

APOLOGIES – OVERCOMING PUBLIC SECTOR RELUCTANCE

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INTRODUCTION TO APOLOGIES

The purpose of the paper

This paper looks at the importance of apologies, what are the essential elements of a full and effective apology, and current approaches to the encouragement and facilitation of apologies that may be relevant to the public sector.

What is an apology?

An apology is an expression of feelings – an expression of sorrow, remorse or regret and an acknowledgement of fault, a shortcoming or a failing. An apology is a communication of information – a message. It consists of words that are exchanged that pave the way for a reconciliation.

Nobody is perfect, and neither is any organisation – we all make mistakes. Things can and will go wrong. In such circumstances there are many different ways to go about making an apology. The most appropriate form and method of communication of an apology will depend on the circumstances of the particular case, the harm suffered, and what is hoped to be achieved by giving the apology. This might include restoration of reputation, acknowledgement of the wrong done, reconciliation, or an assurance that a problem has been addressed or will not recur.

There are a number of communications that go part way towards meeting the essential elements of a full apology, but are much less likely to be successful due to their limited nature - in particular a failure to acknowledge fault. These partial apologies include:

- expressions of sympathy or empathy (eg. *'I'm sorry this happened to you.'*)
- expressions of regret for the act or its outcome (eg. *'I regret that this happened.'*)
- expressions of sorrow (*'I'm very sorry for what has happened.'*)
- alternatively, there can be an acceptance of responsibility or fault (*'I take full responsibility for what occurred.'*), but without any expression of sympathy or regret.

Why do some people apologise?

When people apologise, they do so for various reasons. These can be conveniently categorised depending on whether they are motivated by factors internal or external to the individual giving the apology. Internal or personal motivations would include:

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- *politeness* – the automatic response to minor social infractions
- *conscience* – an attempt to address negative consequences such as shame or guilt
- *empathy* – feeling strongly for the suffering of others, or
- *ethics* – doing the 'right' thing.

External or more public motivations might include:

- *avoidance* – a desire to avoid actual or potential negative repercussions such as embarrassment, bad publicity, damaged reputation, legal action, etc;
- *strategic* – a mechanism to regain control or influence over an issue or a situation or to undercut/reduce the level of support for the wronged party by taking the moral high ground;
- *compliance* – meeting the expectations of colleagues, the public generally, or a segment of the public, that an apology be given in a particular circumstance;
- *reaction* – reacting to external pressures to apologise, for example media or political pressure, or
- *obedience* – complying with directions from superiors or an employer policy or directive on disclosure and apology.

While these various motivations could be seen as ranging from positive to negative, the particular motivation of the person giving an apology does not necessarily impact on the effectiveness of the apology. As indicated later in this paper, the effectiveness of an apology depends on how well it addresses the perceptions and motivations, and meets the needs, of the recipient.

Why is it often difficult for people to apologise?

It is a fact of life that most people do not like to admit they are wrong – which is a necessary pre-condition to a sincere apology. Reasons why people often find it difficult to admit fault and to apologise may include:

- admitting being wrong is a truth many people don't wish to face;
- concern that giving an apology could be seen as a sign of weakness or will put them at a disadvantage;
- fear that an apology will damage their reputation, that they will suffer a loss of dignity, face or respect;
- concern about confirming responsibility for something that was otherwise only speculated or assumed;
- a reluctance to acknowledge incompetence or inappropriate behaviour;
- fear of accepting legal liability or blame, or providing evidence that can be used against the giver;
- an inability to accept responsibility for their actions or ownership of the problem;
- a desire to avoid a difficult interaction with the person who was wronged, or
- fear that their apology will not be accepted – that there will not be forgiveness.

Apologies are a bit like a largely untested foul tasting medicine for an embarrassing condition. You might know that the medicine is likely to be very effective, but are embarrassed about admitting the problem, concerned about the likely taste and afraid of possible adverse side effects.

PART 2 – THE IMPORTANCE OF APOLOGIES

The importance of apologies from the perspective of people who experience harm

Experience shows that 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, where appropriate, provided with 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 and time and resources that can be involved.

Apologies can also start a process that can lead to resolution of a conflict or dispute, particularly if there's an ongoing 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.

When something goes wrong, the injured party or their family don't immediately call a lawyer or begin calculate the quantum of possible compensation. They want to know what went wrong, who was responsible and how those responsible are going to address the problem. They also want to know that the injured party/family will be properly cared for or compensated for damage or loss. The problem therefore often isn't the event that caused the damage or injury – it is the way the person was treated afterwards, for example, a failure to communicate or a failure to acknowledge that something went wrong and admit error.¹

If answers are not forthcoming, if there is a failure to acknowledge the problem and its cause, or 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 cause pain. This is when they are likely to start to think about money – a way to measure the pain they want to cause. When up against powerful organisations or individuals, the best way for individuals to fight back is to go to a lawyer.

Research in the area of customer satisfaction shows that giving an apology is often the most effective way to deal with a complaint. Many complainants just want an organisation or responsible staff to listen to, understand and respect their concerns, and give them an explanation and apology. Studies undertaken in the US in the 1990s showed that over one third of patients and families who filed medical malpractice suits might not have done so if they had been given a proper explanation and a full apology – factors they considered more important than monetary compensation.

