



# THE POWER OF APOLOGY

## An Effective Form of Remedy in Dispute Resolution<sup>1</sup>

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Chris Wheeler  
Deputy Ombudsman

## Apologies have statutory protection in civil proceedings in NSW, ACT and Queensland

In 2002 New South Wales was the first jurisdiction in the common law world to legislate to protect a 'full' apology made by any person, followed closely by the ACT and more recently by Queensland. The NSW Model went on to be used as the foundation for the Canadian legal reform. So far, at least eight Canadian Provinces have passed apology legislation.

The NSW *Civil Liability Act 2002* contains protections for apologies that include an admission of responsibility, which is often referred to as a 'full' apology. Section 69(2) of the Act specifically provides that evidence of such an apology "*is not admissible in any civil proceedings as evidence of the fault or liability*".<sup>2</sup>

The Act provides that an apology does not constitute an admission of liability, and will not be relevant to the determination of fault or liability, in connection with civil liability of any kind. Furthermore, evidence of an apology is not admissible in a court hearing as evidence of fault of liability (other than the categories of civil liability excluded by s.3B of the Act).<sup>3</sup> An apology is defined in the Act as:

*"...an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter **whether or not the apology admits or implies an admission of fault** in connection with the matter."* (s.68). [emphasis added]

Since the commencement of s.69, the general effect of an apology on liability is that it does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and is not relevant to the determination of fault or liability in connection with that matter. The protection for apologies has three elements:

1. a declaratory element – it is not an admission of fault
2. a relevance element – it can't be taken into account in determining fault, and
3. a procedural element – it is not admissible as evidence of fault.<sup>4</sup>

In other words, in most circumstances people in NSW can make a full apology for any harm they have caused without prejudicing their legal position in any subsequent or related legal proceedings.

Where action is taken to rectify a problem, for example as part of a package of measures in a 'full' apology, it is relevant to note another provision of the Act that in proceedings relating to liability or negligence:

*"the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk"* (s.5C of the Act).

While an apology cannot be used in court to prove fault or liability on the part of the person or body who made the apology, on the other hand the giving of the apology does not absolve the person or body from any potential liability – although it may help in mitigation of damages.

It is important to note that although an apology and information conveyed in an apology may not be admissible, the apology may convey information that can be used to obtain information in an admissible form in other ways for use in court proceedings.

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1 This is based on the paper delivered to the Judicial Commission of NSW on 16 February 2011.

2 Civil Liability Act 2002 (NSW), s.69.

3 Public Sector Agencies fact sheet No. 1 – Apologies, NSW Ombudsman, October 2006.

4 Per John Kleefeld, "Thinking Like a Human: British Columbia's Apology Act" [2007] UBC Law Review, 40, 798-799.

In the public sector context, making apologies inadmissible in civil proceedings does not result in any detriment to the rights or interests of members of the public. In the absence of such a protection it is unlikely that public sector staff would give an apology in circumstances where this could be seen as an admission of liability. The practical consequence of this legislation should be that more public sector staff will be encouraged to say 'sorry' and more members of the public are likely to feel satisfied that their grievance has been taken seriously. An apology shows an individual or agency taking moral, if not legal, responsibility for his/her/its actions and the research shows that this is what many people are looking for.

It is important to note that the protections under the Act do not apply to all civil proceedings. Although in most cases the NSW legal system now can't make you sorry you've said sorry, there are still some circumstances where a full apology is not protected. This could be in relation to, for example, traffic accidents, intentional violent acts intended to cause injury or death, sexual assault or other sexual misconduct, or workplace injuries.<sup>5</sup>

Although these exclusions appear at first glance to be extensive, apart from motor accidents, in practice they have little relevance to the vast majority of the day-to-day interactions affecting public officials or officials and members of the public.

Therefore, where a 'full' apology has been given, including a sincere admission of responsibility, any subsequent litigation will be limited to the quantum of damages. Even where compensation is sought, if a genuine effort has been made to offer an apology (including an acceptance of responsibility), this may act as a catalyst to make negotiations more cordial, less time consuming and less likely to end in formal proceedings.

Even though this statutory protection for apologies has been in force in NSW for almost a decade, I find it interesting how few NSW lawyers appear to be aware of its existence. Whenever I raise the issue in legal circles, or in seminars and conferences such as this, it is quite clear to me from their reactions that the existence of the protection for apologies comes as quite a surprise to most of the lawyers present!

### Impact of the statutory protection on litigation

A few years ago the NSW Ombudsman carried out a brief survey of NSW judgments over the previous 10 years, concentrating on the period since the *Civil Liability Act* came into force. This work was centred on cases where some mention was made of an apology. The vast majority of these cases related to defamation, contempt of court and anti-discrimination matters. There did not appear to have been any change in the number of references to apologies in some form since the introduction of the *Civil Liability Act*.

