

Open disclosure and apology – Time for a unified approach across Australia

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Introduction

This paper concerns the importance of open disclosure and apology and the need for a unified approach across Australia to the protection of apologies. It considers why we need to recognise and admit our mistakes, to authorise people within an organisation to admit mistakes and to take responsibility for corrective action, and to remove any actual or perceived legal impediments to the making of full apologies.

- I will be referring to two types of apologies:
- ‘partial’ apologies – an expression of sorrow without any exploration of why,
- ‘full’ apologies – apologies that include an explicit admission or acceptance of fault or responsibility.

The importance and potential effectiveness of appropriate apologies have been recognised for millennia. Unfortunately, the litigious nature of our society generally and the innate caution of lawyers have resulted in apologies being associated more and more in people’s minds with unacceptable risk taking.

It is time to reverse this trend and recognise that the giving of apologies is not only the ethically and morally right thing to do when mistakes for which we are responsible have caused harm but also, in a very practical sense, a very powerful risk management tool. This change in attitude would be assisted by the adoption of a unified approach to the legal protection of apologies across Australia.

What is the statutory status of an apology in Australia?

Australian jurisdictions with protections for full apologies

NSW, the ACT and Queensland protect ‘full’ apologies from being admissible in civil proceedings. NSW became the first jurisdiction in the common law world to legislate to give legal protection for a full apology made by any member of the community a decade ago, through an amendment to the *Civil Liability Act 2002*.¹ Section 69(2) of that Act specifically provides that evidence of such an apology ‘is not admissible in any civil proceedings as evidence of the fault or liability’ (other than the categories of civil liability excluded by s 3B of the Act).²

The NSW legislation was followed almost immediately by the ACT (*Civil Law (Wrongs) Act 2002*, s 132 – with limited exclusions), and more recently by Queensland (*Civil Liability Act 2003*, ss 72A-72D – with exclusions similar to those in the NSW legislation).

Unfortunately, the other 5 Australian states and the Northern Territory have only legislated to protect ‘partial’ apologies, ie apologies that do not include any admission or acceptance of fault or responsibility - in other words apologies that need no legislative protection! For completeness I should add that all Australian jurisdictions have adopted statutory protections for full apologies in their defamation legislation (see Annexure A).

The protection for apologies in the New South Wales *Civil Liability Act* has three elements:

- 1) a declaratory element – an apology is not an admission of fault
- 2) a relevance element – an apology can’t be taken into account in determining fault, and

3) a procedural element – an apology is not admissible as evidence of fault.³

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.

It is also important to note that where action is taken to rectify a problem, for example as part of a package of measures in a ‘full’ apology, 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.⁴

There is a dearth of judicial consideration of the scope of such statutory provisions. A Canadian decision (*Robinson v Cragg*, 2010 ABQB 743), which considered a largely equivalent apology protection provision, distinguished between expressions of sympathy/regret and admissions of fault on the one hand, and factual admissions relating to liability on the other. Only the former were held to be covered by the protection.

It is quite possible that Australian courts would adopt a broader approach. As clearly stated in the Second Reading speech to the amendments to the *Civil Liability Act 2002* that introduced ss 67-69, the intention of those provisions was to encourage apologies that are accompanied by explanations. The then Premier, Bob Carr, explained the benefits of an apology in the following terms:

Injured people often simply want an **explanation** and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases ending up in court.⁵ [emphasis added].

A review of the few Australian cases that have considered apology protection provisions similar to that in NSW⁶ indicates a consistent approach to statements that include an apology. The Australian courts that have considered the issue:

- have not adopted a narrow definition of an apology as confined to sympathetic utterances; and
- have not looked at the apology in question to find evidence of fault or liability – focussing instead on acts and/or omissions that have occurred before and/or after the event in question, finding no probative value in the apology.

Some support for a broader interpretation of apology protections can also be found in the view expressed by the presiding judge in another Canadian case. In *Hutchison v Fitzpatrick* [2009] ACTSC 43, Harper J expressed the view that it was regrettable, in light of such provisions, that lawyers continued to advise their clients not to speak with other parties. Harper J was presumably of the view that apologies should be given a broad definition. If Harper J meant that lawyers should advise their clients to only make sympathetic utterances, it seems that most lawyers would prudently advise their clients to make no statement at all in case the apology went further than a sympathetic utterance. This would effectively render such legislative protections ineffective.