A good example was given in evidence to a recent inquiry into complainants handling in the NSW Health Department² where Professor Clifford Hughes, Chief Executive Officer of the NSW Clinical Excellence Commission, recalled the following incident:

... we had 11 patients in our unit who were given a contaminated solution that we injected into the heart to stop it while we operate. Five of those patients were to go on and to die. There was an error somewhere in the system; but it was never discovered, despite the coronial inquiries. But long before we knew what had happened, one of my senior colleagues called all the families together and he and I sat down with the 11 families and said, "This is a terrible thing that has happened. It is awful. We are truly sorry that this has happened. We are not going to do another operation until we have got these patients out of the woods". And we did not. We said, "We are going to leave no stone unturned until we find out what the cause is." We knew it was an infection; we knew it had occurred somewhere in the processing of that solution, which was beyond our control as individual clinicians. But we said sorry. None of those patients took legal action...

Not only did none of those patients take legal action, but two of them came back to the same hospital and the same surgeons to have repeat surgery many years later because they had confidence that the clinicians were actually on their side and were empathic with them. And, surely, in this day and age we can allow our clinicians to be empathic with the people that, after all, they went to work to help.

A 'full' apology given at the right time can:

- restore dignity/face/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 response to mishaps.

The importance of apologies from the perspective of public officials responsible for the problem

From the perspective of the public officials responsible for the problem, failing to acknowledge that something went wrong:

- is dishonest, or at least lacking in full honesty;
- is often counter productive, and
- can leave the person(s) responsible living a lie or experiencing feelings of shame or guilt.

On the other hand, if they do acknowledge the problem and give a full apology it may:

- lead to forgiveness – a liberating and therapeutic experience that helps the giver deal with any shame or guilt;
- reduce the possibility of retaliation or embarrassment;
- improve or establish the credibility of the giver and trust between and giver and receiver, and
- create or lay the groundwork for a restored relationship.

The importance of apologies from the perspective of the public interest and good administrative practice

From the perspective of the public interest and good administrative practice, where public officials make full apologies this:

- ensures that public officials and public sector agencies are held properly accountable for their actions;
- ensures proper transparency in public administration, and
- is the appropriate ethical and moral response where an action or inaction has caused harm.

PART 3 – MAKING APOLOGIES – A SEVEN POINT CHECKLIST FOR AN EFFECTIVE APOLOGY

What happened and who is responsible?

The first step is to work out what happened and who was responsible. It is very important to identify at the outset the nature and scope of a problem, and whether the organisation, or a person or persons within the organisation were responsible. This may require an inquiry or investigation to be conducted.

In many cases, some assessment will be needed to be in a position to properly assess whether an apology is an appropriate response to events or circumstances, and if it is, to be in a position to properly structure a meaningful and effective apology. This may require some

initial contact with the person concerned - an opportunity that can also be used to get a sense of whether they want or would be open to an apology.

If it was the organisation or person(s) within the organisation who was/were responsible:

- is this responsibility certain, highly likely, more likely than not, or merely a possibility?
- were they fully or only partially responsible for the wrong?

However, if neither the organisation nor its staff were in any way responsible for the wrong, an explanation should be provided but no apology given (although it may be appropriate to express sympathy).

It is also important to establish the full nature and scope of the harm caused to the person concerned and the relationship between that harm and the wrong, ie, the degree to which the harm is referable to or caused by the wrong.

Should there be any initial communication with the person(s) concerned?

The second step is to identify if there is a need to conduct inquiries into the nature and cause of, and responsibility for a problem. If so, it may be necessary to communicate this fact to the person(s) concerned. This communication could include an expression of sympathy for the plight or circumstances of the person(s) concerned, which does not admit fault or responsibility.

If an apology is requested or demanded, or is otherwise warranted, and the case is complex and/or sensitive, it may be important to discuss the issue with the intended recipient for the purpose of:

- reaching a common position on the nature and scope of the wrong that occurred and the details of the harm experienced;
- identifying or clarifying what the person wants from the apology and believes is appropriate to address or redress the wrong.

The particular content and method of communication necessary for an apology to be effective can be significantly influenced by the perceptions, needs and motivations of the person or persons who have (or perceive they have) been harmed by a wrong. Prior to the giving of a formal apology, it will therefore often be necessary for there to be preliminary discussions, written communications, or even negotiations (possibly conducted by a third party).

What are the options for redressing the wrong and addressing the harm?

The third step is to consider options to redress the wrong and address the harm. Often a mere expression of sorrow, remorse or regret alone will not be sufficient to resolve a dispute or a problem. Such an expression needs to be accompanied by or packaged with an acceptance of fault or responsibility and information about how the giver of the apology intends to redress the wrong and address the harm it caused.

There are a wide range of possible options for redress that can help achieve a fair and reasonable resolution. The general principle is that, wherever practicable, people harmed by a wrong (including a failure to meet expected standards of care or service, incompetence, misconduct, negligence, etc) should be put back in the position that they would have been in had the wrong not occurred. Often this will not be practicable, particularly where the harm is not amenable to quantification in financial terms. In such circumstances, people harmed by

maladministration should be offered other options aimed at satisfying their legitimate concerns in ways that are reasonable and fair to all concerned.