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<sup>5</sup> Civil Liability Act 2002, s.67(1) and s.3B. The types of civil liability that are not covered by the protection for apologies in the Civil Liability Act can be briefly summarised as liability for:

- (a) an intentional violent act done with intent to cause injury or death (including sexual assault or misconduct)
- (b) the contraction of a dust disease, or for a personal injury allegedly caused by smoking or the use of tobacco products
- (c) the apology provisions of the Act do not apply to motor accidents, or to economic loss, non-economic loss or psychological/psychiatric injury to an injured person and liability for the compensation of relatives of a deceased person that arises from a motor accident (or transport accident as defined in the Transport Administration Act 1998) to which the Motor Accidents Act 1998 applies, or from a motor accident or public transport accident to which the Motor Accidents Compensation Act 1999 applies
- (d) damages payable by an employer for the injury or the death of a worker resulting from or caused by an injury, and compensation under various workers compensation legislation, the Victims Support and Rehabilitation Act 1996 or the Anti-Discrimination Act 1977, or for the benefit payable under the Sporting Injuries Insurance Act 1978.

The only case we were able to find that has cited s.69 of the *Civil Liability Act* to date is *T Wagstaff v Haslam & Anor* (2006) NSWSC 294. The nature of this case was negligence and it demonstrates the protective effect that s.69 has on apology and liability. In this case a bar manager after an altercation at his premises in which Mr. Wagstaff was assaulted by another drunken patron apologised to Mr. Wagstaff for the incident. The licensee and occupier of the hotel was sued for breach of duty of care to take reasonable measures to safeguard the plaintiff from foreseeable risk of harm from the conduct of intoxicated or unruly patrons on the hotel premises. However, in the proceedings s.69 had the effect of making the apology inadmissible as evidence of fault or liability of the bar manager. The Judge had regard to s.69 stating 'I remind myself that an apology is not to be taken as amounting to an admission of fault.' The effect of this meant that the Judge did not record what Mr. Wagstaff recounted as being the substance of the apology that was expressed by the bar manager.

Whilst the court did not take into account the bar manager's apology, the court still found that the defendants were negligent. Even though the apology was inadmissible as evidence, the outcome of the case was the same as if an apology had been admissible as evidence of liability of fault. This case demonstrates that even though s.69 protects apologies, it will not have the general effect, as feared by some, of protecting persons from liability for acts or omissions for which they are responsible.

There have been a number of cases before the Industrial Relations Commission where members have considered apologies. In a contempt matter, the members commented that they:

*"...also accept the respondent's apology to the Court, which we regard as having been genuinely offered. The respondent is sincerely remorseful. He was obviously distressed in making his statement to the Court and it is apparent he now realises the enormity of the consequences of his mistake, which includes the impact on him and his family, emotionally and financially."*<sup>6</sup>

Another Industrial Relations Commission matter demonstrated the danger of a late apology:

*"Such a belated concession and apology, was not ... a real and genuine attempt of remorse or contrition. Faced with the likely prospect of dismissal, it was an entirely predictable, but belated response. It deserves little credit."*<sup>7</sup>

There was also a recent decision in the District Court where Gibson DCJ noted that an apology proffered in open Court by counsel on behalf of one defendant was a factor warranting the exercise of discretion as to costs.<sup>8</sup>

In relation to legal proceedings, it is interesting to distinguish between apologies:

1. made by the defendant before the institution of proceedings, which appear to have been motivated by a desire to avoid those proceedings
2. made by the defendant before the institution of proceedings, which appear to have been motivated by remorse and a desire to 'do the right thing'
3. made by defendants after institution of proceedings, which appear to be motivated by a desire to settle the proceedings, and
4. ordered by a court or tribunal.

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6 Industrial Registrar v Mejias (No 2) [2007] NSWIRComm 253 at para 14

7 Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales on behalf of Graham Douglas Gregg and Roads and Traffic Authority of NSW [2009] NSWIRComm 14 at para 204.

8 Lissanah v State of New South Wales (No.4) [2010] NSW DC 289 at [34].

Looking at the first circumstance, after reviewing numerous cases it is clear that an apology made by the defendant before the institution of proceedings can have great benefits. At best it can result in early settlement thereby avoiding costly proceedings, and if proceedings cannot be avoided may help to mitigate the damages awarded. Perhaps the best examples of instances where apologies have been made by the defendant before the institution of proceedings, which appear to have been motivated by a desire to avoid those proceedings, are seen in medical malpractice litigation. There is striking data evidencing the effect of apology in lowering the number of malpractice suits and notices of intent to sue. Examples of apologies appear to have been made in such circumstances include: *Gary John Humphries v Twt Limited* (1993) FCA 577; (1993) 120 ALR 693; *Edmund Bateman v Bruce Shepherd, Australian Medical Association Ltd and Reed Business Publishing Pty Ltd* (1997) ACTSC 6; and *Kerry Francis Bullmore Packer v The Australian Broadcasting Corporation, Kerry O'Brien, Mark Bannerman, Vivian Vivian, Peter Rothwell, Mark Avis, David Webb, Sue Spencer and Ian Carroll No. SC 620 of 1990* [1993] ACTSC 270.