Until such time as either the legislation is clarified or the interpretation of the current provisions is considered by the courts, there will remain a grey area around the scope of the protection provided. Hopefully the courts will interpret the protection broadly to encompass

statements explaining the reasons why the giver of the apology is accepting fault or responsibility – generally an essential element of an effective apology.

What is the statutory status of an apology in Canada and the USA?

Looking elsewhere in the common law world, most Provinces of Canada took to the legislative protection of apologies like ducks to water. Starting with British Columbia in 2006, at last count 8 Provinces now have passed laws protecting full apologies, all based on the Canadian Uniform *Apology Act*, which is drafted in terms that are simpler and tighter than the NSW law. In particular, the uniform Act and all apology laws passed so far contain no exceptions.

Most States of the USA have gone down a different path (see Annexure A). While, since 2003, 20 States have passed laws giving protection to full apologies, such protection is in all cases limited to health care providers only. A further 18 States have passed laws to protect ‘partial’ apologies (7 of which are limited to health care providers). As I mentioned earlier, such protections serve little purpose in practice because a ‘partial’ apology by itself would be most unlikely to incur legal liability in civil proceedings – even in the USA!

What is the common law status of an apology?

It is unfortunate that the standard response by lawyers across the common law world to any suggestion that their client should apologise is to advise against it. Time and again I have heard and read of such advice, always predicated on the view that to give a full apology is to incur legal liability. Such advice seems to be almost always accepted by clients without question. I have never heard of legal advisers being asked to prove it – to quote case law that demonstrates the downside of a full apology.

In fact, the Australian case law gives little if any support to the claim that even a ‘full’ apology will be found by the courts to incur legal liability. The High Court of Australia considered the issue of apologies and liability in *Dovuro Pty Ltd v Wilkins* (2003) 201 ALR 139. The defendant in that case had made a written apology that included a statement that it had ‘*failed in its duty of care*’ to its customers. In holding that this statement did not amount to a basis for finding negligence, Gleeson J said:

... care ... needs to be taken in identifying the precise significance of admissions, especially when made by someone who has a private or commercial reason to seek to retain the goodwill of the person or persons to whom the admissions are made ... And it is always necessary for the fact-finder to consider precisely what it is that is being admitted. If the driver of a motor vehicle says to an injured passenger: ‘I am sorry, I let you down’, that may not mean much, or anything. ... The statement that the appellant ‘[failed] in its duty of care’... cannot be an admission of law, and it is not useful as an admission of failure to comply with a legal standard of conduct. There is no evidence that the author of the statement knew the legal standard.⁷

It may readily be accepted that what is said after an event may constitute an admission of relevant facts. Tendering an apology for what has happened ... may, in some cases, amount to such an admission. But there is always the risk that what is said after an event is informed only by hindsight, and the speaker’s wish that the clock might be turned back.⁸

While this case focused on an explicit admission of liability, it is a strong indication of the general approach to apologies and liability that we can expect from Australian courts, even in jurisdictions without a statutory protection for full apologies.

Research in the USA has gone some way towards a possible explanation of the reluctance of lawyers in relation to offering apologies. Jennifer Robbennolt, Professor of Law and Psychology, University of Illinois College of Law, has observed that:

...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.⁹

However, Professor Robbennolt went on to note that her research ‘...demonstrated that attorneys react differently to apologies than do claimants’. She observed 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 also commented that:

[m]any 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.

In practice, there is a growing body of evidence, particularly from the USA but increasingly also from Australia, that a full apology, given at the right time, in practice has the opposite effect to that traditionally claimed by lawyers.

In other research, Professor Robbennolt found that while 52% of claimants accepted settlement offers when no apologies were offered, this number jumped to 73% when settlement was offered along with an acknowledgement of fault and expression of regret.¹⁰ The Ombudsman of British Columbia cited similar research from the USA which showed that an apology from a medical practitioner would have stopped 30% of negligence claims going to court.¹¹

Why apologise?

The benefits that can flow from an appropriate full apology

The important benefits that can flow to all parties from a ‘full’ and sincere apology include:

- moral/ethical benefits – from doing the right thing – when our mistakes have caused harm, an admission of fault and an appropriate apology is what good management practice dictates, moral/ethical conduct requires and the public expects.
- 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; and
 - forgiveness, allowing both the giver and the receiver of an apology to ‘move on’.