Where a wrong has led directly to harm that can be readily quantified in financial terms, compensation is generally the core of the appropriate response. However, where this is not possible or the harm is the indirect result of a wrong, other options for redress should be considered. The range of options for redress can be grouped into the following five categories – communication, rectification, mitigation, satisfaction and compensation³:

i) Communication

The first option for redress is to communicate with the person who has suffered detriment as a result of a wrong – an integral part of a full apology. Communication involves a two-way process of listening, discussing, explaining and negotiating. Options include:

- providing an explanation, and information about the facts of the case and legal options;
- giving reasons for decisions;
- discussing with the person who has been wronged the outcomes that they believe are necessary to provide or ensure appropriate redress, or
- reaching an agreement through mediation, conciliation or other informal approaches to resolution.

ii) Rectification

The second option for redress is for the organisation or responsible person to act to correct the original action or inaction – another integral part of a full apology. When harm has resulted or is anticipated to result from an agency's maladministration, rectification is generally the agency's foremost obligation. Options include:

- reconsidering conduct and taking any necessary action, stopping action that should not have been started, or cancelling an intended action;
- ensuring compliance with law, procedure, practice or policy;
- ensuring compliance with obligations, whether legal or otherwise;
- correcting records that are incomplete, incorrect, out of date or misleading.

iii) Mitigation

The third option for redress is to mitigate the adverse consequences of a wrong, ie, to take practical action to alleviate problems caused by, arising, or likely to arise out of a wrong. Mitigation involves attempting to deal with the consequences arising out of the wrong. Options include:

- ceasing action that has, is, or will cause further harm;
- publishing an apology for, and correction of, defamatory matter;
- correcting records that are incomplete, incorrect, out of date or misleading;
- repairing physical damage to property, or replacing damaged or lost property;
- refunding fees or charges, or waiving fees, charges or debts, or
- providing assistance and support.

iv) Satisfaction

The fourth option for redress is to satisfy, through non-material means, the reasonable concerns of the person who has suffered harm. 'Satisfaction' may include actions of a symbolic nature, and is distinguishable from mitigation or compensation in that it does not

involve the provision of material benefit to the person who suffered the wrong. 'Satisfaction' is the core element of a full apology, which can include an expression of sorrow or remorse, an admission of fault or responsibility.

v) Compensation

The fifth category of redress that should be considered is whether it is appropriate to pay compensation for harm sustained directly or indirectly as a result of a wrong. Under the *Sorry Works!* program (discussed later in this paper), compensation is an integral part of the disclosure and apology process. Compensation can include a monetary 'equivalent' for a loss or an 'adequate substitute' for it. Options include:

- *restitution* for loss or damage to property or loss of earnings or financial or other benefits; or injury or damage to health;
- *reimbursement* for costs or damage incurred arising out of the wrong, eg, medical costs resulting from injury or damage to health, or
- *satisfaction or appeasement* for damage to reputation or humiliation, worry, distress or inconvenience, including 'bother', ie, the inconvenience of having to complain in the first place.

What are the motivations of persons who have been wronged?

The fourth step is to consider the motivations and needs of persons harmed by a wrong. Such persons may want or expect an apology (including an admission and acceptance of responsibility) for a range of reasons. These reasons could include one or more of the following:

- *reassurance* – that something was a mistake and not indicative of an attitude or approach (eg, an '*I'm sorry for the delay*' when a person has been left waiting for attention at the front counter for an unreasonable period of time);
- *restoration of reputation* – to save or restore face, dignity, reputation, respect or honour, requiring symbolic apologies for a person to regain face or reputation (eg, a public retraction and apology for a defamatory comment in a newspaper);
- *vindication* – an acknowledgement that the recipient was right (or at least was not in the wrong or otherwise at fault);
- *explanation/reason or communication* – an explanation of what happened and why;
- '*the right thing*' – there is a principle at stake about which the individual is not prepared to compromise – the person responsible must do the right thing;
- *recognition/acknowledgement of hurt* – an acknowledgement that the recipient was harmed;
- *revenge, humiliation or punishment* – a desire to humiliate or punish those responsible – to make them suffer;
- *responsibility (admission)* – an admission that somebody else was responsible for the wrong (that the recipient was right, or at least was not in the wrong otherwise at fault);
- *responsibility (acceptance)* – an acceptance of responsibility by those responsible for a wrong to rectify the problem or compensate for the harm;
- *rectification* – to ensure that a problem will not re-occur, either for the recipient of the apology, other people or both;
- *reparation or redress* – to be returned to the position they would have been in but for the wrong or to achieve some other form of redress (such as symbolic compensation);
- *resolution* – a first step towards or part of the resolution process for a conflict or dispute - to enable a fresh start to a relationship.

The particular content and method of communication necessary for an apology to be effective can be significantly influenced by the perceptions, needs (both physical and psychological) and motivations of the person or persons who have been harmed by a wrong.

What should be the contents of an apology?

The fifth step is to craft the apology. In principle, a 'full' apology should incorporate each of the following ten elements. These elements can be grouped under the six 'R's – recognition, responsibility, reasons, regret, redress and release:

Recognition:

- (i) *description of the wrong* – an adequate description of or statement about the relevant problem, act or omission (the wrong) to which the apology applies⁴.
- (ii) *recognition of the wrong* – an explicit recognition that the action or inaction was incorrect, wrong, inappropriate, unreasonable, harmful, etc (an acknowledgement of the grievance from the other party's perspective is a key element in a 'full' apology);
- (iii) *acknowledgement of the harm* – an acknowledgement that the affected person has suffered embarrassment, hurt, pain, damage or loss (ie, an expression of empathy and an indication of respect for the person's feelings about the wrong and the harm)⁵.

Responsibility:

- (iv) *acceptance of responsibility* – an acknowledgement/admission of responsibility for the wrong and harm caused⁶ (another key element in a 'full' apology);

Reasons:

- (v) *explanation of the cause* – a simple, plain English explanation of the reasons for or cause of the problem⁷, or a promise to investigate the cause⁸. It may be appropriate to indicate any mitigating circumstances, for example that the person or organisation responsible had no choice as to whether or not to act in that way and/or that the action or inaction was unintentional⁹.