Looking at the second circumstance, we did not identify any cases of apologies made by defendants before institution of proceedings that clearly appeared to have been motivated by remorse and a desire to 'do the right thing'. Possibly this is because in such circumstances matters are more likely to have settled prior to court. This theory is supported by a story in the Sacbee/PR Newswire of 12 May 2011, where it was reported that a practice of disclosing medical errors (which includes apologies where appropriate) resulted in a significant decrease in lawsuits:

*"A new report from Lockton, the world's largest privately owned insurance broker, examines whether the practice of disclosing medical errors when they occur increases or decreases liability costs for health care organisations.*

*In 'Disclosure of Medical Errors: The Right Thing to Do, But What is the Cost?', Nancy Lamo, RN, BSN, JD, Clinical Risk Consultant for Lockton, found considerable data that supports the idea that disclosure helps mitigate medical malpractice suits, increases patient safety, and ensures other long term financial benefits.*

*The Lockton report describes the 2009 analysis of the University of Michigan Health System's medical disclosure approach (by Richard Boothman, et al) which provides evidence that disclosure makes financial sense for health care organisations:*

- *fewer lawsuits: 38.7 fewer lawsuits after program implementation*
- *faster resolution: Claim resolution was 1.36 years before program implementation, and 0.95 after*
- *lower costs: Average cost per lawsuit decreased from \$405,921 to \$228,308."*

Looking at the third circumstance, apologies made after the institution of proceedings that appear to be motivated by a desire to settle proceedings will generally be made before proceedings commence. The courts seem wary of the sincerity of these belated apologies and approach them with caution, for the court to consider a late apology as rectifying some of the damage done it must also be adequate. For example:

- *Carson v John Fairfax & Sons Limited* (1993) 178 CLR 44

An apology was printed after proceedings had been instituted. The belated apology did not have the effect of settling the proceedings, but rather aggravated the damage done as it failed to address a number of the matters of substance of which the appellant had complaints. McHugh J [51] supported the jury's finding stating "*that the jury were entitled to regard the belated apology of the defendant as inadequate and indeed insulting*".

- *Gerard Otmar Gutman v Brian Couston and Australian Consolidated Press Council* (1989) ACTSC 33

During the hearing the first defendant proffered an apology to the plaintiffs, which was five years after the original defamatory article. Prior to this the defendant had repeatedly rejected the plaintiff's solicitor's requests for an apology. The court considered that because the belated apology was so late it did not mitigate any of the damages awarded but instead justified an inclusion of interest additional to the damages awarded.

Of course the other circumstance where apologies can occur in relation to legal proceedings is where they are court or tribunal ordered. While the common law courts cannot compel apologies, in some exceptional circumstances equity may order a person to apologise<sup>9</sup>, and there are some statutory provisions that allow a court/tribunal to order an apology in certain circumstances, eg, the *Anti-Discrimination Act 1977* (s.108(2)(d)). Later in this paper I discuss some circumstances where sincerity may not be an essential element of a successful apology.

In addition to reviewing court judgments that refer to apologies, the Ombudsman has continued to monitor media coverage as well as the actions of the public authorities to assess the impact of a statutory protection for apologies. This analysis has clearly demonstrated that there has been no detrimental impact on the rights of the public to pursue litigation, or any other impact, as a result of the inclusion of a statutory protection for apologies.

### **Apologies have statutory protection in defamation proceedings in all Australian jurisdictions**

While only NSW, the ACT and more recently Queensland are the only Australian jurisdictions so far to introduce protection for 'full' apologies in negligence, in 2005 all Australian States and Territories introduced protection for 'full' apologies in the context of defamation. The NSW *Defamation Act 2005* contains similar protection from liability as those in the *Civil Liability Act 2002*, without the limitations of s.3B of that Act (ss.20 & 38).

In defamation proceedings, the issue isn't about whether an apology can be admitted as evidence of liability, it is about the implications of a failure to apologise. In the defamation context Australian courts look favourably upon apologies, acknowledging that an appropriate apology, given at the right time, may mitigate the damages awarded.

### **The cost of not apologising**

Where responsibility is reasonably clear, an agency or relevant official may be confronted by the need to decide whether to offer a 'full' apology (including the taking of reasonable steps to 'put things right') or do nothing and wait and see if a problem results in civil litigation, at which time liability is denied and the action defended.

In NSW, the ACT and Queensland where there is a statutory protection for a 'full' apology, some of the differences between offering an apology as an alternative to the 'deny and defend' strategy commonly advocated by lawyers, are set out in **Annexure A**<sup>10</sup> to this paper.

Apologising allows people to do 'the right thing'. It allows for relationships of mutual trust to be restored when an injured party sees someone else accept responsibility for a mistake and take proactive steps to put it right. It also allows those injured to express their needs and negotiations towards settlement to be commenced in a non-adversarial setting.

By contrast, legal action is by its very nature defensive. Individuals and/or agencies communicate as little as possible for fear of conceding liability. Apologising accepts that we all make mistakes and that those we serve generally understand this because they do too.

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<sup>9</sup> See *Summertime Holdings Pty Ltd v Environmental Defenders Office Ltd* (1998) 45 NSW LR 291.

<sup>10</sup> NSW Ombudsman, *Apologies – A practical guide*, 2nd ed., May 2009, p.8.

<http://www.nswombudsman.nsw.gov.au/publication/PDF/guidelines/Apologies%20Guidelines%202nd%20edition%20March%202009.pdf>.