- interactional benefits, 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; and
 - improving the credibility of the giver and the level of trust between the giver and receiver.
- 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.
- systemic benefits – the transparency that goes with a ‘full’ apology, admitting that there is a problem increases the chances that mistakes or other problems will then be properly addressed.

Addressing the needs of people harmed

A ‘full’ apology – an apology that includes an admission of fault and acceptance of responsibility to appropriately address the harm caused – 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 psychological and material 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 an apology are well expressed in the quote that an apology is ‘the superglue of life [because it] can repair just about anything’.¹²

An apology shows an individual or agency taking moral, if not legal, responsibility for his/her/its actions and research shows that this is what many people are looking for.

Facilitating resolution of problems

If a mistake or error led to harm, those harmed often see an appropriate apology as an essential part of the proper resolution of their problem – an appropriate apology that accepts responsibility and expresses regret or remorse 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.

When things go wrong, often the people harmed or otherwise 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 can work wonders, as the old English proverb points out: ‘A fault confessed is half redressed’. It will often avoid the escalation of a dispute and the significant cost, time and resources that can be involved. An apology can also start a process that can lead to the resolution of a conflict or dispute, particularly if there is an on-going issue that needs to be dealt with. A ‘full’ apology given at the right time can:

- restore dignity, face and reputation;
- provide vindication, a sense of justice or an acknowledgement that the recipient was right; and
- clarify that the recipient of the apology 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 the organisation or person accepts responsibility to appropriately address any ongoing care obligations, and/or to pay compensation for any damage or loss arising from the wrong.

Reducing legal and other costs and detrimental impact on staff

Particularly in the health sector, a number of studies have been reported in recent years showing that effective open disclosure and apology programs can have a significant impact on litigation costs, the average time taken to resolve claims and lawsuits, and on the numbers of claims and lawsuits lodged. A recent study of 10 Chicago area hospitals found that open disclosure programs had resulted in:

- an 80% reduction in time to close cases;
- a 70% reduction in litigation expenses; and
- a 20% reduction in defensive medicine.

Another benefit is the reduction in the associated stress experienced by staff who are the subject of such claims and lawsuits.

How should we approach disclosure and apology?

Options for responding when action or inaction has caused harm

When a mistake is made that causes harm, those affected want to know who was responsible and what they are going to do to set things right.

Option 1 – Cover-up

Taking active steps to hide involvement or responsibility is certainly unethical. In the public sector, it would constitute maladministration and, depending on the circumstances, may well be illegal. While the public can forgive honest mistakes where these are admitted and appropriate steps taken to address any harm caused, they do not forgive being misled. This applies equally to partial truths and to outright lies – in both cases the public's response is likely to reflect the proverb: 'a half the truth is often a whole lie'.

Option 2 – Deny and defend

This is a common response and, in the public sector, would again constitute maladministration. History is replete with cases where this approach has merely 'added fuel to the fire' and resulted in people who perceive they have been wronged waging long campaigns seeking 'justice'.

Option 3 – Head-in-sand

Ignoring the problem and hoping it will go away. This too would constitute maladministration in the public sector.

Option 4 – Yes, but...!

Arguing that responsibility was minimal and/or that the harm was minor. Partial acceptance of responsibility when a greater level of responsibility is clear is certainly not best practice, and depending on the circumstances, could constitute maladministration in the public sector.

Option 5 – Acceptance of responsibility

Recognition that a mistake was made and full acceptance of responsibility for any harm caused by the agency is what good management practice dictates, moral and ethical conduct requires, and the public expects.

We all have made mistakes and no doubt will make more in future - as they say, 'to err is human...'. Sir Liam Donaldson, Chief Medical Officer of the UK Department of Health took this saying further when he said: 'to err is human; to cover up is unforgivable; and to fail to learn is inexcusable'.

How people and their organisations respond to their mistakes says a lot about their character and culture. It can also have a long term and profound impact on whether and to what degree the mistake will damage their reputation and credibility, level of trust, on-going relationships, resources and more. As another old adage puts it, while 'pain is inevitable, suffering is optional'.¹³

The way we respond to problems requires us to make certain decisions about:

- *Leadership* – do we lead or follow?
- *Recognition* – are we prepared to recognise we made an error?
- *Responsibility* – are we prepared to accept responsibility for our error and the harm caused?
- *Ownership* – are we willing to take ownership (and control) of the problem and its resolution?

