

# 1 Options for redress

<b>Introduction</b> .....	237
<b>1 The meaning of relevant terms</b> .....	238
1.1.1 Remedy .....	238
1.1.2 Redress .....	238
1.1.3 Detriment .....	238
1.1.4 Maladministration .....	238
<b>2 Options for redress</b> .....	240
2.2.1 Introduction .....	240
2.2.2 Communication .....	240
2.2.3 Rectification .....	244
2.2.4 Mitigation .....	246
2.2.5 Satisfaction .....	248
2.2.6 Compensation .....	253
<b>3 Principles for redress</b> .....	260
3.3.1 General principle – restore to original position .....	260
3.3.2 Redress should be fair and reasonable .....	261
3.3.3 Redress should provide a comprehensive resolution of the issue .....	262
3.3.4 Redress should be responsive and procedurally sound .....	262
3.3.5 Timely redress .....	264
3.3.6 Limitations on redress .....	264
3.3.7 Relevance of external actions or circumstances .....	265
3.3.8 Standard of proof for maladministration .....	266
3.3.9 Unacceptable responses to detriment arising from maladministration .....	266
<b>4 Developing a redress policy</b> .....	268
4.4.1 Introduction .....	268
4.4.2 Documentation .....	268
4.4.3 Delegations .....	268
4.4.4 Codification .....	269
4.4.5 Training .....	269
4.4.6 Contracting out .....	269
4.4.7 Authorisation .....	269
4.4.8 Legal advice .....	270
<b>Annexure A: The meaning of ‘maladministration’</b> .....	271
<b>Annexure B: Public Sector Agencies Fact Sheet</b> .....	276
<b>Annexure C: Contracting out</b> .....	278



# Introduction

---

This chapter is intended to assist public sector agencies and their staff to deal with people who have been detrimentally affected by maladministration and to ensure a consistent approach to redress for detriment arising from maladministration throughout the public sector.

Agencies have an obligation to act fairly and reasonably towards members of the public who have suffered detriment arising out of maladministration for which the agency is responsible. If a person suffers detriment arising out of maladministration, agencies need to consider appropriate redress.

In some cases the person suffering detriment will have a legal entitlement to redress and in this situation, where possible, the agency should provide appropriate redress that obviates the need for that person to pursue his or her legal remedies. In many other cases there may be no legal entitlement to redress. In these cases fairness and reason may still dictate that the agency provide redress.

Redress is the range of appropriate responses that can and should be provided by agencies to individuals or groups of people that have been detrimentally affected by maladministration with the aim of achieving a fair and reasonable resolution for all. A comprehensive response requires that the full range of redress options be considered. For convenience this chapter groups options for redress into the following categories:

- communication
- rectification
- mitigation
- satisfaction
- compensation.

# 1 The meaning of relevant terms

---

## 1.1.1 Remedy

---

Remedy is used in this chapter to refer to the means used to establish that a wrong has occurred. This is done in order to obtain redress eg through complaints to an agency or the Ombudsman, or through appeals to the courts or tribunals.

A complaint handling system within an agency is a specific form of remedy. Model complaint handling processes, appeals and procedures are described in detail in Chapter 1, *Effective complaint handling*.

## 1.1.2 Redress

---

Redress is used here to refer to the range of appropriate responses that can be provided by agencies to individuals or groups of people that have been detrimentally affected by maladministration, or who are likely to suffer detriment at some time in the future if previous or ongoing maladministration is not rectified. The aim is to reach a fair and reasonable resolution.

## 1.1.3 Detriment

---

The possibilities for detriment that can arise out of maladministration are broad, both in nature and scope. Detriment can be quantifiable or non-quantifiable (eg physical or emotional detriment), it can consist of costs that would not otherwise have been incurred, or loss, damage or injury that would not otherwise have been suffered.

## 1.1.4 Maladministration

---

Maladministration is used here as shorthand to refer to the types of conduct outlined in s.26(1) of the *Ombudsman Act 1974*.

26 (1) *conduct ... of any one or more of the following kinds:*

- (a) *contrary to law,*
- (b) *unreasonable, unjust, oppressive or improperly discriminatory,*
- (c) *in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory,*
- (d) *based wholly or partly on improper motives, irrelevant grounds, or irrelevant consideration,*
- (e) *based wholly or partly on a mistake of law or fact,*
- (f) *conduct on which reasons should be given but are not given,*
- (g) *otherwise wrong.*

A useful working definition of the terms used in the *Ombudsman Act* is set out in Annexure 5A. It is recommended that agencies adopt this scheme to define maladministration when handling complaints and considering redress.

The fact that maladministration has been established does not by itself mean that any complainant must therefore have suffered detriment or injustice as a consequence. Conversely, even where it is established that the complainant has suffered detriment, this does not necessarily mean that the detriment arose out of the maladministration. For example, the detriment may be due to the actions of the complainant or a third party. It is necessary to establish, on the balance of probabilities, that the detriment occurred as a consequence of the maladministration, whether directly or indirectly.

## 2 Options for redress

---

### 2.2.1 Introduction

---

Redress refers to the range of appropriate responses that can be provided by agencies to individuals or groups of people that have been, or are likely to become, detrimentally affected by maladministration, with the aim of reaching a fair and reasonable resolution.

Where maladministration has led directly to detriment 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 detriment is the indirect result of maladministration, other options for redress should be considered.

A comprehensive response requires that the full range of redress options be considered. The range of options considered in these guidelines have been grouped into the following categories:

- communication
- rectification
- mitigation
- satisfaction, and
- compensation.

These are not firm or fixed categories and various options for redress will fit into more than one category. All options should be considered, but not all may be required. Conversely, consideration of one should not preclude consideration of others. For example, decisions about compensation may be the most complex, but other options — particularly a prompt apology — may be as (or more) important to the person who has suffered detriment. Whether other options are relevant or appropriate would be dependant on the circumstances and seriousness of the maladministration and the nature and degree of detriment. Decision-makers are encouraged to use the full range of responses, as appropriate.