Some of the views set out in **Annexure A** to this paper are reflected in the May 22 2009 Newsletter of the SorryWorks! Coalition, a US not-for-profit organisation that advocates for apologies in the health sector, in the following terms:

*“...filing a lawsuit is difficult...cases have to be “valuable” to be accepted, and most patients/families have no idea how to present a potential case to a trial lawyer. Litigation often takes years to resolve and patients/families are forced to relive their tragedies day-in/day-out through this process. And even if the process produces a monetary award or settlement, patients/families still have a hollow feeling because apology, accountability, and yes, forgiveness are not traditionally part of the litigation process.”*

In another newsletter of the SorryWorks! Coalition, the two approaches to dealing with problems were contrasted as being the difference between the 3 As and the 3 Ds. Between the one hand:

- **A**ccessibility to those harmed;
- **A**ddressing the problem; and
- **A**pologising.

And on the other hand:

- **D**istancing;
- **D**enying; and
- **D**efending.

Research in the United States has gone some way towards a possible explanation of the reluctance of lawyers in relation to offering apologies. In a paper discussing the results of certain research, Jennifer Robbennolt, Professor of Law and Psychology, University of Illinois College of Law included the following statements:<sup>11</sup>

*“...contemporary empirical research has ... generally found that apologies influence claimants’ perceptions, judgments, and decisions in ways that are likely to make settlements more likely – for example, altering perceptions of the dispute and the disputants, decreasing negative emotion, improving expectations about the future conduct and relationship of the parties, changing negotiation aspirations and fairness judgments, and increasing willingness to accept an offer of settlement.”*

However, Professor Robbennolt went on to note that her research “...demonstrated that attorneys react differently to apologies than do claimants”. She noted that while “...apologies tend to lower claimants’ aspirations and estimates of a case’s fair settlement value...”, on the other hand “...apologies pushed attorneys’ aspirations and estimates of fair settlement values in a different direction...”. She noted that:

*“Many commentators are concerned about the risk that attorneys’ focus on the relevant legal rules will dominate the negotiation process and the ultimate settlement of the dispute, to the exclusion of the non-legal interests of the parties.”*

## **The importance of taking responsibility for problems**

A ‘full’ apology – an apology that includes an admission or acceptance of responsibility or fault – can be remarkably effective in addressing the key needs of people who have experienced harm. Although they are not guaranteed to work in every case, the more an apology addresses the needs of the person harmed, the greater the likelihood it will be effective in reducing anger, restoring a damaged relationship, and helping the person to ‘move on’. The potential benefits of

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<sup>11</sup> Robbennolt Jennifer K, Attorneys, Apologies and Settlement Negotiation, Social Science Research Network: <http://ssrn.com/abstract=1275419>.

an apology are well expressed in a quote from comic strip writer Lynn Johnston who saw an apology as “*the superglue of life [because it] can repair just about anything*”.

When things go wrong, the appropriate agency or official should accept responsibility and take ‘ownership’ of the problems for which they are responsible. This is what good management practice dictates, ethical conduct requires and the public expects.

Unfortunately, I am sure we have all seen occasions where organisations or individuals refuse to take responsibility and instead ignore a problem, deny its existence or deny responsibility for the problem or the harm it caused. When the problem is obvious and responsibility clear (or reasonably perceived to be so), denying its existence or denying responsibility are likely to be seen as more than mere blindness or ignorance – they can easily be seen as being wilful and deceptive. This can have serious detrimental effects on levels of trust and credibility. On the other hand, admitting fault and taking responsibility for a problem (ie, doing the right thing) is a prerequisite for forgiveness (analogous to a religious concept of confession and absolution).

### **Benefits that can flow from apologies**

Research in Australia and overseas supports the view that a timely, genuine and comprehensive apology avoids a sizeable amount of litigation. This can have a very positive impact, particularly in professions such as medicine where increasingly complex and delicate clinical procedures have developed, along with a society that is increasingly litigious, leading to upward pressure on the costs of medical insurance and a passage of this cost either to the consumer or the public health system.

For example, in the Ombudsman’s second edition of *Apologies – A practical guide*, he highlighted the research of Jennifer Robennolt from the University of Illinois. She found that while 52 percent of claimants accepted settlement offers when no apologies were offered, this number jumped to 73 percent when settlement was offered along with an acknowledgement of fault and expression of regret. The Ombudsman of British Columbia cited similar US research to show that an apology from a medical practitioner would have stopped 30 percent of negligence claims going to court.<sup>12</sup>

From the Ombudsman’s own complaint handling experience, such figures are not surprising. Many people who come to the Ombudsman know that things can never be put back exactly as they were before. However, they complain seeking a degree of justice, fairness and validation of the wrong done in their case, as well as for altruistic motives of not wishing to see whatever happened to them being visited on another. Therefore, if people feel their concerns will not be heard or not be taken seriously by an agency, the Ombudsman has found that matters escalate “*simply because of poor communication or because of inadequate publicity about the services and policies and procedures of (an agency)*”.<sup>13</sup>

Apologising addresses many human needs, from the moral urge to do the right thing, to the wish to restore a relationship, to the potentially more pragmatic aim of not wanting a matter to proceed to litigation. While saying sorry for a wrong may not prevent formal action, it will help to demonstrate that the organisation is honourable and trustworthy.

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<sup>12</sup> Office of the Ombudsman of British Columbia, op. cit., p.13.