Leadership

Where a mistake has been made resulting in unintended harm to others, in a practical sense the choice that is open to the individual or organisation responsible is effectively between leading or following! If you lead, you retain at least some control over events and their repercussions. If you follow, you give away that control. Which choice is made will often come down to questions of leadership and courage. As Doug Wojcieszak, Founder of Sorry Works!, an American NGO dedicated to open disclosure and apology in the health sector, has said '[f]olks, we don't have a med-mal crisis in this country, we have a leadership crisis post-event. Medical people by and large fail to lead after something goes wrong'.¹⁴

Recognition of error

A preparedness to recognise that we or our organisations have made a mistake is a fundamental pre-requisite for an appropriate apology. A full apology is only appropriate where we have recognised (or reasonably suspect) and accepted that we have done wrong by somebody. If someone has suffered harm, but our action or inaction is not the cause, while an expression of sympathy may well be in order, an apology would not be appropriate.

Recognition of error is also important because we need to recognise a problem to do anything about it – to know what to fix. Two thousand years ago, the Roman philosopher Seneca said: ‘The first step towards amendment is the recognition of error’.¹⁵ For an apology to be effective where harm has been done, it needs to be given in the context of appropriate action being taken (or promised) to address the harm done and to prevent re-occurrence. ‘Actions speak louder than words’.¹⁶

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. In another Sorry Works Newsletter, the alternative approaches to dealing with problems were contrasted as being the difference between the 3 **As** and the 3 **Ds**:

- between on the one hand:
 - Accessibility to those harmed;
 - Addressing the problem; and
 - Apologising
- and on the other hand:
 - Distancing;
 - Denying; and
 - Defending.

The ‘deny and defend’ strategy so loved by lawyers often has the opposite result to what is intended. It leads directly to frustration, and as the Roman philosopher Seneca pointed out 2000 years ago, frustration leads to anger. Research has shown that anger is a primary trigger for litigation, particularly in relation to medical misadventure. This is a central theme of the Sorry Works! Message, illustrated by the following quote from a Sorry Works! Newsletter:

“A growing body of evidence in the peer-reviewed medical literature shows that patients and families file lawsuits against doctors because of anger, not greed. Patients and families become angry with their doctors (...) when communication, honesty, accountability and – literally – good customer service are lacking after a perceived error. In other words, patients and families are suing not so much because of errors, but because of the bad behaviour surrounding errors”.¹⁷

When a 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. Such responses are easily seen as wilful and deceptive. This can have serious detrimental effects on levels of trust and credibility. When your actions or the actions of your organisation have caused harm, or you reasonably suspect they have done so, if you don’t respond appropriately you run the risk of turning a victim into an enemy.

Responsibility

Ignoring a problem or failing to engage and communicate with those affected is almost as bad as the ‘deny and defend’ option. 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. Justice theory (sometimes referred to as organisational justice theory) refers to such an intervening event as a 'double deviation'. Proponents of justice theory argue that if an original problem is not dealt with properly, and the person affected is not treated with courtesy and respect, including being given adequate information in a timely manner, this can lead to a particularly negative response. 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. In the NSW Ombudsman's experience, a failure to properly respond to an issue and the person concerned is often the trigger for what can become quite unreasonable conduct by that person.

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.

Another often-quoted proverb is that: 'Attack is the best defence'. This is as true in the context of the response to a mistake as it is in war, subject to the same rider – that you have correctly identified your enemy! Where a mistake has been made causing harm, the correct enemy is the problem and the harm it caused, not the person harmed. It is far better to run towards our problems than away.

Ownership

Taking ownership, including accepting responsibility, engaging with those harmed and taking constructive steps to address the problem and the harm done, keeps you in the driver's seat. It also reduces the chances of unintended consequences and collateral damage and increases the chances of an ongoing workable relationship (or a restored relationship) with those harmed. Taking ownership of a problem allows us to keep some measure of control over, for example:

- how the problem is handled;
- options for a solution;
- how the problem is actually resolved;
- what happens next; and
- our reputation and credibility.

It is also far better to be seen to be doing the right thing voluntarily than reluctantly in response to pressure being brought to bear.

Staff need to be given authority to disclose and apologise

Particularly because admissions of error and responsibility (a fundamental element of a full apology) are associated in people's minds with risk, if we expect an organisation's staff to respond appropriately to mistakes, they need to be explicitly authorised to do so. This could either be in an organisation's policy or in individual delegations of authority. Precisely what authority is given to particular individuals would of course vary depending on such factors as

their level of authority, the nature of their duties, the nature and degree of their interaction with the public/customers, etc.