The following sections list definitions and specific options in each category, with a discussion of some issues relevant to each. All the examples are from previous annual reports of the NSW Ombudsman.

### 2.2.2 Communication

---

#### Definition

The first option for redress is to communicate with the person who has suffered detriment as a result of the maladministration. Communication involves a two-way process of listening, discussing, explaining and negotiating. Depending on the particular circumstances, regular communication will have already been taking place throughout the complaints process from its initial receipt through to its final determination. Communication should not cease at this point. It continues to play a vital role at the redress stage.

Communication should be engaged in without delay. Prompt communication may reduce the need for the adoption of other options and potentially reduce any costs on the agency.

**Practical tip****Options for communicating with people who have suffered detriment include:**

- providing explanations
- giving reasons for decisions orally or in writing
- discussing outcomes with the complainant(s) that they believe are necessary to provide or ensure appropriate redress
- establishing the degree of detriment (where not already established as part of the investigation)
- providing sufficient information to complainants about the facts of their case and their legal options
- giving apologies
- reaching agreements acceptable to the complainant through mediation between the parties, conciliation or other informal approaches to resolution.

**Issues*****Providing explanations***

Often all that a complainant requires is an adequate explanation of why the action complained about (and which caused the detriment) was taken, or how the maladministration occurred. It may also be helpful to explain what remedial steps the agency is taking to rectify the situation and/or prevent a repetition. Where the problem arose out of a misconception on the part of the complainant, it may be possible to resolve the problem by providing information about the decision-making process involved, or how the problem arose. Details of the relevant policies, procedures and/or legislation can also be provided, with an explanation of how these applied to the situation in question.

***Giving reasons***

The giving of reasons is a requirement of good administrative practice and its absence often represents maladministration. It is also a requirement under the *Administrative Decisions Tribunal Act 1997*, where reasons are requested in relation to a reviewable decision. The failure to give reasons is one of the grounds on which the Ombudsman can make an adverse finding.

***Discussing outcomes***

Discussion of outcomes should have taken place earlier in the complaints handling process. However, at earlier points of the process the emphasis is likely to have been different. Discussing outcomes may have been an effective way of getting to the heart of the complaint or it may have been an important way of managing the complainant's expectations.

Discussion about outcomes at the redress stage serves a very specific function. Asking the complainant about his or her views as to what would be a fair and reasonable outcome may be particularly useful if it is not possible to simply rectify the problem that has or is causing the detriment. However, an agency must be careful to solicit this information in a manner which cannot be taken to imply agreement or subsequent acceptance that the complainant's view will prevail.

In a large number of cases, by discussing the outcome, the agency will discover that the complainant actually requires less of the agency than it was otherwise willing to do. Sometimes, complainants can be quite altruistic. They realise something has gone wrong, and perhaps the clock cannot be put back so far as they are concerned, but they do not want to see the mistake or fault recur.

***Establishing the degree of detriment***

If the degree of detriment suffered by the complainant has not already been established during the earlier phases of the complaint handling process, discussions are necessary to clarify this.

***Providing sufficient knowledge***

In relation to the agency's findings on the specific complaint, complainants should be told in clear terms what can and cannot be done. They should be given a clear understanding of the agency's position and told about alternative remedies that are available to them, especially if it is not possible or practicable for the agency to resolve their complaint. This may involve telling them about a right of appeal or review, or a right to make a complaint to an external watchdog body, such as the Ombudsman. This should not involve the provision of legal advice.

***Giving apologies***

Many complainants demand no more of an agency or its representatives than to be listened to, understood, respected, and provided with an explanation and apology.

If an apology is warranted, it should be given immediately, and in a sincere manner. Even if an apology is not warranted, the act of apologising can be a potent way to appease an aggrieved person. In such cases, an apology can be given that does not accept blame for the agency eg 'I'm sorry that this situation has made you dissatisfied with us'. Regardless of who is in the wrong, a sincere apology for mistakes or misunderstandings, provided at the outset, is likely to work wonders. The longer the delay in providing an apology the less effective it is likely to be in appeasing the complainant.

See 5.2.5 for advice as to practices for apologies that should not incur legal liability.

***Reaching agreements***

A conciliated or mediated agreement is the most cost-effective complaint handling outcome. Complaints about an agency's staff, especially alleging rudeness or other improper conduct, often are conducive to semi-formal conciliations. This describes a situation where a more senior officer has a face-to-face meeting with the complainant(s), hears them out and offers a formal apology on the part of the agency and undertakes to take corrective action. The aim is principally to prevent the complaint from escalating into a larger and more time consuming dispute and ensure that the parties to the dispute do not adopt concrete positions from which they are unlikely to retreat.

In some cases conciliation or mediation will be entirely inappropriate. They should not be used, generally speaking, where the matter involves a systemic problem, a significant public interest question, serious abuse of power or criminal conduct (see Chapter 4, *Public Sector Mediation*).



## **Communication examples**

### ***Public sector agencies***

- A failure in Sydney Water's complaints management policy left a number of complainants without any written response to their complaints. When this was brought to its attention, Sydney Water agreed a response was needed, along with an apology for the delay. (1997/8:86)
- Energy Australia failed to provide any reasons for denying liability for an altered voltage supply. As a result of our intervention, EnergyAustralia sought our advice about how to prevent such complaints in future. It also wrote to the complainant providing him with a full explanation of why it did not consider itself liable in this instance. (1997/8:86)
- A person in a long-standing dispute with the Department of Housing was helped through mediation, where rent calculations were satisfactorily explained to her. (1995/6:70)
- The Legal Aid Commission, after a number of approaches by the Ombudsman, agreed to provide full reasons for a decision and took subsequent action to implement such action as standard policy. (1992/3:102)

