AUSTRALIAN COMMISSION ON SAFETY AND QUALITY IN HEALTH CARE

NSQHS STANDARDS

Australian Open Disclosure Framework

Supporting materials and resources

Saying sorry

A guide to apologising and expressing regret during open disclosure

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1. Introduction

Apologising or expressing regret, in conjunction with saying sorry, is a key component of open disclosure. This resource is designed to assist clinicians and other open disclosure participants apologise or express regret with sincerity and empathy and without speculating or creating uncertainty.

While this document focuses on apologising or expressing regret, it is important to note that this only forms part of open disclosure. To ensure that open disclosure is effective, apologising or expressing regret should be in the context of other communication and actions.

At the same time, and as emphasised by the Royal Australian College of General Practitioners, apology should also be regarded as an important communication tool between clinicians and patients that can be useful in various situations, not only after something hasn't gone to plan.[1]

This document should be read in conjunction with the *Australian Open Disclosure Framework* and support materials provided to assist with open disclosure implementation and practice. These can be accessed at www.safetyandquality.gov.au/opendisclosure

The information provided in this resource is a guide only. Health service organisations and clinicians should obtain legal advice when developing open disclosure policies and implementing practice.

2. Saying 'sorry' as part of open disclosure

One of the principal aims of open disclosure is to restore patient trust in clinicians and the healthcare system. A key element of achieving that aim for patients is early acknowledgement of harm by providers and clinicians and an apology or expression of regret for the harm endured. Apologising and expressing regret are key components of open disclosure, but also the most sensitive. 'Saying sorry' requires great care.

The person leading an open disclosure meeting on behalf of the health service should, as relevant and appropriate:

- acknowledge that an adverse event has occurred
- apologise or express regret for what has occurred (including the words 'I am/we are sorry')
- provide known clinical facts and discuss ongoing care (including any side effects of which to be aware)
- invite, and listen to, the patient's side of the event and how it has affected them both clinically and personally
- indicate that a clinical review is being or will be undertaken to determine what happened and to implement processes to prevent the adverse event from happening again
- agree to provide feedback information from this review when available.

2.1 What is the difference between apology and expression of regret?

An apology may or may not imply an acceptance of responsibility for what has occurred whereas an expression of regret is purely an expression of sorrow. It is recognised that sometimes an apology may not feel appropriate following an adverse event or harmful incident.

Examples of adverse events in which it may feel more appropriate to express regret rather than apologise is a mechanical failure or a highly unusual and unpredictable combination of circumstances. Nonetheless, others may feel it appropriate to apologise because they feel that apologising does not imply acceptance of responsibility for what has occurred and that the patient will benefit from the act.

Apologising and expressing regret should be done empathically and sincerely, and must contain the word 'sorry'. Research supports this action as a very important step in the post-incident process for patients.

2.2 What if it isn't clear that an adverse event has occurred?

The *Australian Open Disclosure Framework* recommends acknowledging patient harm and an initial discussion as soon as practicable after patient harm is detected, even if all the facts are not known.

In these situations it is still appropriate to say 'sorry' for the harm that has occurred. The apology or expression of regret should be followed by the known facts but not be followed by speculation on the causes of the incident or other related matters.

An example of appropriate wording in such situations is:

> 'I am/we are sincerely sorry that this has occurred. It is clear that something went wrong and we are investigating it right now. We will give you information as it comes to hand. It is very important for us to understand your version of what happened. We can go through this now if you like, or we can wait until you are ready to talk about it.'

2.3 Phrasing your apology or expression of regret

The exact wording and phrasing of an apology (or expression of regret) will vary in each case. The following points should be considered:

- The words 'I am sorry' or 'we are sorry' should be included.
- It is preferred that, wherever possible, people directly involved in the adverse event also provide the apology or expression of regret.
- Sincerity is the key element. The effectiveness of an apology or expression of regret depends on the way it is delivered, including the tone of voice, as well as non-verbal communication.
- The apology or expression of regret should make clear what is regretted or being apologised for, and what is being done to address the situation.
- An apology or expression of regret is essential in helping patients, their family and carers cope with the effects of a traumatic event. It also assists clinicians in their recovery from adverse events in which they are involved.