As noted in the NSW Ombudsman's publication *Apologies – A practical guide*,¹⁸ organisations should have an open disclosure and apology policy that addresses matters such as, among other things:

- the procedure to be followed by staff when they become aware that a mistake may have been made, or a complaint is made alleging that a mistake has occurred (eg who should be notified, what inquiries should be carried out before any disclosure is made and apology given);
- the events and circumstances in relation to which apologies can be given, and the events and circumstances in which the agency believes apologies should be given;
- the information to be disclosed at the outset when things go wrong or when a complaint is made, and to whom it should be disclosed;
- the content of apologies, including the types of admissions that can be made and the associated information that should be conveyed (eg details of the event or circumstance concerned; the cause of the problem, if known; the known or anticipated effect on the person(s) to whom the apology is to be given; the actions to be taken to rectify the problem and/or prevent its reoccurrence; any systemic issues highlighted by the problem);
- responsibility for the giving of apologies and any necessary delegations of authority to give apologies, offer redress;
- responsibility for coordinating the apologies process within the organisation; and
- records that need to be made and retained.¹⁹

Practical training should be provided to staff at all levels on the importance of apologies, and when and how to make them.

Staff need to accept responsibility to disclose and apologise

It is one thing to be given authority to apologies in appropriate circumstances. It is of course another thing entirely for people to accept responsibility to apologise. It is important to recognise that most people do not like to admit they are wrong – but this is a necessary precondition for a sincere apology. People may find it difficult to admit fault and apologise because of a range of internal or external reasons.

It is important that organisations send a clear message to their staff that a failure to acknowledge that something went wrong is dishonest, or at least lacking in full honesty, is often counter-productive, and can leave the person responsible 'living a lie' or experiencing feelings of inner turmoil, shame or guilt. On the other hand, staff should also be made aware that if people responsible for a problem acknowledge it and give a full apology, this may achieve a number of positive outcomes. For example, a full apology might lead to forgiveness (which helps the giver of the apology deal with any shame or guilt), reduce the possibility of retaliation or embarrassment, lead to a greater willingness to resolve a dispute, improve or establish the credibility of the giver, increase trust between the giver and the receiver, and lay the groundwork for a constructive relationship or the reconciliation of an existing relationship.

What should an apology include?

The essential elements of a 'full' apology

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.

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. What is required for an apology to be effective comes down in the end to what is important to the person harmed.

Other than in the more simple situations, in principle, to maximise effectiveness an apology should incorporate the elements set out in Annexure B. This Annexure highlights the importance of clearly identifying the needs of the person harmed, and of taking steps to appropriately address those needs. In other words, where a problem has caused harm a full apology:

- may need to be the culmination of a process of communication, investigation and negotiation (including frank discussions with the person concerned to explore and attempt to appropriately address their questions and concerns); and
- may need to consist of a package of actions, including admissions of responsibility, explanations of cause, appropriate actions to put things right (where possible) and to address identified causes, and expressions of sorrow and remorse.

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 to address the legitimate needs of the person harmed, their exclusion will decrease the chances of success. Annexure C provides examples of things to be avoided in an apology taken from the NSW Ombudsman's *Apologies – A practical guide* (2nd edition).

When considering how to offer an apology, and what an apology should consist of, it is very important to bear in mind that you only get one chance to properly apologise. 'You never get a second chance to make a good first impression'.²⁰

Where to from here for statutory protection for full apologies?

It is difficult to point to measurable benefits that flow from giving statutory protection for full apologies. Certainly, there is anecdotal evidence of a public sector showing a greater preparedness to apologise, however one crucial factor that reduces the impact of the legislation is the fact that public sector and community awareness of the statutory protection is limited.

Another way to look at the impact of statutory protections for apologies is to consider whether there has been a downside. Statutory protection for 'full' apologies has been around since 2002 in NSW and the ACT and has spread across many of the Canadian Provinces since 2006. This has not resulted in the end of civilisation as we know it in those jurisdictions. We have found no such evidence – not even a suggestion that the statutory protection for apologies has had any negative results.

What issues need to be addressed?

