

# Consultation Response Enactment of Apology Legislation in Hong Kong



**July 2015**

## **Overview**

As a membership organisation that represents the medical and dental professions, we are limiting our comments in this consultation to how the proposals will impact on these professions.

MPS is wholly committed to promoting openness in healthcare. MPS supports and advises members to be open with patients when something has gone wrong and encourage them to provide appropriate apologies. We provide regular high quality training and education to members to support this culture in medical and dental practice. Yet we know that many doctors worry about the legal and professional consequences of doing so. We believe that giving protection in legislation, so the use of apologies cannot be used as a means of establishing legal liability, will support and promote a culture of open communication.

When considering an adverse incident, it may be some time before all the facts, and perhaps the reason(s) why and how the event occurred, is fully understood. Until these are established, speculation should be avoided as this is unhelpful for all involved. However, we advise members that this consideration should not hinder a prompt apology from being forthcoming. At the initial contact between the patient and the doctor or dentist involved they may not have answers to all the questions or adequate explanations. Where this is the case, we advise members to say so but commit to endeavour to establish them and report back to the patient.

Apologies are important when things go wrong. Healthcare professionals should feel able to apologise after an adverse incident, in the knowledge that the apology is in itself not an admission of liability, rather a means of expressing sympathy. This is why MPS supports the introduction of such a Bill. Indeed MPS has supported the introduction of similar legislation in England and Wales and most recently, in Scotland. However, we are clear that while supportive of the legislation, this represents only a small part of what is needed to bring about positive and lasting cultural change and to create a truly open learning culture.

## **Response to specific recommendations**

1. An apology legislation is to be enacted in Hong Kong.

The stated aim of enacting apology legislation is to encourage doctors to offer a sincere apology for any medical mishap without fear of the consequences, and hence to facilitate the early resolution of disputes or complaints and to encourage open dialogue between doctors and patients.

MPS supports the sentiments underpinning the proposal to enact apology legislation in Hong Kong. These principles are already supported in the Medical Council's Code of Professional Conduct; it sets

out in paragraph B.5 the importance and principles of good communication between doctors and patients and the importance of information dissemination.

It is important, however, for the Hong Kong Government to consider what other factors might lead to a perceived reluctance to apologise to patients. Loss of reputation, for example, and the potential impact on livelihood may also be compelling reasons for doctors' reluctance to apologise.

2. Apology legislation is to apply to civil and other forms of non-criminal proceedings, including disciplinary proceedings.

The rationale of encouraging open dialogue and the resolution of disputes is not applicable to professional disciplinary matters, the purpose of which is to protect the public and maintain public confidence in the profession. Such issues are matters for independent scrutiny of the professional conduct and/or competence of the practitioner by the practitioner's employer and/or regulatory body.

An apology is only relevant in circumstances where it demonstrates insight on the part of the practitioner and may be used in mitigation when considering sanctions. If the Hong Kong Government were minded to include disciplinary matters within the legislation it should be explicitly stated that no adverse inference can be drawn in disciplinary proceedings from an apology. This should only be admissible as evidence in the practitioner's favour. Legislation aimed at preventing legal liability from being attached to an apology made in disciplinary procedures would not ameliorate the risk of this being perceived as an admission of a failing on the practitioner's part which could have implications for their future employment and, indeed, registration.

3. The apology legislation is to cover full apologies

MPS agrees that the terms in which partial apologies may be couched could be perceived as insincere and, furthermore, give rise to a degree of ambiguity and misunderstanding as to the elements of the care for which an apology is being offered. Apologies should therefore be framed in the context of the factual matrix on which the apology is being offered. This will also help to direct the parties towards agreeing a satisfactory resolution to any dispute, to ensure that remedial action is taken where appropriate and patient care is improved in the longer term.

An apology is not a "stand alone" response to be considered in isolation but part of an on-going and developing dialogue between doctors and patients as part of good clinical practice. Apologies may be made swiftly at a time when the facts of a case have not been fully established or investigated.

As discussed earlier, it must be understood that when considering an adverse incident, it may be some time before all the facts, and perhaps the reason why and how the event occurred, is fully understood. Until these are established, speculation should be avoided as this is unhelpful for all involved. However we advise members that this consideration should not hinder a prompt apology from being forthcoming. At the initial contact between the patient and the doctor or dentist involved they may not have answers to all the questions or adequate explanations. Where this is the case, we advise

members to say so but commit to endeavour to establish them and report back to the patient as soon as is reasonably practical.

4. The apology legislation is to apply to the Government

If the legislation is to be enacted it should apply to the Government and its representatives and not just individual citizens. This will promote a sense of fairness and consistency.

5. Apology legislation expressly precludes admission of a claim by way of an apology from constituting an acknowledgement of a right of action for the purposes of limitation ordinance.

MPS agrees that apology legislation should prevent an apology from constituting such an acknowledgement for the purposes of the limitation ordinance.

6. The apology legislation expressly provides that an apology shall not affect any insurance coverage that is, or would be, available to the person making the apology

MPS does not have a position as to whether or not this should be the case.

MPS encourages its members to make appropriate apologies and it does not penalise its members for doing so. This is therefore not an issue for healthcare professionals and dentists with membership of MPS. MPS is not an insurance company. Benefits of membership include access to indemnity and all the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association.

7. The apology legislation to take the form of standalone legislation.

MPS has no comment on this particular point.

## **About MPS**

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world. Our benefits include access to indemnity, expert advice and peace of mind. Highly qualified advisers are on hand to talk through a question or concern at any time.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This includes clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, E-learning, clinical risk assessments, publications, conferences, lectures and presentations.

MPS is not an insurance company. All the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association.

## **CONTACT**

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