### ***Local government***

- In the recommendations arising out of a major investigation into a council's development assessment processes, the Ombudsman proposed that council develop a formal and comprehensive mediation program to deal with disputes between applicants and objectors over development applications. (1997/8:101)
- Most councils have adopted guidelines produced by the Ombudsman for the processing of insurance claims against them. These guidelines emphasise the importance of councils giving reasons when liability is declined. (1995/6:100)

### ***FOI***

- A complaint was made to the Ombudsman about a council's refusal to grant access to a geotechnical report under FOI, on the basis that it was privileged. Following the intervention of the Ombudsman, the complaint was resolved by the council agreeing to release a copy of the report and also to arrange for the mayor and other senior council staff to meet with residents about their related concerns. (1996/7:130)

### ***NSW Police***

- Police youth liaison officers have been introduced in all local commands across NSW to help improve police relations with young people. They have been proving pivotal in resolving young people's grievances about police or police procedures at an early stage. So far the feedback indicates that some youth liaison officers are instrumental in resolving more complex concerns, particularly problems which require the cooperation of other agencies such as local councils or support services. (1997/98:33)
- Following a controversial police operation, which involved young people being stopped and photographed at a train station, consultation was undertaken with the peak youth agency. This resulted in the production of guidelines to be followed in the event of similar future operations. The guidelines emphasise the need for the police to communicate with groups likely to be affected by such an operation. (1997/8:34)
- NSW Police are able to conciliate large numbers of complaints every year, often by the provision of apologies. Surveys conducted by the Ombudsman demonstrate a high satisfaction rate among members of the public who have participated in conciliations.

### 2.2.3 Rectification

---

#### Definition

The second option for redress for people suffering or likely to suffer detriment is for the agency to rectify the maladministration – to act to correct the original action or inaction. As the Oxford Dictionary defines it, to rectify is to *'put right, correct, amend; remove any errors in; ... restore to ... a satisfactory or normal condition'*.

When detriment has resulted or is anticipated to result from an agency's maladministration, rectification is generally the agency's foremost obligation. The agency can provide whatever should have been provided or stop whatever needs to be stopped, such as a wrong procedure. Generally speaking, rectification entails dealing initially with the individual case, and then with any problems of a systemic nature which the case has highlighted.

Agencies must act swiftly to rectify the maladministration. Any delay may mean that to simply rectify the problem is not a sufficient form of redress.

#### ***Practical tip***

##### **Options for rectification**

- Reconsidering conduct and taking any necessary action, stopping action that should not have been started, cancelling an intended action, or otherwise changing the conduct or its consequences.
- Changing the law or practice regulating the conduct.
- Ensuring compliance with law, procedure, practice or policy.
- Ensuring compliance with obligations, whether legal or otherwise.
- Ensuring continued compliance with procedural, policy or legal obligations so that the complainant is not affected by further maladministration.
- Giving reasons for the original conduct.
- Correcting records that are incomplete, incorrect, out of date or misleading.
- Protecting complainants and whistleblowers from intimidation, retaliation or reprisals.

#### **Issues**

##### ***Reconsidering conduct***

Conduct can be reconsidered in the light of any:

- new information
- re-interpretation of certain facts or the law
- assessment of any relevant matters which were unintentionally, incorrectly or improperly omitted from consideration, or ignored at the time of the original assessment, and/or
- full and proper assessment of all relevant matters.

Reconsidering conduct may lead to:

- affirmation or confirmation of the original conduct
- taking action that should have been taken, but was not
- stopping action that should not have been started
- cancelling intended action that should not be taken, or
- otherwise changing the conduct or its consequences.

### ***Changing the law or practice***

A complaint may disclose the need for the introduction of a policy or guidelines, or changes to an existing policy or guidelines, to assist staff in undertaking particular aspects of their role. In such cases it may not be possible to rectify the maladministration for that individual complainant, but changes to the law or practice will prevent similar instances of maladministration occurring in the future.

### ***Giving reasons***

In relation to a failure to give reasons, particularly where the absence of reasons may be the only form of maladministration involved, if reasons are supplied promptly then this may be a sufficient form of redress (see also 5.2.2).

### ***Correcting records***

The correction of records that are incomplete, incorrect, out-of-date or misleading must be done in accordance with appropriate legislative authority, such as the provisions of the *Freedom of Information Act 1989* and the requirements of the *State Records Act 1998*.

### ***Protecting complainants***

When complaints are made by public officials that meet the requirements of the *Protected Disclosures Act 1994*, and in particular where such complaints are made under an internal reporting policy adopted by an agency for the purposes of that Act, the agency and its management have an obligation to protect the whistleblower from detrimental action. This could include intimidation, retaliation or reprisals. Agencies should assume the same responsibility in relation to staff who make disclosures in good faith that do not meet all the technical requirements of that Act as to members of the public who make complaints about the conduct of the agency or its staff.

### **Rectification examples**

#### ***Public sector agencies***

- An investigation into sales of blocks of land by Landcom alerted the agency to the fact that its priority numbering system (PNS) guidelines were often not being followed and were in any case flawed and in need of review. The subsequent review took account of the Ombudsman's recommendations for greater fairness and transparency in the PNS guidelines, and a new set were brought into force. (1997/8:74)
- The Department of Housing reinstated an incorrectly cancelled rental rebate from the date of cancellation, and reviewed its procedures. (1995/96:76)
- In a case involving the Board of Studies wrongly withholding a student his marks, recommendations were made for the results to be provided 'forthwith'. (1993/4:78)

**Local government**

- Examples of rectification by local government include: enforcement of conditions on development consents; agreement to process a sub-division application after previously refusing on legal grounds; adding omitted conditions to a development consent; and providing additional information that was at first not considered necessary (eg that a site may be subject to flooding). Rectification can also involve stopping an action, such as withdrawing a demolition order not allowable by law.