Exclusions

Both the NSW and Queensland apology protection provisions contain a number of exclusions. For example:

- Why do we need to exclude apologies for the contraction of a dust disease or for personal injury allegedly caused by smoking or the use of tobacco products? Was there any significant likelihood that this might happen to any appreciable extent? If it did, what would be the downside?
- Why deny the protection to people who wish to apologise for an intentional violent act? It doesn't mean they walk away scot free, but it does mean that the victim might receive something more personally meaningful than a criminal conviction and possibly incarceration of the perpetrator.
- Why in NSW do we deny the protection to people involved in a car crash? And don't think that any such admission of responsibility would void their insurance, because if the exclusion wasn't there the insurer wouldn't be able to bring the apology into evidence if taken to count for breach of the insurance contract. This problem would be completely solved if we adopted the Canadian model provision that specifically addresses insurance issues.

A further problem caused by the use of exclusions is that it creates an unnecessary complication that does not aid comprehension or comfort. The whole idea of such protections is to create a sufficient level of comfort to remove the fear of the legal consequences of a proper apology. One good example of this problem relates to communications with patients and their families following a medical misadventure. Much work has been done in Australia to develop and implement open disclosure policies in the public health sector. The National Open Disclosure Standard²¹ and individual State Open Disclosure Policies advocate not only the open disclosure of incidents, but also the expression of regret and apology. However, it appears that the provisions outlining the content of the apologies that health professionals are authorised to make have been drafted narrowly, with the potential legal liability issue (and possibly the insurance issue) clearly in mind.²²

Scope

The scope of the statutory protections in the NSW, Queensland and ACT provisions (as with the provisions protecting partial apologies in the other Australian jurisdictions) is limited to civil proceedings. The NSW and Queensland provisions go further and specifically exclude intentional acts done with intent to cause personal injury, including sexual assault or unlawful sexual misconduct.

As the protection of apologies in civil proceedings in various jurisdictions (extending back over a decade in some cases) has not resulted in any identifiable downside, maybe it is time to consider expanding the scope of the statutory protection to include criminal proceedings. This might initially be limited to criminal proceedings in certain circumstances, for example in relation to apologies given in the context of restorative justice processes such as victim-offender mediation, community or family group conferencing, and sentencing circles.

Uniformity

Another issue to consider is that the differences between the statutory protections for apologies across the Australian jurisdictions create confusion in relation to the legal position for businesses that operate in more than one Australian jurisdiction.

Conclusions

First, open disclosure about mistakes, the taking of responsibility for the cause and resulting harm and the giving of appropriate apologies is what good management practice dictates, ethical conduct requires and the public expects. Taking ownership of a problem and responsibility for its resolution is almost universally perceived to be a sign of strength and good character in an individual and an ethical culture in an organisation.

Secondly, only in NSW, the ACT and Queensland is there a statutory protection for full apologies (other than in certain circumstances in NSW²³ and Queensland, and limited circumstances in the ACT).

Finally, there should be a uniform approach across Australia to the legal protection for apologies. This might best be achieved by the Standing Council on Law and Justice adopting a Model Australian Apology Act (preferably along the lines of the Canadian Uniform Apology Act) that could be adopted by all Australian jurisdictions.²⁴

Annexure A

*Statutory Protections for Apologies **

Full apology – general application (12):

Australia (3):

ACT (2003)

NSW (2002)

Qld (2010)

Full apology – defamation actions (8):

Australia (8):

All Australian states and major territories (2005)

Full apology – health care providers (20):

USA (18):

Arizona (2005)

Colorado (2003)

Connecticut (2005)

Georgia (2005)

Idaho (2006)

Illinois [time limit of 72 hours] (2005)

Louisiana (2005)

Montana (2005)

Nebraska (2009)

North Carolina (2004)

Partial apology – general application (16):

Australia (5):

Northern Territory (2003)

South Australia (2002)

Tasmania (2002)

Victoria (2002)

Western Australia (2003)

Partial apology – health care providers only (7):

USA (7):

Delaware (2006)

District of Columbia (2007)

Maine (2005)

Maryland (2004)

Minnesota (2010)

New Hampshire (2011)

Virginia (2005)

Canada (9):

Alberta (2008)

British Columbia (2006)

Manitoba (2007)

Nanavut (2010)

Newfoundland and Labrador (2009)

Nova Scotia (2008)

Ontario (2009)

Saskatchewan (2007)

Yukon [a lapsed Bill]

North Dakota (2007)

Ohio (2004)

Oklahoma (2004)
Oregon (2003)
South Carolina (2006)
South Dakota (2005)
Utah (2011)
Vermont [oral only & time limit of 30 days] (2005)
West Virginia (2005)
Wyoming (2007)

USA (11):

California (2003)
Florida (2001)
Hawaii (2007)
Indiana (2006)
Iowa (2007)
Massachusetts (1986)
Michigan (2011)
Missouri (2005)
Tennessee (2003)
Texas (1999)
Washington (2002)

*** Sources include:** NSW Ombudsman research and the AMA Advocacy Resource Centre: *'Apology Inadmissibility Laws: Summary of State Legislation'*, 2012.