<sup>13</sup> NSW Ombudsman, *Effective complaint handling*, June 2004, p.13.

[http://www.ombo.nsw.gov.au/publication/PDF/guidelines/Chapter%201\\_Effective%20complaint%20handling.pdf](http://www.ombo.nsw.gov.au/publication/PDF/guidelines/Chapter%201_Effective%20complaint%20handling.pdf).

A 2009 media report demonstrated both the effectiveness of apologising for mistakes and how some individuals who may have been seriously harmed view their greatest need as being an acknowledgement of the injury caused to them, long before compensation is even considered. In a newspaper article in May of 2009, it was reported that a 31 year old man was admitted to hospital for the treatment of a foot ulcer. However, the infection in the ulcer spread, meaning that his leg was amputated. While many would expect the patient to sue for damages, the young man told the *Daily Telegraph* that: "...he [was] *not considering legal action, but [wanted] an apology to ensure it doesn't happen to anyone else...*"<sup>14</sup> The Health Minister issued an apology, saying the department would arrange for a prosthetic leg, wheelchair and home modifications.<sup>15</sup>

Important benefits that might flow to all parties from a 'full' and sincere apology include:

- firstly, *moral benefits* – from doing the right thing
- secondly, *emotional/psychological benefits*, including:
  - showing respect to the recipient
  - giving peace of mind to the recipient through the giver accepting responsibility for a problem and/or through giving an explanation as to what occurred and why
  - forgiveness, allowing both the giver and the receiver of an apology to 'move on'.

I think this is well illustrated in a quote from the former Prime Minister of Canada, Brian Mulroney: "*Most of us in our lives have had occasion to regret certain things we have done. Error is an ingredient of humanity, so too is apology and forgiveness. We all have learned from personal experience that as inadequate as apologies are they are the only way we can cleanse the past so that we may, as best we can, in good conscience face the future*".

There are also *interactional benefits* that flow from 'full' apologies, including:

- repairing or laying the groundwork for a restored relationship, which is particularly important where there will be on-going interaction between the giver and receiver
- improving the credibility of the giver and the level of trust between the giver and receiver.

A full apology can be contrasted with the qualified apology where a person or agency acknowledges an event occurred but fails to express contrition or perhaps even address the specifics of an incident. Such lukewarm statements leave aggrieved persons ambivalent at best and, more agitated at worst. Indeed, Ms Robennolt's earlier mentioned research showed that qualified apologies resulted in only 35 percent of claimants agreeing to settlement.<sup>16</sup>

Further benefits that can flow from 'full' apologies include:

- *personal or operational benefits* – a reduction in the likelihood and/or severity of negative outcomes
- *financial benefits* – a reduction in the chances of on-going difficulties that can seriously impact on time and resources, including litigation.

There are also *systemic benefits* – the transparency that goes with a 'full' apology, i.e. admitting there is a problem increases the chances that mistakes or other problems will then be properly addressed. If you don't admit there is a problem, you are unlikely to fix it! As the Roman philosopher Seneca said 2000 years ago: "*The first step toward amendment is the recognition of error*" – we need to recognise a problem to do anything about it.

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<sup>14</sup> Leg lost in hospital infection, News, Daily Telegraph, 7 May 2009.

<sup>15</sup> Ibid.

<sup>16</sup> Robbennolt opcit, p.9.

## The potential impact of apologies in resolving problems

If a mistake or error led to harm, an appropriate apology is often seen by complainants as an essential part of the proper resolution of their complaint – an appropriate apology is often the main thing they really want. The greater the harm, the greater the likely value of an appropriate apology to the person harmed.

How often have we seen articles reporting somebody saying something along the lines of “*All I wanted was an apology*”?

When things go wrong, many of the people who experience harm or have otherwise been wronged want no more than to be listened to, understood, respected and – if appropriate – given an explanation and apology. A prompt and sincere apology for any misunderstanding is likely to work wonders. It will often avoid the escalation of a dispute and the significant cost, time and resources that can be involved. Apologies can also start a process that can lead to the resolution of a conflict or dispute, particularly if there’s an on-going issue that needs to be dealt with.

Apologies can help to build trust – a necessary first step to a better understanding in a damaged relationship.

A ‘full’ apology given at the right time can:

- restore dignity, face and reputation
- provide vindication or a sense of justice or an acknowledgement that the recipient was right
- allow for an acceptance of responsibility for actions or ownership of a problem – it assures the recipient that he or she is not at fault, a common feeling after a mishap.

When something goes wrong, the injured party or their family will generally want to know what went wrong, who was responsible and how those responsible are going to address the problem. They also will want to know that they will be properly cared for or compensated for damage or loss. If things then become difficult, the problem often isn’t the event that caused the damage or injury – it is the way that person was treated afterwards. This could be, for example, due to a failure to communicate or acknowledge that something went wrong and to admit error.

Experience in many fields indicates that people who have been harmed don’t immediately seek retribution, revenge or vindication. There is usually a two stage process – between the original issue or problem and a very negative response there is usually some intervening event or conduct. Experience indicates that this intervening event or conduct will usually relate to how the problem was dealt with, how the person was treated or how the person’s initial expression of concern was handled. There will therefore usually be a window of opportunity after something goes wrong to properly address the problem and its impact in ways that are acceptable to all concerned.