**NSW Police**

- NSW Police developed a range of strategies to overcome a number of limitations in the use of the Computerised Incident Dispatch System, highlighted through complaints. (1997/8:48)
- Rectification in police matters will often involve legal process eg, dropping charges. Other options include stopping inappropriate access to police records and resolving inconsistencies between policies.

**FOI**

- In FOI matters rectification most often involves release of documents to which access has previously been refused.

**Corrective Services**

- In a case where prison authorities were wrongly monitoring telephone calls, they stopped the action and afforded the inmates privacy. (1993/4: 111)
- In another case, privileges wrongly withdrawn from prisoners were reinstated. (1992/3:136)

## **2.2.4 Mitigation**

---

**Definition**

The third option for redress is to mitigate the adverse consequences of maladministration ie to moderate the severity of the detriment suffered.

Mitigation also takes the form of practical action to alleviate problems caused by, arising, or likely to arise out of maladministration. Mitigation goes beyond simply meeting an obligation, or merely rectifying or correcting the actual maladministration. It is more the 'constructive' performance of the agency's duty and involves attempting to deal with the consequences arising out of the maladministration.

**Issues**

***Altering records***

Any alteration of records by:

- the addition of information
- removal or destruction of inappropriate or inaccurate records or
- the correction of incomplete, incorrect, out of date or misleading information

should be done in accordance with appropriate legislative authority. The *Freedom of Information Act 1989*, *Privacy and Personal Information Protection Act 1998* and/or the *State Records Act 1998* apply.

**Practical tip****Options for mitigating the adverse consequences arising out of maladministration include:**

- ceasing action that has, is, or will cause further unnecessary, unreasonable or inappropriate detriment
- taking action to prevent unnecessary, unreasonable or inappropriate detriment
- adding information to public records to clarify or explain relevant facts or circumstances
- removing or destroying records that are inappropriate or inaccurate
- correcting records that are incomplete, incorrect, out of date or misleading
- repairing physical damage to property or the environment
- replacing damaged or lost property
- refunding fees or charges
- waiving fees, charges or debts
- returning property inappropriately, improperly or illegally seized or held
- providing assistance and support
- ensuring privacy of the person who has suffered maladministration
- protecting complainants and whistleblowers from intimidation, retaliation or reprisals
- taking other action that is reasonable in the circumstances.

**Agency powers**

Agencies may need to examine their legal powers to carry out activities for the purpose of mitigation. For example, certain agencies may be barred by law from making certain reparations, even though these are appropriate. Where any such bar exists, agencies should give consideration to seeking the necessary powers to waive debts, or the like, in appropriate circumstances.

**Authorisation and policy**

Care needs to be taken to avoid inconsistent approaches to mitigation, conflicts of interests, or the potential for corruption. This can be achieved by developing and adopting a properly articulated policy. The policy must set out:

- relevant criteria for making decisions to mitigate the adverse consequences of maladministration and the form of mitigation
- who has authority to make decisions regarding mitigation, and
- reporting and auditing requirements.

**Mitigation examples****Public sector agencies**

- A student who had inadvertently purchased the wrong form of concessional rail ticket was issued with an infringement notice. In light of the facts of the case (in particular, that there was no difference in price between the two concessional fares) the SRA waived the fine. (1997/8:85)
- An agency conceded that a number of statements it made in a letter to an engineering firm were either incorrect or potentially misleading, and wrote back to the firm correcting the relevant statements. (1997/8:76)

- The RTA responded to a complaint of hazard and noise created by some road works by resurfacing the road and later undertaking further structural changes. (1995/6:73)

***Local government***

- In a case of an illegal charge being levied, refunds were made not only to the complainant but to others also unfairly affected. (1995/6:109)
- Illegally underpaid amounts for land acquisition of parts of some properties were paid to those still on their holdings. (1995/6:130)

***FOI***

- After external reviews, local councils and government agencies have reversed their original decisions and amended documents found by the Ombudsman to contain information which is incomplete, incorrect, out-of-date or misleading.

***NSW Police***

- When a driver was given a traffic infringement notice in circumstances where a caution was called for, the fine was refunded, the constable was counselled and, importantly for the man, his driving record was cleared. (1994/5:48)

***Corrective Services***

- After an initial refusal, an inmate was eventually refunded money he had paid to attend a Christmas family day picnic, but which he was unable to attend when he was unexpectedly transferred to another correctional centre. (1997/8:145)
- In mitigation for the illegal segregation of some prisoners and for the harsh and punitive conditions in which they were held, inmates were considered for release on licence at an earlier time than otherwise would have applied. (1991/2:140)

## **2.2.5 Satisfaction**

---

**Definition**

The fourth option for redress is to satisfy the reasonable concerns of the person who has suffered detriment arising out of maladministration through non-material means.

Satisfaction may include actions of a symbolic nature, such as an apology on behalf of the agency, that in appropriate circumstances and if given freely and in a timely manner, may have a very real meaning to those who have suffered detriment. Other actions of a symbolic nature would include public acknowledgments or the entering into of undertakings to take action, eg to recommend relevant and appropriate changes to laws or disciplinary action. Of course, what follows these undertakings may be governed by processes beyond the control of the agency and the outcome may not be pre-determined. However, any outcomes that follow undertakings should be communicated.

Compensation, or indeed any action that acknowledges that a wrong has occurred, has elements of this symbolic nature. Satisfaction is, however, distinguished from mitigation or compensation as it does not involve the provision of material benefit to the person who suffered the wrong.

**Practical tip****Options for satisfying the reasonable concerns of people who have suffered detriment arising out of maladministration include:**

- providing an admission of fault by the public sector agency or public official, or by the agency on behalf of the public official.
- providing an apology
- publicly acknowledging the wrong done
- giving undertakings to set in place improvements to systems, procedures or practice, and communicating the outcome to the complainant and others affected by any changes, or any other undertakings that are reasonable in the circumstances
- recommending changes to relevant laws and subsequently advising the complainant as to the outcome of such recommendations
- instituting disciplinary action against any public official responsible for misconduct and subsequently advising the complainant as to the outcome
- prosecuting offenders and subsequently advising the complainant as to the outcome.

