

5 January 2009

Mr Lorenzo Berardinetti, MPP (Scarborough Southwest)  
Chair, Standing Committee on Justice Policy  
Room 361, Main Legislative Building  
Queen's Park  
Toronto ON M7A 1A4

Dear Mr Berardinetti:

**Re: Bill 108: Apology Act, 2008**

I am writing in response to the Standing Committee on Justice Policy's call for written submissions with respect to Bill 108, *Apology Act, 2008* (the "Apology Act"). The Canadian Medical Protective Association ("CMPA") welcomes the opportunity to comment on this important legislation.

The CMPA is a not-for-profit mutual defence organization operated by physicians for physicians and is the principal provider of medical-legal assistance to Canadian physicians. Approximately 28,000 Ontario physicians are CMPA members. In addition to providing legal representation to its members, the CMPA also provides broader advisory services to physicians on a magnitude of medico-legal issues including risk management, quality assurance, research and education. In this regard, the CMPA is an interested stakeholder in any developments or proposals that might have implications for Ontario physicians. As a national organization, the CMPA is uniquely positioned to comment on the proposed *Apology Act* in Ontario having been involved with similar legislation in several other provinces.

**General Comments on Disclosure of Adverse Events to Patients**

The CMPA fully supports the stated objective shared by most apology legislation of promoting an early, effective resolution of disputes by reducing concerns about the legal implications of an apology. Any initiatives that might facilitate these goals are to be encouraged.

As the Committee may be aware, the issue of disclosure of adverse events to patients has been generating increased interest over the past several years. Many patient safety advocates are of the view that a "full apology" is a necessary component of the disclosure process and therefore believe that apology legislation will facilitate apologies in these circumstances. The CMPA has long recognized the importance of informing patients of adverse events and has advised physicians accordingly. The disclosure of adverse events to patients is an integral part of ethical patient care. As such, the CMPA typically encourages its member

physicians to express feelings of empathy and concern where appropriate. It also generally advises members that expressing sincere regret about what has happened, or a personal wish that the event had not occurred, is entirely acceptable and desirable in certain circumstances.

The CMPA is encouraged that the proposed *Apology Act* recognizes the important distinction between apologies and admissions of fault. Just as the disclosure of adverse events to patients is distinct from the attribution of fault or blame, expressions of regret or apologies, in any context, should not be construed as admissions of fault or liability in the legal context.

Providing patients with known, factual information regarding an adverse event does not necessarily include speculating as to the cause of the event or concluding that such an event is blameworthy or has resulted from error. There must be a distinction maintained between the disclosure of adverse events to patients and the attribution of fault in the legal context. Adverse clinical outcomes can be disappointing or tragic to patients and their families. They can also be professionally and personally devastating for physicians. In such an atmosphere, it is not surprising that a caring physician may feel responsible for the outcome, even if it is in no way related to deficient care. In this regard, the CMPA generally recommends that when disclosing adverse events to patients, physicians avoid statements that speculate as to the cause of the adverse event or that may be perceived as attributing blame or fault.

## **Specific Comments on Proposed Apology Legislation**

### **(a) Meaning of Apologies**

One concern occasionally expressed about allowing apologies to be admitted in legal proceedings is that an adverse party might attempt to construe the apology as an admission of responsibility. Early proposals for apology legislation (primarily outside of Canada) generally took two different approaches. The first would protect apologies only if they did not include admissions of fault. The second was broader and would protect all apologies, including those that include admissions of fault. The narrower form of apology legislation might have the unintended effect of discouraging apologies if there is the possibility that some elements of an apology might be admissible in legal proceedings. Moreover, it can be very difficult in the vast majority of cases to determine responsibility for an adverse outcome before all the circumstances and facts about the case are known. Nevertheless, some of the authors in this area clearly seem to be of the view that one element of an apology is an admission of responsibility. The following quote illustrates this perspective:

To apologize is to declare voluntarily that one has no excuse, defence, justification, or explanation for an action.<sup>1</sup>