Annexure B

The Essential Elements of a 'Full' Apology

- 1) **Recognition** - This includes:
 - a description of the wrong – an honest and comprehensive description of the relevant problem, act or omission to which the apology applies;
 - recognition of the wrong – an explicit recognition of the action or inaction that resulted in the problem; and
 - an acknowledgement of the harm – an acknowledgement that the affected person has suffered harm, e.g. embarrassment, hurt, pain, damage or loss.
- 2) **Responsibility** – An acceptance or acknowledgement of responsibility for the wrong and harm caused.
- 3) **Reasons** – An explanation of the cause of the problem, or at least a promise to investigate the cause. An all too common failing in apologies is an attempt to justify the wrong by giving excuses. It is of course quite acceptable to provide an explanation of the reasons why the problem occurred for the purpose of outlining what has or will be done to ensure the problem does not re-occur. However, most people can distinguish a factual statement as to cause from an excuse designed to avoid or lessen blame. If the person (or organization) is in fact blameless, then the circumstances may warrant an explanation and an expression of sympathy, but not an apology.²⁵
- 4) **Regret**. This is the core element of the apology, being a statement expressing sincere sympathy, sorrow, remorse and/or contrition. To be effective, an apology must meet the needs of the person(s) to whom it is given. In many cases (although not all) an essential ingredient of an effective apology will be sincerity, and whether or not it is present will be closely analysed by the recipient of the apology. Indicators of sincerity are likely to include:
 - 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 givers reputation or relationship with that 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; and/or
 - 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.

Circumstances where sincerity may not be essential for an apology to be effective would include where the primary harm done has been damage to a person's reputation. In such cases it may well be that the needs of the person harmed are to receive a public admission of fault plus an expression of regret. As noted in *Apologies - A practical guide*: '[i]t comes down in the end to what is important to the person harmed, for example one or 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); and/or
- the *feelings* that motivated the apology...' [at p.19].

- 5) **Responsiveness** or redress - this would include:

- a statement of the action taken or proposed to put things right, which might involve money, actions or promises to fix (whether or not raised by the person harmed, any reasonable ongoing care and compensation needs must be considered and appropriately addressed);
 - a promise not to repeat – a promise or undertaking that the action or inaction will not be repeated; and
 - timeliness – no undue delay.
- 6) *Release – A request for forgiveness or a release from blame. This is an optional element in an apology, but it can be important. Forgiveness can have immense power to heal emotional wounds and sooth anger allowing people to move on with their lives. Forgiveness should not be confused with forgetting – it is about understanding and acceptance and no longer feeling resentment. Forgiveness means that the problem or hurt will be remembered without bitterness – that it will not be held against the giver, will not be brought up again, that the person will ‘let go’ and move on.*

Annexure C

Things to be Avoided in Apologies

Apologies - A practical guide (2nd Edition) gives a number of practical examples of things to be avoided in apologies:

Subject matter

Inaccurate apologies — apologies that incorrectly identify the issues of primary concern to the recipient.

Misguided apologies — apologies for action/inaction or harm for which there was in fact no obvious responsibility.

Generalized apologies — apologies that fail to identify the relevant problem, fault or mistake, eg 'I am sorry for what occurred,' or the classic 'mistakes were made.'

Content

Avoidance apologies:

- apologies that try to excuse or avoid responsibility, eg 'I am sorry for what I said, but ...';
- apologies that focus on the action or reaction of the recipient rather than the conduct of the person giving the apology, eg 'I am sorry you took offence at what I said'; and
- apologies that question whether there was a problem, eg 'A comment was made that may have caused offence'.

Conditional apologies:

- apologies that question whether the recipient was harmed, eg 'If you were offended by what I said, then I am sorry';
- apologies that are untargeted and conditional, eg 'If somebody was offended by what I said, then I am sorry'; and
- apologies that question whether any harm was done, eg 'If what I said was offensive, then I am sorry'.