**Issues*****Giving apologies***

The issue of apologies on behalf of a government was the subject of considerable debate in 1997 due to the release of *Bringing Them Home*, the report of the Human Rights and Equal Opportunity Commission's national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families. One of the important issues arising out of this debate was the symbolic importance of an apology.

When things go wrong, many complainants demand no more of an agency or its representatives than to be listened to, understood, respected and, where appropriate, provided with an explanation and apology.

Where an apology is warranted it can have great impact if given immediately and in a sincere manner. Even if an apology is not warranted, the act of apologising can be a potent way to appease an aggrieved person. Regardless of who is in the wrong, a prompt and sincere apology for any mistakes or misunderstandings is likely to work wonders. It often will avoid escalation of a dispute and the significant cost in time and resources that can be involved.

***Are apologies an admission of liability?***

In the past, public sector agencies and their staff were reluctant to apologise as this could be taken as an admission of liability leaving them open to action through the courts from people seeking compensation. This situation changed for the better with the commencement of amendments to the *Civil Liability Act 2002* (the Act) on 6 December 2002.

In the Second Reading speech in the Legislative Assembly, the Premier explained the benefits of an apology and the basis for the Act protecting the giver of an apology:

*'An apology by or on behalf of the defendant will also not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability. 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.'* (Hansard, Assembly 23/10/02)

Part 10 of the Act provides that an apology (including an expression of sympathy or regret) 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 nor can it be admitted into evidence in a court hearing as evidence of fault or liability (other than the categories of civil liability excluded by s.3B of the Act). Specifically, section 69 provides that:

- '(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.'* (s.69)

An apology is defined in the Act as *'an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter'*. (s.68)

### ***Form of the apology***

There are many different ways to make an apology. The most appropriate form and method of communication of an apology will depend on the circumstances of the particular case, the detriment suffered, and what is hoped to be achieved by giving the apology (for example restoration of reputation, acknowledgement of the wrong done, reconciliation, assurance that a problem has been addressed or will not recur).

The most effective apologies are given promptly and sincerely and incorporate the following elements:

- **scope** - a description of the relevant act or omission to which the apology applies
- **detriment** - recognition that the affected person has suffered some detriment (which could include embarrassment, damage or loss) and acknowledgement of the types of detriment suffered (including both detriment immediately caused by the act or omission and any consequential detriments)
- **cause** - an explanation as to how the act or omission came about
- **responsibility** – an acceptance of fault, responsibility or accountability (which could include a statement as to whether the act or omission was discretionary or unintentional)
- **apology** - an expression of sorrow, sympathy or regret or of a general sense of benevolence or compassion



- **action taken or proposed** - the statement of the action taken or specific steps proposed to address the grievance or problem and to ensure it will not recur.

Please note that care should be exercised in relation to any statements as to how an act or omission occurred. This is because, although the protection extends to the apology and information conveyed in the apology would not therefore be admissible, the apology may convey information that can be used to obtain information in an admissible form in other ways for use in court proceedings.

Also, in proceedings relating to liability for negligence, the subsequent taking of action that would (if taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk or constitute an admission of liability in connection with the risk (s.5C of the Act).

In the limited circumstances where the protections of the Act do not apply to an apology, it may still be appropriate to offer an expression of sympathy or regret.

The Act therefore provides that an apology made by a person who is, or who subsequently becomes, a defendant in civil proceedings will not, of itself, have any detrimental effect on the person's defence in the proceedings. However, special circumstances apply in a case of alleged defamation (referred to below).

#### ***What apologies are not protected by the Act?***

The protections under the Act do not apply to all civil proceedings. The types of civil liability that are not covered by the protection for apologies (as set out in s.3B of the Act) are liabilities for:

- an intentional violent act done with intent to cause injury or death (including sexual assault or misconduct)
- the contraction of a dust disease
- personal injury allegedly caused by smoking or the use of tobacco products
- 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 1988*) to which the *Motor Accidents Act 1988* applies
  - from a motor accident or public transport accident to which the *Motor Accidents Compensation Act 1999* applies
- damages payable by an employer for the injury of a worker or the death of a worker resulting from or caused by an injury
- compensation under the *Workers Compensation Act 1987*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, the *Workers' Compensation (Dust Diseases) Act 1942*, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977* or for a benefit payable under the *Sporting Injuries Insurance Act 1978*.

An apology should not be made in any matter that falls (or is thought to fall) into any of the categories listed in s.3B until legal advice has been obtained. This is because an apology provided in such a matter may act as an admission of liability and may therefore breach a contract of insurance held by the agency. If legal advice is sought by an agency in such circumstances, the agency should clearly ask its legal adviser to consider whether a 'without prejudice' offer of an apology could still be made, as it may facilitate an agreement between the parties that settles the matter.

Although the range of exclusions from the operation of the apologies provisions of the Act appears at first glance to be extensive, in practice the exclusions have little relevance to the vast majority of the day-to-day interactions between public sector staff and the public.

***When is an apology appropriate?***

The most common instances where it would be appropriate for a public official to give a prompt and genuine apology will be where a member of the public has been given wrong information, or provided with poor service or where the conduct of the public official falls within the domain of maladministration.

An apology may also be made in circumstances where a member of the public alleges that they were defamed. In such cases, however, an apology should not be made until an agency has obtained legal advice as there are many technical issues that apply and the manner and expression of the apology can affect any potential future proceedings.

Where even an expression of sympathy or regret is considered too sensitive to issue, subject to legal advice, a statement could still be offered that:

- describes or explicitly acknowledges the grievance or alleged problem (but only in general terms without referring to causation or acknowledging liability), and
- states the action taken or the specific steps that are proposed to help address the grievance or alleged problem.