Regret (or remorse):

- (vi) *apology* – an expression of sincere sorrow or remorse, ie, that the action or inaction was wrong¹⁰ (the third key element in a 'full' apology);
- (vii) *sincerity of communication* – the form or means of communication of an apology is very important as such matters can indicate or emphasise the level of sincerity of the apologiser.

Redress (or reparation/rectification):

- (viii) *action taken or proposed* – a statement of the action taken or specific steps proposed to address the grievance or problem, by mitigating the harm or offering restitution or compensation¹¹;
- (ix) *promise not to repeat* – a promise or undertaking that the action or inaction will not be repeated¹².

Release:

- (x) *request for forgiveness* – a release from blame or the reconciliation of a relationship (an optional element in a full apology¹³ (an optional element in a full apology)).

When should an apology be given?

The sixth step is to decide when would be the most appropriate time to make the apology.

Apologies should generally be given at the earliest practical opportunity. Although it is best to apologise as soon as a wrong is identified, it may be important to delay a full apology to allow time for inquiries or an investigation to establish the nature and cause of the problem, to allow one or both parties time for cool reflection to calm down or, as stated by Dr Gregory Tillett (an author and lecturer in ADR) in a recent symposium¹⁴, '*Most people need to ventilate before they can negotiate*'.

The best time to make an apology depends on the nature and seriousness of the wrong and the harm caused:

- in commonplace social interactions not involving deliberate hostile acts or serious impacts (such as bumping in the street, short delays in attending to customers at a counter, interruptions to conversation, etc) – apologies should be offered immediately;
- where the event/interaction is 'private' in nature involving a less serious personal offence (such as rudeness, anger, insensitivity, etc) – apologies should be offered immediately;
- where the event/interaction is 'private' in nature involving a more serious personal offence (such as a betrayal of trust, lying, cheating, etc) – it may be best to delay an apology to allow time for cool reflection and for initial discussions, communications or negotiations (possibly through third parties) as to the appropriate content and method of communication of the apology;
- where the event/interaction is 'public' in nature, for the wrong or harm caused would reasonably be perceived by the aggrieved party and/or third parties to be serious and responsibility or blame is clear – apologies should be offered immediately;
- where the event/interaction is 'public' in nature, the wrong or harm caused would reasonably be perceived by the aggrieved party and/or third parties to be serious, but responsibility or blame is not clear – the aggrieved party, and if necessary the wider audience who are aware of the event/interaction, should be informed that inquiries are being made or an investigation is being held and that the result will be conveyed to them at the earliest opportunity (such advice could be accompanied by expressions of sympathy or regret that do not amount to a full apology and acceptance of responsibility).

How should an apology be communicated?

The seventh step is to decide who should make the apology, who the apology should be made to and how it should be communicated.

Apologies must be given **by** the right person, ie, by the person who committed or is responsible for the wrong that caused the harm or by a person who is clearly perceived as speaking on behalf of the organisation that is responsible for the wrong and resulting harm.

An apology must be given **to** the right person, ie, the person who was harmed. Apologies to third parties generally only work for governments or large corporations as no forgiveness can be given.

Where the wrong and harm experienced are public, particularly if reputation, honour, pride or face is involved, the apology should be public, or at least in writing so that recipients can make it public should they so choose. Where the harm is a more private matter, the apology should also be private.

The form or means of communication of an apology is very important as they can indicate or emphasise the level of sincerity of the giver. A written apology implies time, effort and personal investment in its preparation, yet a face to face apology may be more appropriate where a person concerned wishes to express the depth or intensity of their pain, embarrassment or anger directly to the person responsible. Where an apology can be adequately expressed in a short letter, a handwritten apology generally will have a more powerful impact than a typed apology.

Depending on the circumstances, the most effective method of apologising may be to give a verbal (face to face) apology, followed up by a written apology that goes into more detail.

PART 4 – FACILITATING AND ENCOURAGING APOLOGIES

Different approaches to the facilitation/encouragement of apologies

Where the importance of apologies has been recognised, approaches that have been adopted to encourage and facilitate the making of apologies in appropriate circumstances include:

- *full statutory protection* – some governments in Australia have introduced legislative protection for apologies – apologies can include an admission of fault or liability, however liability and compensation issues are left to be addressed in a different forum (eg, the NSW *Civil Liability Act*);
- *partial legislative protection/partial open disclosure policies* – individual organisations introduce a partial open disclosure and apology policy – the apologies advocated under these policies do not include admissions of fault or liability, which together with compensation are issues left to be addressed in a different forum (eg, the NSW Health Open Disclosure Policy and the Australian National Standard on Open Disclosure);
- *full open disclosure policies* – individual organisations introduce a full open disclosure and apology policy – the apologies advocated under these policies include an admission of fault or liability, with liability and compensation issues being addressed as part of the open disclosure and apology policy (eg, *Sorry Works!*, an approach increasingly being used in the medical sector in the USA – discussed later in this paper).

‘Full’ statutory protection for apologies

‘Full’ statutory protection for apologies from civil liability generally

In March 2001 the NSW Ombudsman made a suggestion to the NSW government that statutory protection be introduced for public officials making apologies for the purpose of resolving complaints. The government decided that this was a good idea and that the protection should apply generally across the whole community.

New South Wales introduced a broad statutory protection for apologies through amendments to the *Civil Liability Act 2002* that commenced on 6 December 2002.

