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Risk Alert

APRIL 2023

Saying Sorry - Questions and Answers with experts on Open Disclosure:

Safety, Quality and Transparency –
how a duty of candour can build trust and enhance risk management.

In this Risk Alert we cover:

1. What is Open Disclosure?
2. What are the Benefits and Risks of Open Disclosure?
3. What are Do's and Don'ts of Open Disclosure?
4. Resources

INCIDENT RESPONSE AND GOOD GOVERNANCE

Responding to an incident seems instinctive, but when it comes to talking to people about what went wrong, organisations can come unstuck. Poorly managed disclosure of incidents can give the impression of a lack of care or accountability and a feeling that there's something to hide. There may also be a reluctance to share bad news for concerns about liability – which can have the opposite affect; creating suspicion and distrust and give rise to claims against the business.

Engaging appropriately in transparent conversations about incidents with clients and families is good governance. When done well, open disclosure can build trust and demonstrate a commitment to improvement. This Risk Alert explores common questions about Open Disclosure (OD) and asks experts their views, through a legal, governance and insurance, and risk perspective.

Our experience has showed that litigation is more likely to occur if clients and families aren't communicated with in a timely fashion, don't feel heard or there isn't an appropriate and proportionate response to prevent future recurrence.

Adverse incidents and 'near misses' occur every day in aged care, disability services, childcare, community services and even in a client's home. They happen for a range of reasons and are largely attributed to human error. While many incidents or near misses may not have a material impact, some can have life-changing or life-ending consequences.

MEET OUR EXPERTS

Penelope Eden
Minter Ellison

Lawyer, Partner and National Aged Care and Human Services Sector Lead

Penelope leads Minter Ellison's national aged care and human services practice and is passionate about the work she does and her contribution to the sector.

PE

Dr Melanie Tan
Consultant

Independent Clinical Governance and Medico-legal Consultant.

Melanie is a medical practitioner and health lawyer by background. She consults independently to clients across sectors within the scope of clinical governance (including in 'non-clinical' contexts), bringing a simultaneous understanding of the nuances of care provision and the legal (and medico-legal) landscape around it.

MT

Stephen Ratcliffe
Ansvar Insurance Australia

Senior Enterprise Risk Management Consultant

Stephen works with Boards, CEOs and Executives to strengthen enterprise risk management frameworks and alignment to their strategic objectives. This includes care/clinical governance and practices to safeguard children and vulnerable people from abuse and neglect.

SR

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WHAT IS OPEN DISCLOSURE?

MT OD is a conversation about an incident (including 'near miss')' – because a 'near miss' is considered an 'incident' (to avoid confusion). It has traditionally been regarded as a way to mitigate the risk of a claim against a practitioner or provider, however the focus has shifted these days to be on continuous improvement - on how to be better. OD involves saying 'sorry' for the experience someone has had, in a sincere way - however it's not an admission of liability. **Far from being a matter of process, the key to OD is expressing genuine compassion and empathy for the impact an incident has had on a person.** It is also about listening – OD is a two-way street.

PE One of the most critical elements of OD is that the communication is timely and proactive – and it's not a one-way conversation. OD is an important opportunity to hear the care recipient's experience and perspective about how an incident occurred and how it might be prevented in future. In most cases, the opportunity to be heard is one of the most important thing for people immediately following an incident.

WHAT ARE THE BENEFITS OF OPEN DISCLOSURE? AND WHAT ARE THE RISKS?

PE Done early and done well, OD can create trust and confidence in an organisation – that is, it learns from its mistakes and takes continuous improvement seriously. From a transparency perspective, it shows there isn't anything to hide and can reduce the chances of a complaint escalating internally or externally to a regulator. **Our experience has shown it is more likely to occur if clients and families aren't communicated with in a timely fashion, don't feel heard or there isn't an appropriate and proportionate response to prevent future recurrence.**

Open disclosure is not about admitting fault. Importantly, an apology and saying 'sorry' cannot be used in subsequent litigation as an admission of fault or liability.

SR Serious incidents can have a significant impact on staff too. It is important to support staff to raise concerns and report incidents arising from mistakes. A strong focus on learning from mistakes can enhance the reporting culture of the organisation. A sign of a good reporting culture is usually a high number of incident reports and near misses.

There are also financial risks for the organisation, through compensation or increased future insurance premiums. Other penalties may apply if the incident occurred through knowingly not following procedures or failing to demonstrate due care by staff.

HOW DO YOU PLAN FOR OPEN DISCLOSURE?

SR What advice can you give when preparing for an OD?