Alternatively, the better course may be to indicate a willingness to attempt mediation or a preparedness to negotiate in some other way. However, to offer mediation may create certain perceptions on the part of the recipient and is a significant step. Mediation should only be offered where the public official has authority to do so. Where the public official does not have the necessary authority, he or she should seek instructions before such an offer is made. See Chapter 4, *Public Sector Mediation*. When in doubt legal advice should be sought.

While an apology can not be used in court to prove fault or liability on the part of the person or agency who made the apology, on the other hand, the giving of the apology does not absolve the person or agency from any potential liability.

For more information, please see the fact sheet on Apologies in Annexure 5B.

***Advising complainants about disciplinary proceedings***

The conduct causing detriment may warrant disciplinary or criminal action. Although it is desirable that decisions or undertakings to discipline or prosecute officials should be communicated to the complainant, this issue may be complicated by the natural justice rights of a person who is the subject of the complaint. Once a disciplinary or criminal process is completed, however, a compelling argument would be required to limit access to information about the outcome.

**Satisfaction examples**

***Public sector agencies***

- In response to a complaint regarding various aspects of an electricity bill, the electricity supplier agreed its bills were difficult to understand and invited the complainant to take part in a customer consultative committee to redesign the accounts. (1997/8:87)
- A clerical error which resulted in a licence cancellation by the RTA, as well as rudeness from staff, led to a full explanation and a formal written apology. The staff involved were reminded of the proper procedure and reprimanded. (1995/6:77)

- A Department of Education case involving the improper expulsion of a student produced a range of outcomes including an apology from the principal and the department, the issuing of new instruction cards, and a review of policy.

#### **NSW Police**

- NSW Police was persuaded that laying charges was the most appropriate response for a particular instance of misuse of access to information by a police officer. (1997/8:47)
- An Aboriginal community worker who had her vehicle unlawfully searched was offered a personal apology by the police officer concerned. NSW Police also advised that the officer's conduct would be monitored and that he would receive customer relations training, including cultural awareness education. (1997/8:46)

#### **Corrective Services**

After failing to follow correct procedures, which resulted in an inmate being denied the opportunity to attend a funeral, the correctional centre's general manager wrote to the inmate expressing his regret at the errors that had been made. (1997/8:144)]

## **2.2.6 Compensation**

---

### **Definition**

The fifth category of redress is financial compensation for detriment sustained directly or indirectly as a result of the maladministration.

Compensation carries a range of meanings. It can include monetary 'equivalent' for a loss and an 'adequate substitute' for it. It can make 'amends' symbolically for the loss and has elements of providing 'indemnity' (*Macquarie Dictionary* and *Oxford Dictionary*).

### **Issues**

An entitlement or claim for certain damages will depend on the complainant being able to properly establish that the detriment occurred, and would be subject to the limiting tests of cause, contribution and remoteness.

#### **Loss of earnings**

Compensation for loss of earnings should be limited to losses that the people affected can establish have actually been incurred due directly to the maladministration in question.

#### **Reimbursing costs incurred**

The payment of compensation would be particularly appropriate in relation to costs incurred in preparing tenders, applications and the like, where the tender or application would most likely have been successful but for the maladministration in question, particularly in circumstances where no legal remedy is available or practical.

The reimbursement of professional costs should be limited to expenditure a person would not have otherwise incurred, and which was reasonably required to establish the maladministration.

When a person has dealt with a matter without recourse to professional assistance, the time and trouble involved could include time away from work to sort out a problem, telephone bills and postage.

### **Practical tip**

#### **Options for compensation include:**

Restitution for:

- loss or damage to property or financial interests
- loss of financial or other benefits
- loss of earnings
- injury or damage to/deterioration of health
- disturbance to amenity if quantifiable, or
- loss of opportunity to make gain ie potential or future earnings.

Reimbursement for:

- costs or damages that may or are likely to be incurred arising out of the maladministration ie indemnification
- medical costs resulting from injury or damage to/deterioration of health
- costs incurred in preparing tenders, applications and the like
- professional costs incurred by a person in demonstrating that maladministration has occurred and/or the scope of detriment arising out of maladministration, or
- the time and trouble involved where a person has dealt with a matter without recourse to professional assistance.

Satisfaction or appeasement for:

- damage to reputation or humiliation
- worry or distress, including grief and suffering
- disturbance to amenity (if not quantifiable)
- inconvenience
- loss of opportunity or rights
- 'bother' ie the inconvenience arising out of the fact of having to complain at all
- maladministration in the form of nominal damages, or
- countering the effects of legislative provisions that are found to be flawed.

#### **Bother**

Compensation for bother is only appropriate in exceptional circumstances, eg where the complaint itself was not handled appropriately, including where there was excessive delay.

#### **Nominal damages**

Nominal damages may be appropriate where no financial loss was caused to the complainant, or in cases of serious maladministration or delay. In the latter circumstances, a payment provides both a recognition of significant administrative error, and some sanction against its repetition.

### **Flawed legislative provisions**

Compensation may be appropriate on those rare occasions where the application of legislation produces a result that is clearly unintended by the legislature, and which is anomalous, inequitable or otherwise unjust. In particular, payments may be appropriate where legislative changes have subsequently been made to address harsh or otherwise unintended effects of earlier legislation. Such unintended effects would normally relate to matters peripheral or ancillary to the matters that are the major focus of the legislation. Examples are machinery or procedural provisions, or situations that arise from the interaction of separate pieces of legislation, or between original legislation and later amendments.

### **Available remedies**

There are several bases for awarding compensation for detriment arising out of maladministration in NSW. These include:

- Ex gratia payments not made on the basis of any legally enforceable obligation or liability, but where such payments are justified:
  - on moral or humanitarian grounds
  - by the obligation on government to be properly responsive or accountable
  - by recommendations made by the Ombudsman (under s.26(2)(d1) of the *Ombudsman Act*, with payment being authorised under s.26A of that Act, or otherwise).
- Payments from agency self-insurance or external insurance schemes for specific damages or actions.
- Statutory schemes for a class of people affected by government action or negligence such as HomeFund.
- Court orders for the payment of costs or damages, including out of court settlements.