Whenever papers are given at legal seminars and conferences on the provisions of the NSW *Civil Liability Act*, they generally focus on the provisions of the Act that:

- limit the circumstances where a person must take precautions against a risk of harm to others;
- create a presumption of awareness of obvious risks;
- limit liability for harm resulting from an obvious risk of a dangerous recreational activity;
- limit the ability of intoxicated persons to recover damages for personal injury or property damage;
- limit the liability of professionals when they act in a manner widely accepted by their peers as competent professional practice, and/or
- limit liability of public authorities¹⁵.

Such papers generally skip over or ignore the part of the Act that deals with apologies. This is unfortunate as these apology provisions are potentially far more relevant to the everyday lives of the people in NSW than the rest of the provisions of the Act put together.

The relevant part of the Act provides that if you apologise, in most circumstances it can't be used against you in a court. In other words, in most aspects of daily life you don't need to worry about legal liability if you say sorry. With apologies hopefully now being largely a lawyer-free zone, this may well lead to a more 'civil' society in NSW.

Apologies are defined in the *Civil Liability Act* to be '*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).

The general effect of an apology on liability is set out in the Act in the following terms:

69 Effect of an apology on liability

- (1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person:
 - (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
 - (b) is not relevant to the determination of fault or liability in connection with that matter.
- (2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

In other words, the apology provisions of the Act mean 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 or liability.

The protections under the Act do not apply to all civil proceedings. While in most cases our legal system now can't make you sorry you've said sorry, there are still some circumstances where an apology could still be a problem, for example traffic accidents, intentional violent acts intended to cause injury or death, or workplace injuries (see s 3B of the Act). Unfortunately the exclusion of these disparate areas of civil liability from the protections provided for apologies is likely to create confusion as to the actual coverage of the protection.

While some of the items in the list make some sense, several are almost bizarre – for example there is no protection for an apology for contraction of a dust disease, or a personal injury caused by smoking! There is also no protection for an apology made in connection with a car accident – which might be seen to discriminate against women given that some studies suggest women are more likely than men to apologise after a car accident. The exclusions contained in s 3B appear to make little good sense in the context of the protection for apologies in s 69.

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, it must be recognised that 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.

Full statutory protection for apologies is also in force in the Australian Capital Territory (*Civil Law (Wrongs) Act 2002*), and for health care providers in various states in the USA, such as the Colorado Revised Statute 13-25-135 (2003), and Vermont S198 Sec.1.12 V.S.A. 1912 (2006).

Statutory protection for apologies from liability in defamation

An indication that the various State, Territory and Commonwealth governments in Australia see the protections in the NSW *Civil Liability Act* as working well is that, when defamation laws were comprehensively reviewed three years after the introduction of those statutory protections for apologies, the revised legislation in most if not all jurisdictions incorporated statutory protections for apologies largely equivalent to the provisions in the NSW Act.

The NSW *Defamation Act 2005* now contains similar protection from liability to that in the *Civil Liability Act*.

20 Effect of apology on liability for defamation

- (1) An apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person:
 - (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
 - (b) is not relevant to the determination of fault or liability in connection with that matter.
- (2) Evidence of an apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.
- (3) Nothing in this section limits the operation of section 38. ...

38 Factors in mitigation of damages

- (1) Evidence is admissible on the behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that:
 - (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter; or
 - (b) the defendant has published a correction of the defamatory matter,...

Each Australian jurisdiction has now introduced largely similar defamation legislation, including an equivalent provision to s 20 of the NSW Act protecting apologies.

Has full statutory protection for apologies achieved good results?

Since the introduction of full statutory protection for apologies in the NSW *Civil Liabilities Act*, it appears from the matters dealt with by the NSW Ombudsman and from various newspaper reports that public sector agencies have become far more prepared to offer an apology to a complainant, in appropriate circumstances, than they were prior to the introduction of the legislation. It appears that the offering of apologies by public sector agencies is now widely considered to be almost an unremarkable day-to-day event. Prior to the legislation, the offering of an apology was almost unheard of, other than in circumstances where, for example, a 'political' imperative was seen to outweigh any potential liability issues that could arise. If this general perception of a change in agency attitude and approach is correct, the apologies part of the legislation would appear to be working well.

Further, there does not appear to be any evidence to indicate that the statutory protection for apologies has created any problems or caused any damage to the interests of government or any person or body. It is important to note here that making apologies inadmissible in civil proceedings does not in practice result in any detriment to the rights or interests of members of the public – in the absence of such a protection it is extremely unlikely that public officials in particular would give an apology in circumstances where this could be seen as an admission of liability. In contrast, the practical consequence of this legislation should be that more public sector officials 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 agency taking moral, if not legal, responsibility for its actions and the research shows that many people would be satisfied with that. Therefore, the introduction of the protections for apologies can be said to have had either at least a neutral effect or very possibly a beneficial effect.

It is still too early to see the effect of the protections that have been introduced into defamation legislation around Australia in the last few years.

'Partial' statutory protection and 'partial' open disclosure policies

'Partial' statutory protection for apologies

Since the incorporation of that provision into the *Civil Liability Act*, every other State and Territory has followed the NSW lead and brought in legislation that provides varying levels of protection for apologies or expressions of regret in relation to civil liability. While the scope of the protection provided in each jurisdiction varies significantly, it appears that a simple '*I am sorry*' will in most circumstances be protected in all States and Territories in Australia.