If the response to the individual’s concerns is respectful, positive and constructive (which can include an apology if appropriate), those concerns can often be resolved satisfactorily, enabling the person to ‘move on’. If the response is rude, dismissive, negative, defensive or misleading, this is likely to result in an escalation of the problem with consequences that are detrimental to the interests of all the parties concerned.

If answers are not forthcoming, if there is a failure to acknowledge the problem or the harm it has caused, or in particular if the person suspects a cover-up, this is likely to result in resentment and anger.

When people are angry they often want to lash out – to get revenge, to cause pain or to force those they see as responsible to explain what happened. When up against powerful organisations or individuals, the best way for individuals to fight back is to go to a lawyer or the media. This is when they are likely to start thinking seriously about money, which they may see as a way to measure the pain they want to cause, or at a minimum to get enough money to be able to pay the lawyer!

I think a good example of the power of a good apology concerned the Catholic Diocese of Dallas where a civil jury awarded the plaintiffs \$119.6 million. It was reported in the media that this was reduced to \$23.4 million by agreement with the plaintiffs, who, it is reported, agreed to vacate the original verdict in exchange for an apology by the Bishop.

### **The essential elements of a 'full' apology**

To be effective, an apology must usually include an express acceptance or admission of responsibility or fault for the actions or inaction that caused harm (that is, a 'full' apology). Research indicates that a 'partial' apology – an apology that does not include such an acceptance or admission – can do more harm than good.

The idea of an apology is relatively simple – that expressing sincere sorrow, regret or remorse for wrong doing and/or the harm it caused can be an effective way to help resolve a problem and restore the relationship between the giver and the receiver. However, this simple idea tends to mask the complexities involved in its implementation.

The content and delivery of an apology is a particularly good example of the old adage that 'the devil is in the detail'. In particularly complex, sensitive or serious situations, for an apology to be effective a wide range of issues will usually need to be considered. The most appropriate content and method of communication of an apology will depend on the circumstances of the particular case and what is hoped to be achieved by giving the apology. For example this could be restoration of reputation, acknowledgement of the wrong done, reconciliation, or an assurance that a problem has been addressed and will not happen again.

What is required for an apology to be effective comes down in the end to what is important to the person harmed, which might be one of more of the following:

- the fact of the making of the apology
- the content of the apology (for example an admission of responsibility or an explanation of why something occurred)
- the feelings that motivated the apology, such as the apparent motive and degree of regret, or
- the level of sincerity evident in the apology.

Where these prerequisites are met, not only is an apology likely to be effective in relation to the person harmed, it can also be effective to prevent or lessen adverse media comment or intervention by some watchdog bodies.

Other than in the more simple situations, in principle, to maximise effectiveness an apology should incorporate the following elements:

Firstly *recognition*. This includes:

- *a description of the wrong* – an honest and fulsome description of the relevant problem, act or omission to which the apology applies. In relation to how much is disclosed, in a recent article in The Australian newspaper discussing how Malcolm Turnbull has responded to the ‘ute affair’ email fiasco, a senior Liberal MP was reputed to have said: “*Sometimes you have to bare all to be forgiven*”.<sup>17</sup> In relation to honesty, as two former politicians from the Victoria recently wrote: “*People do forgive mistakes. What they don’t forgive is being misled*”.
- *a recognition of the wrong* – an explicit recognition that the action or inaction that resulted in the problem was wrong – for example where Pope Benedict recently said in Sydney:  
  
“*Here I would like to acknowledge the shame which we have all felt as a result of the sexual abuse of minors by some clergy and religious in this country. These misdeeds, which constitute so grave a betrayal of trust, deserve unequivocal condemnation.*”
- *an acknowledgement of the harm* – an acknowledgement that the affected person has suffered harm, eg, embarrassment, hurt, pain, damage or loss – for example where the Prime Minister said in his sorry speech to the stolen generation:  
  
“*I offer you this apology without qualification. We apologise for the hurt, the pain and suffering that we, the Parliament, have caused you by the laws that previous parliaments have enacted. We apologise for the indignity, the degradation and the humiliation these laws embodied.*”

Secondly *responsibility* – an acceptance or acknowledgement of responsibility for the wrong and harm caused. For example where the Prime Minister said in his apology to the stolen generation:

“*To the stolen generations I say the following: As Prime Minister of Australia I am sorry. On behalf of the Government of Australia I am sorry. On behalf of the Parliament of Australia I am sorry.*”

Thirdly *reasons* – an explanation of the cause – of the reasons for the problem, or a promise to investigate the cause (but not excuses which are merely an attempt to deflect responsibility).

Fourthly *regret*. This is the core element of the apology, being a *statement* expressing sincere sympathy, sorrow, remorse and/or contrition. The *sincerity* of this communication will generally be absolutely essential, and whether or not it is present will be closely analysed by the recipient of the apology. I have set out some thoughts on the issue of sincerity in **Annexure B** to this paper.