2.3.1 Active listening

It is important to listen to the patient and give them the opportunity to relate their experience and how it has affected them. It can be useful to say back to the patient, in your own words, what they have told you. Non-verbal communication is an important part of active listening.

These skills are not often innate and may need to be practised. Open disclosure training and education for health professionals should develop these skills.

2.3.2 What not to say

Certain phrases should be avoided during an apology or expression of regret. This is to ensure that only known facts are communicated to the patient, and to ensure that there is no direct or implied blame of colleagues or the health service organisation. Liability is not determined by what is said, but it is prudent to phrase your apology or expression of regret accurately**.**

Hearing the word 'sorry' in an apology or expression of regret is very important to patients who have been harmed, and their family and carers. However, any insincerity, real or perceived, can have the opposite effect. It is important to realise that people harmed during care are likely to have a heightened emotional sensitivity.

Some examples of **wording to be avoided**:

- *'It's all my/our/his/her fault…I am liable'*
- *'I was/we were negligent…'*
- *'We're sorry …but the mistake certainly didn't change the outcome…"*
- *'I know, I know for you this is unpleasant, awful... but believe me, for me it's shattering'*
- Any speculative statements and apportioning of blame:
    - '*I would say that the night shift staff probably neglected to write down that you were given this medication*…'
- So-called apologies that are vague, passive or conditional:
    - *'I apologise for whatever it is that happened'*
    - *'Mistakes were made'*
    - *'These things happen to the best of people…"*
    - *'If I did anything wrong, I'm sorry'*

Examples of **more suitable wording**:

- *'I am/we are sorry for what has occurred'*
- Factual statements explaining how the incident occurred ('*this incident occurred because the wrong label was mistakenly placed on your specimen sample'*)
- Explaining what is being done to ensure it does not happen again (*'we are currently investigating exactly what caused this breakdown in the process and will inform you of the findings and steps taken to fix it as soon as we know'*)

2.4 Non-verbal communication

Non-verbal communication should be congruent with verbal communication while apologising or expressing regret. The person delivering the apology and expression of regret, and others present, should be aware of:

- body language and positioning such as facing the patient
- maintaining appropriate eye contact throughout
- mobile telephones and pagers being turned off
- active listening, which includes giving the patient the impression that you are taking in what they are saying through your physical responses such as nodding and other body language.

Again, these skills are often not innate and may need to be practised. Open disclosure training and education for health professionals should develop these skills.

2.5 Factual explanations and speculative statements

An apology or expression of regret can be given once harm has been recognised and accompanied by all the known facts. A full, factual explanation of the event requires the facts to be established. In the event of serious harm, it is unlikely that all the facts will be available at the time of disclosing the harm to the patient and the initial apology or expression of regret.

The *Australian Open Disclosure Framework* stresses the importance of communicating harm, and apologising, as soon as possible but that avoiding speculative statements is critical. Speculation includes conjecturing on the causes of the harm as well as what will occur as a result of the harm (other than noting that an investigation will occur). Making promises or other statements to patients after adverse event that are subsequently retracted can undermine trust.

You should consider the following points when signalling open disclosure and/or preparing for a formal open disclosure process:

- Harm should be acknowledged and an apology or expression of regret provided as appropriate.
- The known facts should be provided.
- There should be no speculation on the causes of an adverse event.
- Blame must not be apportioned to any individual, group or system.
- The results of reviews and investigations must not be pre-empted.

3. Legal aspects of apology

Apologising or expressing regret is central to open disclosure. All Australian jurisdictions have enacted apology laws to protect statements of apology or regret made after ‘incidents’ from subsequent use in certain legal settings (see Table 1).

3.1 Australian ‘apology laws’

Each jurisdiction has differing “apology laws”. On balance, the various jurisdictional apology laws neither protect nor hinder the practice of open disclosure.[2]

The laws share common features across jurisdictions but variations exist. Five Australian apology statutes (Western Australia, Victoria, Northern Territory,

Tasmania, South Australia) expressly exclude statements containing acknowledgment of fault or liability in the definition of the apology, although the wording of these acts can be interpreted in various ways.[3,a]

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.

There is also variation in the types of legal proceedings to which these laws apply.[2] These variations are summarised in Table 1.