The CMPA is encouraged that the Attorney General has opted in this case for the broader form of apology legislation that protects all apologies irrespective of whether it includes or infers an admission of fault. This is evident from the wording chosen for the legislation, which is nearly identical to other apology legislation or legislative amendments enacted in other provinces, including British Columbia, Saskatchewan, Manitoba and Alberta. These Acts clearly state that an apology is not an admission of responsibility or liability. For example, the term "apology" is defined in the Saskatchewan *Evidence Act* to include statements of sympathy or regret "whether or not the words or acts admit or imply an admission of fault in connection with the event or occurrence to which the words or acts relate." The Saskatchewan legislation also expressly provides that such statements do not "constitute an expression or implied admission of fault or liability by the person in connection with that event or occurrence."

#### **(b) Types of Legal Proceedings to Which Proposed Legislation Will Apply**

Another significant issue that typically arises in considering proposed apology legislation is the scope of the protection as it relates to various types of legal proceedings. In order to be truly effective, the scope of the protection afforded by the legislation must be broad enough to apply to a variety of legal proceedings, not simply civil proceedings. The CMPA is encouraged that the proposed legislation adopts the preferred broad definition of "court" that includes judicial and quasi-judicial proceedings.

The Committee may hear suggestions that the proposed *Apology Act* should apply only to civil proceedings. However, physicians and other regulated professionals in Ontario could potentially be prejudiced by the disclosure of an "apology" in a wide variety of other legal and administrative proceedings, such as those before the College of Physicians and Surgeons of Ontario, inquiries, Coroner's Inquests, etc. In this regard, it is important that the Act contain a broad definition of "court" or "legal proceedings", such as is currently proposed. The *Apology Act* in British Columbia defines "court" in a nearly identical manner as Bill 108 to include "a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity." In Saskatchewan, the *Evidence Act* defines "court" for the purpose of the apology provisions as "any person or body that is authorized pursuant to any

---

<sup>1</sup> Nicholas Tavuches, "*Mea Culpa*", *A Sociology of Apology and Reconciliation* (1991).

Act to hear witnesses, take evidence, make any order, decree, finding, decision or report or exercise any judicial or quasi-judicial function."

### **Consequential Amendments**

A review of apology legislation across the country reveals that there are two generally accepted means of effecting legislative protection for apologies. One is to introduce the protections through amendments to other legislation, such as the *Evidence Act*, as was chosen in Saskatchewan and most recently in Alberta.

The Attorney General chose in this case to proceed by introducing an entirely new "apology statute". The decision to enact a separate statute highlights the need to ensure that any necessary consequential amendments are made to other legislation, (e.g. *Evidence Act*), to ensure consistency amongst the legislation. For example, the definition of "court" in Ontario's *Evidence Act* is not the same as that being proposed in the *Apology Act*. For the reasons discussed above, the CMPA would therefore encourage an amendment to the *Evidence Act* to reflect the preferred definition of "court" as proposed in *Apology Act*.

### **Conclusion**

The CMPA wishes to thank the Committee for the opportunity to participate in its consideration of Bill 108, *Apology Act, 2008*. The Association believes the Act is a major step forward in responding to adverse medical outcomes and we urge the Committee to recommend its enactment without substantive change. I hope that the CMPA's comments will be of assistance in considering this important initiative.

Respectfully submitted,

John E. Gray, MD, CCFP, FCFP  
Executive Director / Chief Executive Officer

JEG/lg

C. Ms Susan Sourial - Committee Clerk  
99 Wellesley Street West Room 1405,  
Whitney Block Queen's Park , Toronto, ON

Mr L. Berardinetti, MPP (Ontario)  
January 2009

5

5

Dr William S. Tucker, President

*CMPA Councillors (Ontario):*

Dr Debra Boyce    Dr Barbara Brennan  
Dr Bryan Callaghan    Dr Robert Cooper  
Dr Gordon Crawford    Dr Edward Crosby  
Dr William Easton    Dr Elliot Halparin  
Dr Maureen Rae

Bc: Corporate Management Committee  
Mrs Margaret A. Ross