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Deputy Premier of Western Australia
Minister for Health; Tourism

Our Ref: 4-84487

Dr Richard Choong
President
AMA (WA)
PO Box 133
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Dear Dr Choong

Medical Indemnity Cover– clarification of "admission of liability"

I am writing in response to concerns expressed by a number of doctors working in the WA public health system that, by providing information on adverse incidents in the context of clinical incident reporting and investigation (such as AIMS) or in the course of open disclosure to the patient/family, they may breach the provisions of the State Government's medical indemnity cover relating to admissions of liability.

This letter, applying to both salaried medical officers and non-salaried medical practitioners, addresses a misconception as to the ambit of the contractual restriction on the making of liability admissions and provides my assurance that the State's medical indemnity cover will not be jeopardised by statements made by a doctor in the course of reporting activities, nor where the doctor has in good faith, acted in accordance with open disclosure principles.

Relevantly, the Terms and Conditions of the medical indemnity cover provides:

> 4.4 No Settlement or Admissions
>
> (a) Subject to Clause 4.2 you or the Minister must not:
> (i) make any admission of liability in respect of any Claim or Potential Claim or part thereof but you may make a statement of regret or sorrow;
> ....
> (c) If you do not comply with paragraph (a) ..., subject to clause 22, the Indemnity may be withdrawn by the Minister by notice in writing to you and then will cease to have any force and effect in respect of the Claim or Potential Claim.

Clause 4.2 relates to the Minister's consultation obligations in the context of the settlement of a claim for damages. Clause 22 is the Review Panel provision.

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It will be seen that, even where an "admission of liability" is made by a medical practitioner, the relevant indemnity cover ceases to be available only if I as Minister exercise my discretion to withdraw it. That contractual discretion must be exercised reasonably.

1. Statements in the course of clinical incident reporting and investigation

Doctors are required to report clinical incidents, including adverse events, to their employer and to participate in the investigation or follow-up of such events through methodologies such as Root Cause Analysis. In any such report to the employer, an admission of fault by the doctor, or assertion of fault by another employee or by the hospital itself, would not constitute an "admission of liability" within the meaning of clause 4.4(a)(i) as that clause is concerned solely with admissions directed to the patient or to a third party not associated with the reporting process.

Accordingly, and as would be expected, admissions material to liability made in the course of clinical incident reporting and investigation do not breach clause 4.4, so that it is not contractually open to the State to withdraw the indemnity.

Of course, while doctors should be completely open and honest in their contribution to the reporting and investigation of clinical incidents, common sense, the integrity of reporting processes and the proper management of claims dictate that (especially as reports will frequently in due course come into the possession of the relevant patient or his or her representatives) care should be taken to minimise the circumstances in which doctors might later regard the contents of their reports, perhaps prepared under considerable time or emotional pressures, as not entirely correct or as perhaps, with hindsight, intemperate. This management issue is, however, an issue entirely distinct from any contractual 'admission of liability' issues.

2. Statements in the course of Open Disclosure

The WA Health Open Disclosure Policy states

> A patient should receive an expression of regret for any harm that they have suffered as a result of a clinical incident. An apology or expression of regret must not include any admission of liability or fault

Notwithstanding this fault admission caveat to the general principle that regret for harm suffered should be expressed to patients, the reality is that from time to time clinical incidents arise of such a nature that appropriate open disclosure to a particular patient cannot occur without there being implied, or in some circumstances express, acknowledgement to the patient or the patient's family of some fault in hospital procedures or by medical staff. Ultimately, it will be a matter for the judgement of the medical practitioners and staff involved as to what approach, having regard to the interests of the hospital and its staff but also the medical and emotional interests of the patient, is reasonable.

I can assure doctors covered under the State's medical indemnity that if, during an open disclosure process he or she makes a statement to a patient or to a representative of the patient which could be regarded as an admission of liability, the discretion to withdraw the indemnity under clause 4.4(c) will not be exercised if the doctor had reasonably been of the bona fide view that such a statement was, notwithstanding its possible liability implications for the hospital and its staff, justified when regard was had to the nature of the clinical incident and the statement's perceived benefits for the patient and/or their family.

I trust that the assurances provided in this letter remove any uncertainty doctors may have had in respect of the application of their contractual indemnity.

Should you require any additional information on this matter, please contact the Executive Director Performance, Activity and Quality Division at the Department of Health on 9222 2085 or louise.o'brien@health.wa.gov.au.

Yours sincerely

Dr Kim Hames MLA
DEPUTY PREMIER
MINISTER FOR HEALTH

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