PE The aged care and disability sectors are highly regulated environments. The Aged Care Quality Standards require providers to undertake the process of OD 'when things go wrong'. Reportable incidents (as defined in the relevant legislation) require reporting to the respective regulators often within 24 hours. Reporting requirements and timeframes will depend on the nature and

HOW DO YOU PLAN FOR OPEN DISCLOSURE? (Continued)

PE type of incident. In order to efficiently respond to incidents and carry out effective OD, providers should have robust OD policies and procedures in place, and staff should be adequately trained on the process as part of organisational continuous improvement.

It's important not to forget the client while adhering to the often burdensome regulatory requirements. Providers need to engage with the client, and where appropriate, their families about the incident. Including advising that an investigation may take place and that the outcomes of any such investigation will be communicated in a timely way. It may be that some investigations are subject to legal professional privilege so providers should exercise caution around disclosure of information.

MT Rather than going in 'blindly', or too reactively, it is important to gain some level of understanding of what happened (of course, once the client's immediate needs have been addressed). That is, we should not make assumptions, speculate, or jump to conclusions – but find out what happened, from the people who were directly involved. This means fostering an environment and culture where staff are supported to speak openly and transparently – where they feel safe to speak out or admit error, without fear of being punished or vilified in some way. We call this psychological safety. That is, for open disclosure to be effective, we need to operate within a psychologically safe environment.

Further, we need to remember that a critical incident review generally can't be completed within 24hours, so at the point of OD, we won't have all the answers. But explaining what the process will be and how it will be reported is important. If you have a serious incident that may give rise to a claim, contact your insurer as soon as possible. They can advise you how to manage the situation, and the level of detail you need to document relating to the incident – although generally, the more you document, the better.

SR Who should do the OD? And do you need a note taker if you're having a face to face meeting?

PE OD should generally be undertaken by the most senior person on shift. If they are inexperienced in the OD process, staff should plan out what they will say and seek advice before doing so.

In an OD meeting, the focus should be on the client and family involved. Note-taking during an OD meeting may be distracting and cause suspicion, and clients and/or families may request copies of any documents created following the meeting. Instead, notes should be taken after the meeting as a record of what occurred.

When preparing for OD, it is important to be conscious of the fact that any documents created are likely to be discoverable from a legal standpoint. In aged care and disability, this has historically been fairly rare but with the commencement of the standards in recent times and the changing consumer profile, there has been a shift.

Legal professional privilege relates to the purpose for which the information was provided or obtained. In OD, the dominant purpose is for continuous improvement, not giving or receiving legal advice. Unless there is a reason why a claim to privilege can be made, it is unlikely that privilege can be claimed over relevant documents if a matter proceeds to litigation, or is examined by a regulator or the Coroner.

DO'S AND DON'TS OF OPEN DISCLOSURE

SR What good practice strategies would you suggest for successul OD? What should be done and what should be avoided?

PE The biggest issue when discussion of prospective litigation arises is organisations 'shut down', going into defensive mode, rather than taking the opportunity to communicate with clients and their families. The key to successful OD is timely communication, being open on any investigation of the incident (where appropriate) and ensuring improvements are implemented to prevent it from happening again.

MT Often staff don't receive training to understand OD. Knowing where to draw the line between saying 'sorry' and admitting liability can be daunting, especially for frontline staff. So that may not do it at all, or do it ineffectively, which can create risks. For example, they may practice OD without empathy, or a clear commitment to improve, or through the use of language that may imply fault.

PE I think for many organisations there is a real knowledge deficit around how to deliver effective OD and how undertaking the process incorrectly might impact their legal position and insurance obligations.