While in NSW and the ACT a person will be protected if they go on to say '*it was my fault*', such an admission will not be protected in any other jurisdiction (ie, in NT, Qld, SA, Tas, Vic, WA). This is unfortunate as an admission or acknowledgement of responsibility is generally essential for an apology to be effective. The only jurisdiction in Australia where an apology does not appear to have any legal protection (other than in the defamation context) appears to be the Commonwealth!

NSW Health Open Disclosure Policy

On 24 August 2006, NSW Health issued a Policy Directive entitled *Open Disclosure*.¹⁶ The policy aims to establish a standard approach to communication with patients, families/ carers and other stakeholders after incidents involving potential injury, damage, loss or other harm to patients. The *Open Disclosure* policy is based on the *National Open Disclosure Standard* (discussed further below). While both policies are very commendable, they advocate only

partial apologies, ie, both warn against the making of admissions of liability. For example, under the heading *Steps in Open Disclosure*, staff of NSW Health are instructed that:

5.2 Communicating with the patient or carer

...An apology is not an admission of liability and health care professionals should not make any proactive admission of liability or verbal or written statement indicating that:

- they, or another health care professional, are liable for the harm caused to the patient
- the health service is liable for the harm caused to the patient
- the incident could have been avoided....

However, even though health care professionals are instructed in the policy not to make admissions of liability, the policy does require that there will be a full disclosure of the findings of investigations, including any Root Cause Analysis Final Report (other than in certain defined circumstances).¹⁷

Given the protections available in ss 68-69 of the NSW *Civil Liability Act*, it is unfortunate that the NSW policy advocates such a limited approach to apologies.

Australian National Open Disclosure Standard

The Australian National Open Disclosure Standard prepared by the Australian Council for Safety and Quality in Health Care was adopted and published in 2003¹⁸. The national standard sets out principles to address the interests of patients, health care professionals and other key stakeholder groups including openness and timeliness of communication; acknowledgement of error; expression of regret/apology, recognition of the reasonable expectations of patients and their support person; staff need for support; and confidentiality.

Handbooks have been prepared and published to assist hospital managers and health care professionals with the implementation of the Open Disclosure Standard. These handbooks¹⁹ cover such topics as: what is open disclosure, the ethical basis for open disclosure, the challenges, strategies to facilitate open disclosure, legal issues, insurance considerations, and frequently asked questions. Under this last heading, the following answer is given to the question: *Does an apology or expression of regret mean admitting liability?*

The Open Disclosure Legal Review²⁰... identified that an apology is not an admission of liability; there are no legal impediments to an appropriately worded apology. It is not an admission of liability to:

- Explain how an adverse outcome occurred;
- Acknowledge that the patient is not happy with the outcome;
- Express your concern for the patient.

However, the answer to this question goes on to say:

If you admit fault then you may be admitting liability. Avoid statements such as:

'I'm sorry – I appear to have made an error in judgement';
'I apologise for this mistake';
'It is my fault that this happened'.

The related handbook for health care professionals includes the following advice:

Step 5 Inform the patient of what has happened and what has been done to prevent a further harm. Include an expression of empathy or regret ...

However, the answer then goes on to say:

Don't:...

- Blame yourself...
- Admit liability.

Under the heading *Open Disclosure and Legal Issues for Health Professionals*, the advice in the handbook includes:

Health care professional need to be aware of the risk of making an admission of liability during the open disclosure process. In any discussion with the patient and their support person during the open disclosure process, the health care professional should take care to avoid the following:

- state or agree that they are liable for the harm caused to the patient;
- state or agree that another health care professional is liable for the harm caused to the patient; or
- state or agree that the health care organisation is liable for the harm caused to the patient.

In answer to the question: *What is an admission of liability?* the handbook notes that the Standard states:

... there is a clear distinction between an admission of fact on the one hand ('we lacerated your liver during the course of the operation') versus an admission of liability for negligence ('the liver laceration constituted a breach of my duty of care to you and the breach has caused your injury') on the other...

However, the Standard goes on to state that:

... in discussions with the patients and their support person under the open disclosure process, health care professionals may:

- acknowledge that an adverse event has occurred;
- acknowledge that the patient is unhappy with the outcome;
- express regret for what has occurred;
- provide known clinical facts and discuss on-going care (including any side effects to look out for);
- indicate that an investigation is being or will be undertaken to determine what happened and prevent such an adverse event happening again; and
- agree to provide feedback information from the investigation when available;...

'Full' open disclosure policies

In the United States an organisation called the *Sorry Works! Coalition* was established in early 2005²¹. The *Coalition* promotes the *Sorry Works!* program, which is a response to medical errors that emphasises the importance of apologies and doing the right thing.

The *Sorry Works!* protocol is based on the open disclosure program developed at the Department of Veterans Affairs Hospital in Lexington, Kentucky. After losing two major malpractice suits in the 1980s, this Veterans Affairs Hospital adopted a revolutionary approach to medical errors – extreme honesty. The hospital administration directed its staff to fully disclose all medical errors, to apologise to harmed patients and their families, and to propose ways to prevent recurrence. The hospital then offered fair compensation to those harmed. A study published in the 1999 edition of the *Annals of Internal Medicine* showed that the Hospital's average cost of error-related payouts was in the bottom quartile of the 35 comparable Veterans Affairs hospitals in the United States. Since that time, these results

have largely been replicated by all Veterans Affairs hospitals, private hospitals and hospital systems that have adopted a similar approach.