Partial apologies:

- apologies that fail to include an admission of responsibility for the problem and the harm caused, eg mere expressions of regret, sympathy, sorrow, benevolence; and
- apologies that use the passive voice without taking 'ownership' of the problem, eg 'An offensive comment was made.'

Delivery

- Impersonal apologies — eg apologies in form letters;
- Untargeted apologies — written apologies that do not identify the recipient, eg 'To whom it may concern ...';
- Delegated apologies — apologies by a person who does not have direct or reasonably perceived responsibility for what occurred, eg 'On behalf of ... I would like to apologize for the offensive comments he made ...';
- Misdirected apologies — apologies made to the wrong person, or apologies made to people indirectly affected but not to the person directly affected;

- Selective apologies — apologies made to only some of the people who were affected;
- Serial apologies — the same person apologizing too often for different things [this can impact on the perceived sincerity of the person making the apologies]; and
- Repeat apologies — a series of apologies for the same re-occurring problem [each has less credibility than the last]. [see pages 12-13]

Endnotes

- 1 That introduced ss 67-69 (Part 10 Apologies) into the *Civil Liability Act 2002* (NSW)
- 2 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*. [s.3B]
- 3 Per John Kleefeld, 'Thinking Like a Human: British Columbia's Apology Act' [2007] *UBC Law Review*, 40, 798-799.
- 4 s 5C, *Civil Liability Act 2002*.
- 5 Hansard, NSW Legislative Assembly, 23/10/02.
- 6 See: *Watson v Meyer* [2012 NSWDC 36; *AV8 Air Charter Pty Ltd v Sydney Helicopters Pty Ltd* [1012] NSWDC 220; *Kingi-Rihari v Millfair Pty Ltd/as the Arthouse Hotel* [2012] NSWSC 1592; *Wagstaff v Haslam* (2007) 69 NSWLR 1; *Hutchison v Fitzpatrick* [2009] ACTSC 43.
- 7 *Dovuro Pty Ltd v Wilkins* [2003] HCA 51 (11 September 2003), at para 25 (Gleeson CJ)
- 8 *Dovuro Pty Ltd v Wilkins* [2003] HCA 51 (11 September 2003), at para 173 (Hayne & Callinan JJ).
- 9 Jennifer K Robbennolt 'Attorneys, Apologies and Settlement Negotiation', Social Science Research Network: <http://ssrn.com/abstract=1275419>.
- 10 Jennifer K Robbennolt 'Apologies and Legal Settlement: an Empirical Examination', *Michigan Law Review*, Vol 102, No 460, 2003. Available at SSRN <http://ssrn.com/abstract=708361> (at pp 484 & 486).
- 11 Ombudsman, Province of British Columbia, *The Power of an Apology: Removing the Legal Barriers*, Special Report No 27 to the Legislative Assembly of British Columbia, p 13.
- 12 Comic strip writer Lynn Johnston.
- 13 A quote usually said to be a Buddhist proverb.
- 14 Sorry Works! Newsletter, March 16, 2011.
- 15 Roman dramatist, philosopher & politician, 5BC – 65 AD.
- 16 Mark Twain (the full quote is 'Action speaks louder than words but not nearly as often').
- 17 Sorry Works! Newsletter, June 29, 2009.
- 18 *Apologies – a Practical Guide*, 2nd Edition, NSW Ombudsman, March 2009: <http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/apologies-2nd-ed>.
- 19 At page 29.
- 20 Attributed to Will Rogers.
- 21 *Open Disclosure Standard*, Australian Commission on Safety and Quality in Health Care, 2008 (first published in 2003 by the former Australian Council for Safety and Quality in Health Care).
- 22 The indications are that NSW in particular is moving towards broadening the scope of the apologies health professionals are authorised, and encouraged, to make under the *Open Disclosure Policy* in the light of the

broad statutory protection available in NSW (as well as the amendments to the Treasury Managed Funds' Contact of Coverage to make clear that an admission of fault made in accordance with the apology provisions of the Civil Liability Act would not void coverage – see cl.9.3 and *Appendix 4 - Apologies*).

- 23 See endnote 1 above.
- 24 As part of such a project, consideration should be given to expanding the scope of the statutory protection to include criminal proceedings, at least in certain circumstances.
- 25 *The Power of Sorry*, Consumer Directions, December 2012.