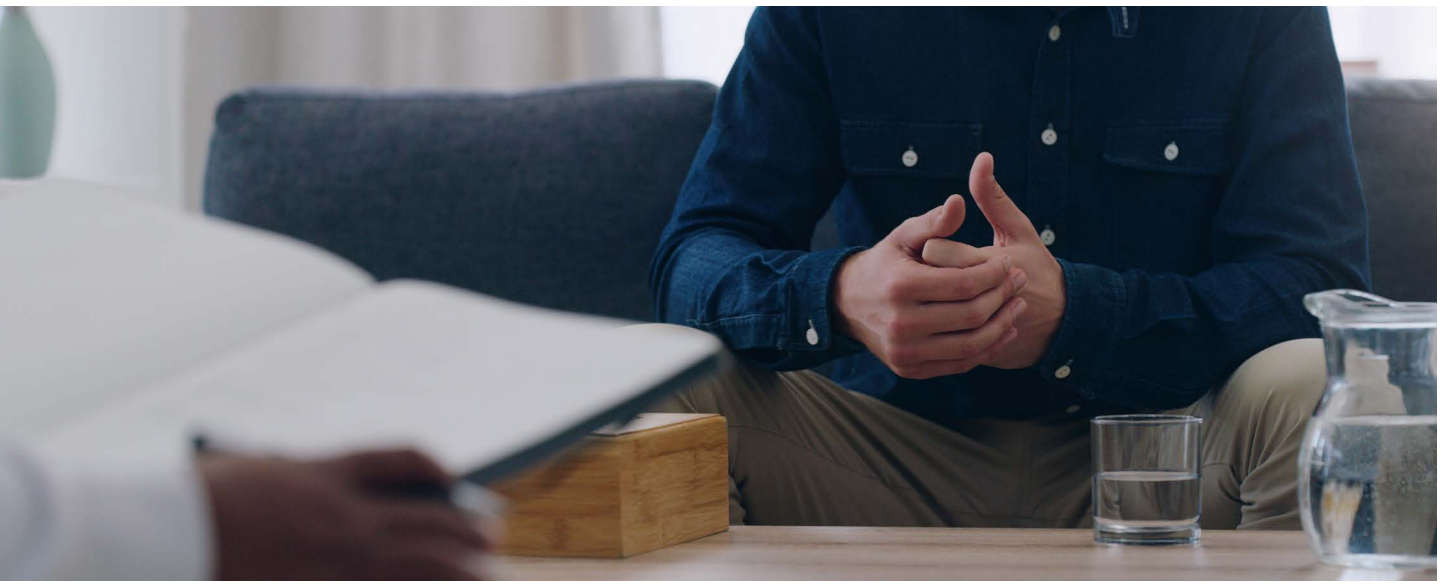
MT While OD emerged in the healthcare sector, the principles apply to all sectors where a duty of care exists.

DO

- Acknowledge the concerns of a client
- Provide a sincere and unprompted apology or expression of regret.
- Offer the client an opportunity to tell their story.

DON'T

- Provide an apology that is vague, passive or conditional.
- Imply blame of staff members or the organisation.
- Speculate about what went wrong.



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EXAMPLES OF HOW TO DELIVER AN OPEN DISCLOSURE

Suggestions on phrasing to guide the open disclosure conversation

SUMMARY:

- Foster an environment and culture where staff are supported to speak openly and transparently – where they feel safe to speak out or admit error, without fear of being punished or vilified in some way. This is known as psychological safety. For open disclosure to be effective, a psychologically safe environment is critical.
- Providers should have robust OD policies and procedures in place, and staff should be adequately trained on the process as part of organisational continuous improvement.
- When preparing for OD, it is important to be conscious of the fact that any documents created are likely to be discoverable from a legal standpoint.
- Open disclosure is not about admitting fault. Importantly, an apology and saying 'sorry' cannot be used in subsequent litigation as an admission of fault or liability.
- Knowing where to draw the line between saying 'sorry' and admitting liability can be daunting, especially for frontline staff
- It may be that some investigations are subject to legal professional privilege so providers need to be cautious about disclosing information around investigations.
- If you have a serious incident that may give rise to a claim, contact your insurance broker as soon as possible.
- Performing open disclosure well (timely, transparently, emphathetically) supports management of risk and reduced likelihood of litigation. Creating the culture that allows this to happen is good governace.

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RESOURCES

SR Do you have any recommendations on OD resources?

MT The Australian Open Disclosure Framework by the Australian Commission on Safety and Quality in Health Care is probably the go-to resource on Open Disclosure in Australia.

PE The Aged Care Quality and Safety Commission has an Open Disclosure Framework and Guidance booklet which is useful across a number of settings.

REFLECTIVE QUESTIONS FOR BOARDS AND MANAGEMENT

BOARDS	YES	NO
Do you receive information about critical incidents through board meetings / papers?		
Are rates of open disclosure reported with critical incident information?		
Does Board receive information from critical incident investigations?		
Has Board received training on open disclosure?		
Is it clear how open disclosure reporting and advice is managed?		
Is Board satsisfied that senior managers / site managers are trained on how to conduct open disclosure?		
Does your organisation have a good reporting culture? (You would expect to see a high number of incidents reported)		
MANAGEMENT	**YES**	**NO**
Do frontline staff have access to the open disclosure procedure, guidance and training?		
Have senior staff been trained on how to deliver an open disclosure discussion with a client / family?		
Do you complete critical incident investigations with root cause analysis for serious incidents?		
Is there a process to validate changes are being actioned at the point of care?		
Thinking about the last 12months, have you notified your insurance broker or insurer of critical incidents that may give rise to a claim against you?		

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For more information

The Risk Solutions team are here to provide a range of consultancy services to assist clients to review and enhance their systems, processes and practices and the time to act is now.

For further advice, email us at info@ansvarrisk.com.au

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Stephen works with Boards, CEOs and Executives to strengthen enterprise risk management frameworks and alignment to their strategic objectives. This includes care/clinical governance and practices to safeguard children and vulnerable people from abuse and neglect.

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