The *Sorry Works!* program or protocol is simple:

- (1) after an adverse event or a bad outcome occurs, the hospital conducts a root cause analysis to see whether or not the standard of medical care was met (ie, was the problem due to medical error or negligence, or was it simply a bad outcome);
- (2) if the standard of medical care was **not** met (ie, an error, system breakdown, etc) the patient/ family is contacted:
 - (a) they are encouraged to retain legal counsel (it has been found by *Sorry Works!* that this adds to the credibility of the program and further reduces litigation)
 - (b) a meeting is held with the patient/family where **the error is disclosed, fault admitted**, explanation is given as to what went wrong and how it will be fixed, and an offer made of fair compensation (as determined by an actuary or some other qualified expert);
- (3) if the standard of medical care **was** met, the patient/family is still contacted:
 - (a) the records are opened and explained, and all questions are answered to demonstrate that the proper standard of medical care was met and that there is no cover up;
 - (b) no apology is offered (although this would not prevent an expression of sympathy for the patient's plight);
 - (c) no compensation is offered, and
 - (d) if sued, the cases are **never** settled and are fought to their conclusion.

Implementation of the program is not reliant on the availability of any statutory protection for apologies, although several states in the USA have adopted *Sorry Works!* type legislation or other approaches to the partial statutory protection of apologies.

It is worth noting here that when an admission of responsibility or fault has been given, if there is any subsequent legal action the court's role is primarily be limited to establishing just compensation, which avoids the need for long, painful and embarrassing proceedings where the plaintiff is arguing that the defendant was negligent/incompetent.

PART 5 – CONCLUSIONS

The components of a 'full' apology

To ensure that an apology has the best chance of being effective in resolving a problem, it should cover at least the following matters:

- i) *recognition* – including a description of the wrong, a recognition that the occurrence was wrong and an acknowledgement of the harm done;
- ii) *responsibility* – an acceptance of responsibility for the wrong and harm (the key missing element from partial apologies);
- iii) *reasons* – an explanation of the cause of the problem;
- iv) *regret/remorse* – an apology sincerely expressed;

- v) *redress/reparation/rectification* – a statement of the action taken or proposed and a promise or undertaking that the problem will not be repeated.

A further matter that could be included in an apology is a request for forgiveness – a *release* from blame.

Comparing approaches to the facilitation and encouragement of apologies

Looked at in terms of risk management, the statutory protection and ‘partial’ open disclosure approaches are based on risk avoidance – risk aversion being effectively the ‘default’ position for the public sector (and many professions, for example medicine and the law). By way of contrast, the ‘full’ open disclosure policy is based on confronting risks head-on to properly address and minimise the consequences of risks when they occur.

Statutory protections for apologies, however, are not necessarily a pre-condition to the making of full apologies. As stated by Dr Lucian Leape, a Professor of Health Policy at Harvard University:

For decades, lawyers and risk managers have claimed that admitting responsibility and apologizing will increase the likelihood of the patient filing a malpractice suit and be used against the doctor in court if they do sue.

However, this assertion, which on the surface seems reasonable, has no basis in fact. There is to my knowledge not a shred of evidence to support it. It is a myth.

The reality, in fact, appears to be just the reverse. Patients are much more likely to sue when they feel you have not been honest with them.²²

It is certainly true that people who are affected by an adverse event often want someone to blame or someone to take responsibility for what occurred. It is one thing to be given a detailed account of what occurred – it is a completely different thing to be told that some identified person or organisation has taken responsibility or accepted the blame or liability for what has occurred.

Therefore, looked at in terms of effectiveness, the statutory protection and full open disclosure approaches encourage and facilitate ‘full’ apologies. The partial open disclosure approach only allows for the far less transparent or effective, and potentially even damaging, ‘partial’ apology.

The open disclosure policy of NSW Health and the Australian National Open Disclosure Standard, while leaders in the field in this area in Australia, are not ‘full’ open disclosure policies because the apologies they advocate are only ‘partial’ – they do not include an acceptance of responsibility or an admission of fault or liability. It is open to serious question whether an apology given in accordance with the NSW Health Open Disclosure Policy or the National Standard is the best and most effective way to assist them to deal with what has happened and move on with their lives.

While the *Sorry Works!* approach appears to be very successful in dealing with single ‘injured party’ (for want of a better term) problems, it does not appear to be a program that is well designed to address problems that affect multiple injured party – the sort of problems that can result from public sector negligence, maladministration, mismanagement or failures to act. It is also often difficult to quantify the harm, damage or other consequence that can flow from problems that arise in the public sector generally, and particularly in relation to problems that affect multiple injured parties. This would be a significant issue for any insurer

whose agreement would be needed for such an approach to be adopted by a public sector agency.

The *Sorry Works!* program is most commendable in its aims and appears to be very successful in the results achieved. However, implementation of the program does require strong moral fibre and the courage to make what presumably is often in practice a 'leap of faith' (that full disclosure and apology will not backfire on the individual or the organisation concerned). In this context the readiness of US medical professionals and hospitals, and importantly their insurers, to consider and trial what many people would see as a 'courageous' new approach may be significantly influenced by what US medical professionals perceive to be the heavy burden placed on them by the level of litigation for medical negligence in the USA.

Prerequisites for the facilitation and encouragement of apologies in the public sector

In Australia and the USA the awareness of the importance of apologies has grown significantly over the last 4 to 5 years. While views seem to differ as to the best way to facilitate and encourage apologies, statutory protection for apologies is an important way to remove what is widely perceived in the public sector (as well as in many professions) to be the major impediment to the giving of a full apology – legal liability. However, addressing the legal liability issue will not, by itself, guarantee that full apologies are given in appropriate circumstances.

