses. I am always in risk, yet never in danger. You may find me in the sun, but I am never out of darkness. Who am I?



# Root Cause Analyses

- persons participating expressly given the assurance information they provide will be confidential
- those participating actively sought a confidentiality guarantee before participating
- documents are kept separate from other medical records
- marked as CONFIDENTIAL
- no prior publication, e.g. through an FOI request or otherwise
- that the 'open disclosure' policy does not result in such disclosure that would prevent public interest immunity been claimed
  - does not involve all RCA documents being released
- that disclosure will impair the ability of the hospital and risk management team to investigate and identify causation and system factors for specific adverse events

Home / Claims / Notify Potential Medical Indemnity Claims

# Notify us of a Potential Medical Indemnity Claim

An adverse medical incident that might result in a claim

**Notification and assistance**

How to notify us



Karen McKenzie  
Claims specialist

Stephen Grant  
Senior claims specialist

Susan Van Dyk  
Claims specialist

Sarah McPherson  
Senior claims specialist

Eve Taylor  
Senior claims specialist

Anna MacLeod  
Manager, Claims  
Medical Indemnity

Sarah O'Leary  
Claims specialist

**Thank you**