I should note here that sincerity is not always an essential requirement – it depends on the needs of the recipient of the apology. Sometimes the mere fact of an apology will be enough, particularly if the harm caused was to reputation – to ‘face’. I think a case in 2002 amply illustrates this point. It involved a magistrate suing a newspaper for defamation arising out of an article which implied the magistrate was soft on crime and unfit to be a magistrate. She was reported on several occasions as saying that all she wanted was an apology – clearly sincerity wasn’t an issue, just public acknowledgement. When it was not forthcoming she sued and was awarded \$250,000.<sup>18</sup>

But where sincerity is essential for an apology to be effective, indicators of sincerity are likely to include:

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<sup>17</sup> “Walking Wounded”, Peter Van Onselen, The Australian, 7 August 2009  
<sup>18</sup> Law Report, ABC Radio National, 11 June 2002

- whether the focus of the apology is on the needs and feelings of the person wronged or the consequences of the action on that person, not on the apologists reputation or relationship with the person
- whether the objective of the apology is clearly to respond to the needs of the person wronged, rather than merely to appease that person or to attempt to justify what occurred
- whether there is an acceptance or acknowledgement of responsibility for the wrong and harm, not an attempt to deny responsibility or imply that the person wronged was in some way responsible for the harm that occurred.

The fifth element of a full apology is *responsiveness* or *redress*, which would include:

- a statement of the *action taken or proposed* to put things right, which might involve money, actions or promises to fix, etc
- *a promise not to repeat* – a promise or undertaking that the action or inaction will not be repeated – of course if it is repeated, that will severely damage the credibility of the apologisee in relation to any subsequent attempt at an apology
- *timeliness* – no undue delay – as one writer said: “*When you realise you have made a mistake, make amends immediately. It’s easier to eat crow while it’s still warm*”, or as another two wrote: “*The longer you wait to apologise, the sooner your weakness is perceived as wickedness.*”

*Finally release – a request for forgiveness or a release from blame. A request for forgiveness is an optional but important element in an apology as forgiveness can have immense power, for example to heal emotional wounds and sooth anger allowing people to move on with their lives. I am not talking here about forgetting, but about understanding and acceptance – about no longer feeling resentment.*

While the inclusion of each of the above elements in an apology will not guarantee that the apology will be successful, where they are important their exclusion is likely to decrease the chances of success. Which elements of an apology are essential will in practice depend on the nature of the need of the person or persons harmed. I have attempted to set out in **Annexure C** what might be the essential elements of an apology depending on the particular physical and psychological needs of the person or persons harmed.

### **‘Apology’ is a simple concept, but there can be many pitfalls in implementation**

While apologies are a simple concept, there can be many pitfalls in implementation due to the large number of potential variables that can impact on their effectiveness. The more complex the situation and the more reprehensible the action or inaction that led to harm, the more care that is likely to be required in crafting and delivering an apology. Conversely, too much ‘care’, or too much choreography – the less the perceived humility and sincerity. It is often best to see an apology as part of a ‘package’ of actions, and as part of a ‘process’ – not just a quickly delivered statement of regret.

### **Failure is not an option**

If an apology fails – for example because of a failure to accept responsibility or because it is not seen as sincere – it is unlikely that any further attempt at apologising will be effective.

### **Conclusions**

In conclusion, I want to leave three thoughts with you today:

- firstly, an appropriate 'full' apology can be remarkably effective in resolving problems in ways that are fair and reasonable
- secondly, where a problem has caused harm, a 'full' apology will consist of a 'package' of actions including admissions of responsibility, explanations of cause, actions to put things right (where possible) and expressions of sorrow and remorse, and
- thirdly, where a problem has caused harm, a 'full' apology may also be the culmination of a 'process' of communication, investigation and negotiation.