To facilitate and encourage apologies in the public sector there appear to be six prerequisites that need to be met. Public officials need to:

1. be aware that they will be legally protected from liability if they do so – particularly important in a risk averse environment such as a public sector (as well as in risk averse professions such as medicine and the law);
2. know that they are authorised by their employer or the government to make an apology;
3. be prepared to admit they have made a mistake;
4. accept that making an apology is the right thing to do;
5. believe that an apology may serve a good purpose;
6. know when and how to make an appropriate apology.

Statutory protections for apologies only address the first prerequisite. The other five prerequisites need to be addressed by the management of a public sector agency:

- ensuring there is a strong ethical culture throughout the organisation
- adopting and implementing a robust open disclosure and apology policy, which could include such matters as:
 - the circumstances in which apologies can or should be given;
 - the content of such apologies, including the admissions that can be made and the information that should be conveyed;
 - the preferred methods of communication of apologies;
 - responsibility for the giving of apologies;
 - responsibility for the coordination of the apologies process;

- what forms of redress may be relevant to the types of circumstances likely to arise (in relation to the functions and activities of the agency) where an apology is warranted;
 - delegations of authority to make apologies, offer redress, etc, and
- providing practical training to staff at all levels on when and how to make apologies.

Endnotes

- 1 *Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients*, Liebman, CB, & Hyman, CS (2004), Health Affairs, 23(4), 22-32.
- 2 Proceedings before the General Purpose Standing Committee No. 2 *Inquiry into Review of Complaints Handling within New South Wales Health*, 14 September 2006, NSW Parliament.
- 3 These are not firm or fixed categories and various options for redress may fit into more than one category. A detailed discussion of each category of options can be found in 'Options for Redress', NSW Ombudsman, 2006 [see www.omb.nsw.gov.au].
- 4 It is best if both parties have a common understanding of what went wrong and what would be an appropriate response, which may require a preliminary discussion, communication, or negotiations possibly by a third party.
- 5 Avoiding the passive voice, eg, '*mistakes were made*' without taking ownership, the conditional tense, eg, '*if I have offended anyone...*' to qualify the apology, or questioning whether the injured party should have been damaged, eg, '*if you were offended...*' (per Aaron Lazare, *On Apology*, Oxford University Press, 2004 (pp.88, 90 & 92).
- 6 The admission must be about something done by the apologist not the recipient, therefore it is not appropriate to say '*I'm sorry you took offence at what I did*'.
- 7 Although the information conveyed in an apology should not be admissible in NSW or the ACT, the apology may convey information that can be used to obtain information in an admissible form for use in court proceedings.
- 8 It is totally inappropriate to say '*I am sorry, but*' followed by an explanation as to why what was done was correct or justified. What is more appropriate is to say '*I am sorry because...*'.
- 9 If the wrong was solely caused by events outside the control of the organisation, its staff, or was caused by a third party, then it may be appropriate to express sorrow or regret without making any admission of responsibility.
- 10 Technically speaking, an expression of regret is not really an apology as it is a wish that the action or harm had not occurred rather than an admission that what occurred was wrong.
- 11 In proceedings relating to liability for 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 NSW Civil Liability Act).
- 12 Particularly where there will be an ongoing relationship or the two parties are likely to interact at some point in the future.
- 13 The giving of forgiveness is the clear sign of a successful apology, and at the very least an apology can prepare the grounds for forgiveness. Forgiveness does not mean that the problem, wrong or hurt will be forgotten, merely that it will be remembered without bitterness – that is, will not be held against the giver, will not be brought up again, will be 'let go' and the person will move on.
- 14 6th National Investigations Symposium, Sydney, 2 November 2006 in discussions following delivery of a paper '*Mediated through plastic: Dispute resolution by telephone*'.
- 15 Maybe a more appropriate title for this legislation could have been the 'S**t Happens Act'!
- 16 NSW Health, PD 2006_069.
- 17 **'5.3 Investigation and feedback**

...

There will be complete disclosure of the findings of investigations from information in the patient's medical record, discussions with staff members, findings from clinical review meetings and final reports from clinical SAC 1[Severity Assessment Code 1] RCAs [Root Cause Analysis] unless information is restricted as follows: [which is followed by a list of certain circumstances where various statutory privilege against disclosure apply]...'

'5.4 Completing the open disclosure process

After completing the investigation, feedback to the patient will take the form of a face-to-face interview, a letter or both. The interview and/or letter must include:

- Reference to the clinical and other relevant facts

- RCA [Root Cause Analysis] Final Report where applicable
 - Reference to details of the concerns or complaints of the patient and the support person
 - An apology and expression of regret for the harm suffered
 - A summary of the factors contributing to the incident
 - Information on measures to be implemented to prevent a similar event occurring
 - What has been and will be done to avoid repetition/recurrence of the incident and how these improvements will be monitored.'
- 18 *Open Disclosure Standard: A National Standard For Open Communication in Public and Private Hospitals, following an Adverse Event in Health Care*, Australian Council for Safety and Quality in Health Care, July 2003.
- 19 *Open Disclosure, Manager's Handbook, and Open Disclosure, Health Care Professional's Handbook, Australian Council for Safety and Quality in Health Care.*
- 20 *Open Disclosure Legal Review (2002)* prepared by Corrs Chambers Westgarth for the Open Disclosure Project. Copies available on the Open Disclosure CD Rom or from the Australian Council for Safety and Quality in Health Care.
- 21 <http://www.sorryworks.net>
- 22 *Full disclosure and apology: An idea whose time has come*, Leape L. *Physician Exec* 32:16-18, Mar.-Apr.2006