The appropriate approach will depend on the facts and circumstances of each case and on the agency's lawful authority to make payments. The fact that there could potentially be a legal entitlement should not prevent attempts to appropriately resolve a matter without recourse to the courts. It is important that agencies not rely on the courts to validate their properly made judgment that a specified amount ought to be paid by the agency as compensation.

From our experience, and from a review of the literature, it is clear that there is no comprehensive approach in NSW to compensation for those affected by maladministration. This has led at least one commentator to suggest the introduction of a general right to damages for wrongful administration per se and a general right to damages for losses sustained as a consequence.

In many cases people who have suffered detriment arising out of maladministration have been denied any remedy. In other cases a remedy has existed, but redress in the form of compensation has not been provided. This may be because of a range of factors including:

- a lack of authority to pay compensation
- a lack of appropriate schemes for the payment of compensation
- a limited interpretation of government policy by staff
- uncertainty as to when to exercise discretion
- problems in defining 'special circumstances' and the requirement for such circumstances to exist for the making of ex gratia payments

- problems in obtaining 'standing' before the courts
- problems in identifying those who have suffered detriment from maladministration
- considerations of equity and practicality
- no restitution allowable if detriment resulted from a mistake of law.

## **Ex gratia payments**

### ***Determining the circumstances and levels of ex gratia payments***

As a general rule, agencies should make public the rationale, scope and administrative arrangements for the payment of ex gratia compensation at the outset. In 1993, the Commonwealth Department of Finance published a discussion paper titled *The Payment of Ex Gratia Compensation by the Commonwealth*. This paper sets out a number of relevant guiding principles for providing ex gratia compensation.

These include:

- there is evidence to suggest that actual losses have occurred, or will be incurred
- there is a clear and identifiable connection between the actions of the government [maladministration] and the events which produced the loss, as distinct from normal insurable commercial risks or failure to comply with normal [reasonable and fair] government requirements
- the persons incurring the loss can be identified
- those adversely affected could not reasonably have been expected to be able to foresee or anticipate the government action or protect themselves against it
- those affected have taken all reasonable steps to minimise the losses incurred as a result of the government action [maladministration]
- there is no existing [Commonwealth] program appropriate for the purpose of providing assistance to those suffering loss.

Once it has been determined that payment of compensation is appropriate, the discussion paper addresses the question of determining the amount of compensation that should be paid. Three principles supporting a framework for determining the appropriate compensation are identified. The principles are:

- where the value of losses can be calculated with reasonable certainty, such as in the case of identifiable market values, these values should be used as the initial base for considering the amount of compensation payable
- where losses cannot be so readily established the methodology used to estimate the value of losses should be identified, and
- where it is apparent that factors beyond the fair treatment of those suffering losses need to be considered in taking decisions on the amount of compensation these should be identified.

## **Ombudsman's recommendations**

The Ombudsman has power under s.26(1) of the *Ombudsman Act* to recommend the payment of compensation or 'any other steps to be taken'.

Compensation is not an uncommon recommendation in reports of the Ombudsman, and in some years the Ombudsman has recommended compensation which, in total, has amounted to hundreds of thousands of dollars.

A key issue that has arisen in the past in the exercise of this power is the authority of agencies to pay compensation. Section 26A of the *Ombudsman Act*, inserted in 1989, clarifies the process for authorising the payment of compensation. Section 26A provides:

- 26A (1) If the Ombudsman recommends in a report under s.26 that compensation be paid to a person by a person other than a local government authority, the responsible Minister:*
- (a) at the request of the head of the public authority whose conduct is the subject of the report, and*
- (b) with the concurrence of the Treasurer, may authorise the payment of compensation to the person out of the appropriate fund.*
- (2) If the payment of compensation authorised under this section is to be made by a Department referred to in Schedule 3 to the Public Finance and Audit Act 1983, the Treasurer may authorise payment out of the Consolidated Fund (but not otherwise), which is accordingly appropriated to the necessary extent.*
- (3) If the Ombudsman recommends in such a report that compensation be paid to a person by a local government authority, the local government authority may authorise the payment of compensation to that person out of its funds.*
- (4) The functions that may be delegated under s.377 of the Local Government Act 1993 by a council do not include a function relating to the authorisation of the payment of compensation under this section.*
- (5) Nothing in any other Act prevents the payment of compensation in accordance with an authority given under this section, and the amount of compensation paid may be the same as, or may be more or less than, any amount recommended in the Ombudsman's report.*

Section 26A(1) requires each and every proposed authorisation by a responsible minister of payment of compensation to such persons to be agreed to by the treasurer. The treasurer must be notified that the minister intends to authorise a particular payment and he or she must presumably make some response or acknowledgment to indicate his or her 'concurrence' or agreement with the proposed authorisation. In the case of payments to be paid by a department in Schedule 3 to the *Public Finance and Audit Act 1983*, the treasurer has the discretion to authorise payment from the consolidated fund, but not otherwise (s.26A(2)).

## **Other issues**

### ***Lawful authority***

Agencies must ensure that any payments made from appropriations, by way of compensation, are able lawfully to be made.

### ***Precedents and classes***

Because ex gratia payments are purely discretionary and not based on any legal obligation, such payments cannot be used by claimants as a legal precedent in other cases. However, on occasion individual cases raise precedents for a whole class of cases which would be difficult to deny. In such circumstances, the fact that such cases could create such a precedent should not be used as an excuse for avoiding responsibility to pay compensation.

### ***Compensation as a means to offset debt***

In this chapter, waiver of debt has been categorised as rectification or mitigation, rather than compensation. However, where there is no administrative discretion or specific statutory authorisation to waive debt, offsetting compensation may be appropriate. There may also be circumstances where there is relevant waiver legislation, but an 'unjust' circumstance exists. Compensation may also be appropriate in these circumstances.