Table 1: Apology or expression of regret acts

ACT	*Civil Law (Wrongs) Act 2002*
New South Wales	*Civil Liability Act 2002*
Northern Territory	*Personal Injuries (Liabilities and Damages) Act 2003*
Queensland	*Civil Liability Act 2003*
South Australia	*Civil Liability Act 1936*
Tasmania	*Civil Liability Act 2002*
Victoria	*Wrongs Act 1958*
Western Australia	*Civil Liability Act 2002*

3.2 Is apologising admitting liability?

Generally, apology laws dissociate apology from liability and are designed to enable the natural 'humane response' of apologising. The statutes are relatively new and there is little case law that guides their operation and effect. Case law on the evidentiary value of admissions of liability suggests that courts do not find expressions of regret, apologies or admissions of duty of care failures as evidence of liability.[3-6]

As noted by Vines, the 'determination [of fault] is for the court, not for the parties to make'.[5(p495-6)] In other words, an admission of fault (whether contained within an apology or not) is, in the eyes of the law, merely the defendant's opinion. Whether this opinion is correct must be established by the facts, not by what is said, and generally the law does not accept these opinions as determinative of legal outcomes. Even in criminal law, a voluntary confession does not automatically create guilt.[6]

Lay people, including clinicians, will not have the knowledge to judge whether their behaviour has met all the requirements for liability. More importantly, they may not necessarily word an apology correctly,[3] often in circumstances involving considerable stress and pressure. Smith argues that '[e]xcept in NSW and ACT, saying 'I'm sorry I did this to you' can still be pleaded as an admission of liability. But if the facts ultimately showed no liability, the facts would dominate'.[7]

These propositions may be particularly relevant in health care. First, rarely is a harmful incident the fault of one individual or practitioner. Second, providers are deeply invested in not harming their patients, to a greater extent than ordinary people are invested in not harming their fellow citizens.

[a] South Australian apology law implies this restriction.

3.3 The human aspect of saying sorry

Apology is the natural, human response to harming another person even if the harm was inadvertent and blameless. Williams calls the reaction 'agent regret', noting that it is natural to feel this even in the clear absence of personal culpability and that, in most societies and cultures, somebody failing to exhibit such regret would be seen as abnormal.[8]

An absence of humility, and of a degree of self-criticism, may undermine an apology following harm. This may be why there is evidence for apology having a neutralising effect on patients who have been harmed seeking redress through the courts, and its absence as one of several key motivators for legal action.

Providers consider medico-legal risks (including apology) as moderate to major barriers to open disclosure but also cite inadequate training and education as key factors.[9]

Some argue that apology is evidence of a personal standard of conduct and not objective proof of negligence.[10] For Helmreich, these are 'humane impulses', made in the moment, rather than admissions of liability: 'one can appropriately *feel* guilty, or take a morally self-critical view of one's past behaviour, without *finding* oneself guilty'.[10(p24)] He goes on to note that it is precisely this self-critical aspect of apology that makes it valuable.[10]

4 Three key points

Open disclosure is about much more than apologising or expressing regret, but its overall success can often depend on how the apology or expression of regret is delivered.

In this regard, the three key points for those engaging in open disclosure are:

- **Do not fear saying sorry.** Providing you don't engage in unwarranted speculation about the incident or apportion blame to other individuals, entities or institutions, there are no medico-legal grounds for avoiding the word 'sorry'.

  Similarly, there is no reason to fear it from an interpersonal point of view. Remember that apology is a natural human response after an unexpected event. Patients who have been harmed, their families, carers and other persons affected by the incident, will appreciate and benefit from a sincere apology.

  Equally, you and your colleagues can also benefit from this interaction. The conversation can be difficult but, according to the available evidence, may lead to a better outcome.

- **Consider your delivery.** Think about your phrasing and non-verbal aspects of your delivery. It is important to remember that what you say is not always what is heard, and that this can be influenced by non-verbal cues such as maintaining eye contact. Other aspects of delivery such as body language, positioning and potential distractions can undermine the conversation.

- **Listen.** Apologising and expressing regret is also about listening and giving the patient an opportunity to tell how they feel, and how the incident has affected them. Practise, and engage in, active listening and always give the patient the opportunity to respond.

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