## ANNEXURE A

Voluntary 'full' apologies	Defended civil action (where liability is denied)
<b>Objective:</b> <ul style="list-style-type: none"> <li>• To resolve a problem</li> <li>• To do the 'right thing'</li> </ul>	<ul style="list-style-type: none"> <li>• To avoid or limit liability</li> </ul>
<b>Focus:</b> <ul style="list-style-type: none"> <li>• Focus on the cause (the wrong done – <i>'I am at fault'</i>)</li> </ul>	<ul style="list-style-type: none"> <li>• Focus on the effect (the harm caused – <i>'You are responsible'</i>)</li> </ul>
<b>Ethical considerations:</b> <ul style="list-style-type: none"> <li>• Involves an ethical/moral judgement by the 'responsible' party</li> </ul>	<ul style="list-style-type: none"> <li>• Does not involve an ethical/moral judgement by either party</li> </ul>
<b>Ownership and control:</b> <ul style="list-style-type: none"> <li>• Action initiated by 'responsible' party</li> <li>• Outcome decided by the 'injured' party</li> <li>• Not enforceable – voluntary acceptance of responsibility</li> </ul>	<ul style="list-style-type: none"> <li>• Action initiated by 'injured' party</li> <li>• Outcome decided by a third party</li> <li>• Enforceable – imposition of responsibility by the 'State'</li> </ul>
<b>Approach:</b> <ul style="list-style-type: none"> <li>• Proactive</li> <li>• Risk management</li> <li>• Communication</li> <li>• 'Responsible' party accepts responsibility and tries to rectify the problem (admit and rectify)</li> </ul>	<ul style="list-style-type: none"> <li>• Reactive</li> <li>• Reliance on legal rights</li> <li>• Silence or guarded communication</li> <li>• 'Responsible' party makes no admissions or denies responsibility ('deny and defend')</li> </ul>
<b>Outcomes:</b> <ul style="list-style-type: none"> <li>• A relatively short process</li> <li>• Both parties can be winners</li> <li>• Can 'cure' mental anguish, emotional suffering, stress and trauma</li> <li>• Can properly address humiliation/loss of face</li> <li>• Can establish trust, restore a relationship and improve reputation</li> <li>• Can resolve the conflict</li> <li>• May lead to forgiveness</li> </ul>	<ul style="list-style-type: none"> <li>• A lengthy process – can take years</li> <li>• A winner and a loser</li> <li>• Very unlikely to 'cure' mental anguish, emotional suffering, stress or trauma</li> <li>• May properly address humiliation/loss of face</li> <li>• Will not establish trust, restore a relationship or improve reputation</li> <li>• May not resolve the conflict</li> <li>• Very unlikely to lead to forgiveness</li> </ul>
<b>Costs and other impacts:</b> <ul style="list-style-type: none"> <li>• Little or no legal costs</li> <li>• Harm can be addressed in a range of ways (not just financial compensation)</li> <li>• Impacts on staff time and stress likely to be short-term</li> </ul>	<ul style="list-style-type: none"> <li>• Significant legal costs</li> <li>• Harm reduced to monetary terms (often on a very artificial basis)</li> <li>• Impacts on staff time and stress likely to be significant and on-going (particularly where responsibility/liability is denied)</li> </ul>
<b>Accessibility:</b> <ul style="list-style-type: none"> <li>• Available to all (need not involve a lawyer)</li> </ul>	<ul style="list-style-type: none"> <li>• Only available to those with legal representation (generally)</li> </ul>

## FACTORS IMPACTING ON PERCEIVED SINCERITY OF APOLOGIES

	More Sincerity	Less Sincerity
<b>WHY</b> <ul style="list-style-type: none"> <li>Objective</li> </ul>	To assist recipient [to respond to pain and suffering, to address needs, to allow recipient to move on]	To assist apologiser [to appease recipient, to justify action looking for exoneration or release from blame]
<b>WHAT</b> <ul style="list-style-type: none"> <li>Focus</li> <li>Responsibility: Cause</li> <li>Culpability</li> <li>Response: Redress</li> <li>Rectification</li> </ul>	<p>On consequences for the recipient [to try to address the recipient's needs]</p> <p>Acknowledged by apologiser [responsibility for the wrong and the harm caused]</p> <p>On apologiser [recognition the action or inaction was wrong and caused harm]</p> <p>Offered by apologiser [compensation voluntarily offered or paid, or other action taken or proposed to put things right]</p> <p>Action by apologiser [reasonable steps voluntarily taken or proposed to prevent repeat]</p>	<p>On consequences for the apologiser [on apologiser's relationship with the recipient, on apologiser's reputation, etc]</p> <p>Not acknowledged by apologiser [responsibility ignored, denied or placed on recipient]</p> <p>Not on apologiser [culpability ignored, denied or discounted]</p> <p>Not offered by apologiser [insufficient or no compensation offered or paid, or other action taken voluntarily]</p> <p>Not by apologiser [little or no action taken or proposed voluntarily]</p>
<b>WHO</b> <ul style="list-style-type: none"> <li>Delivery</li> </ul>	By person responsible [either by the person directly responsible or by a person seen as responsible for that person or for the organisation]	By unconnected person [by a person with little or no connection to the cause of the harm]
<b>WHEN</b> <ul style="list-style-type: none"> <li>Timing</li> </ul>	Soon after event [or as soon as facts are clear]	Unreasonably delayed [for no good reason]
<b>HOW</b> <ul style="list-style-type: none"> <li>Communication</li> </ul>	Face to face	Impersonal form letter

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	Essential Elements of an Apology						
Nature of need	Money	Actions or promises to fix	Admissions of responsibility	Sincerity	Explanation as to cause	Public	Private
Physical needs							
• Compensation/ restitution	Yes	No	No	No	No	No	No
• Rectification of problem	?	Yes	No	No	Yes	No	No
• Assistance	?	Yes	No	No	No	No	No

	Essential Elements of an Apology						
Nature of need	Money	Actions or promises to fix	Admissions of responsibility	Sincerity	Explanation as to cause	Public	Private
Psychological needs (appropriate)							
• Hearing/moving on/peace of mind/restoration of self respect	No	Yes	Yes	Yes	Yes	?	Yes
• Mending relationship/restoring trust	No	Yes	Yes	Yes	Yes	?	Yes
• Assurance that both parties have shared values	No	Yes	Yes	Yes	Yes	?	?
• Reassurance it will not recur	No	Yes	Yes	Yes	Yes	No	Yes
• Restoration of reputation or face/vindication	No	No	Yes	No	No	Yes	No

	Essential Elements of an Apology						
Nature of need	Money	Actions or promises to fix	Admissions of responsibility	Sincerity	Explanation as to cause	Public	Private
Psychological needs (inappropriate)							
• Revenge/retribution	Yes	No	Yes	No	No	Yes	No

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