### ***Taxation***

The payment of financial compensation may be affected by taxation. This should be taken into account when determining the quantum of the payment, so as to place the claimant in the position he or she would have been in but for the effect of the defective administration. This is consistent with the position under the *Scheme for Compensation for Detriment Caused by Defective Administration* operating at the commonwealth level since 1995.

### ***Effects of the complainant's actions***

Any assessment of appropriate compensation should include consideration of the effects of the complainant's actions. Examples include delay in taking action to deal with the matter, failure to mitigate the effects of the maladministration, contribution to the maladministration or the subsequent detriment, failure to take advantage of available benefits or alternative avenues of redress (see 5.3.6).

## **Compensation examples**

### ***Public sector agencies***

- Countrylink had improperly booked a guitar as passenger luggage. When the guitar was subsequently lost, Countrylink agreed to pay the owner compensation for the guitar, despite the fact that it did not otherwise come within the definition of 'passenger luggage'. (1997/8:84)
- A man with an intellectual disability travelling by train from Sydney to the North Coast had been made to leave the train within the metropolitan area when the ticket inspector wrongly believed his ticket to be invalid, causing considerable distress and inconvenience. On the Ombudsman's insistence, Countrylink reconsidered its original offer of reimbursement of out-of-pocket expenses and added an apology and an offer of a complimentary Countrylink holiday. (1997/8:85)
- A man made a claim on EnergyAustralia for the cost of repairs and spoiled food caused by a supply irregularity. Liability for the claim was initially denied, but nine months later the energy supplier confirmed the supply irregularity, apologised for the inconvenience and frustration and made an ex gratia payment equal to the amount of the man's claim. (1997/8:87)

### ***Local government***

- Court costs can be saved by negotiating compensation where liability may exist, eg because of consent being given in inappropriate circumstances resulting in drainage problems. (1994/5:114)
- Ex gratia payments have been made to compensate a complainant for the disturbance to amenity partly caused by a council's lack of decisive action in restraining illegal use of the adjoining property, and where a consent was illegally withheld. (1992/3:89, 83)



- Examples of compensation by local government include legal fees plus 'nominal' compensation for withdrawn tender acceptance and an ex gratia payment for delay in issuing an enforceable fire safety order. (1991/2:84)

***NSW Police***

- In one case of false and defamatory remarks, the police provided 'nominal' damages and legal fees. (1995/6:52)
- In a case involving an interrogation which was described as a 'gross abuse', the person was cleared of charges by the court and awarded some legal costs. Ex gratia compensation was recommended by the Ombudsman for the significant financial and emotional costs to the complainant. (1992/3:60)
- Examples of ex gratia payments by police in one year include compensation to a man improperly detained for 24 hours, to a man improperly arrested for stealing his own car (procedures were also changed) and to a motorist whose stolen car was stripped due to excessive delay in advising him it had been located. (1991/2:76)

***Corrective Services***

- There are a number of cases of compensation being paid to prisoners to cover loss of property in the care and custody of prison authorities. (1995/6:94)

## 3 Principles for redress

---

### 3.3.1 General principle – restore to original position

---

The general principle is that, wherever practicable, people detrimentally affected by maladministration should be put back in the position that they would have been in had the maladministration not occurred. Often this will not be practicable, particularly where the detriment is not amenable to quantification in financial terms. In such circumstances, people detrimentally affected by maladministration should be offered other options aimed at satisfying their legitimate concerns in ways that are reasonable and fair to all concerned.

A distinction is sometimes drawn between ‘real maladministration’ and ‘common’ or ‘normal’ administrative errors. It is sometimes suggested that there needs to be an acceptable level of error because, while maladministration is costly, a very low tolerance of errors is also costly. The opposing view, endorsed here, is that it is preferable that the community as a whole, rather than individuals who happen to be affected, should bear the losses sustained as a result of maladministration. Accordingly, the general principle outlined above applies to all forms of maladministration. If errors are tolerated, there will be less inclination to amend systems to prevent similar errors from recurring. Moreover, providing redress for administrative errors will often be a reasonably straightforward process, requiring no more than simple communication of the reasons for the conduct and rectification of the mistake or error. Errors left unchecked, however, may lead to detriment requiring more complex redress. The impact of costs on an agency may be significant in the short-term, but overall costs of maladministration will not be reduced unless complaint and redress systems are put in place so that feedback about maladministration is absorbed and appropriately acted upon by agencies.

Decisions relating to redress will be affected by certain public law considerations. For example, administrative law (as opposed to private law) will on balance emphasise the idea of a fair and reasonable outcome rather than issues of fault or negligence and this is appropriate when considering redress. The public law notion of providing public benefit also reinforces the goal of achieving broad and appropriate outcomes that address systemic problems as well as providing resolution for complainants.

The nature of the appropriate redress and its scope and timing may be affected by a broad range of considerations.

Redress should be:

- fair and reasonable
- a comprehensive resolution of the issue
- properly responsive and procedurally sound, and
- provided in a timely manner.

Redress may be limited by:

- the time elapsed since the maladministration occurred ie remoteness of actions
- the remoteness of the damage or detriment incurred
- the degree of contributory responsibility for the maladministration or the detriment arising from the maladministration
- mitigation of damage, and
- the need to avoid improperly giving someone financial gain.

Redress may be affected by external actions or circumstances so that certain forms of redress may:

- not be appropriate in certain circumstances (eg where there is an agency investigation or proceedings are on foot in court)
- be subject to judgments about legal liability (although this should not be the sole consideration)
- be related to a specific breach of standards set out in a document such as a charter which calls for codified or otherwise specified responses by the agency, and
- be subject of a class of actions in relation to which specific legislation is enacted which provides for redress.

### 3.3.2 Redress should be fair and reasonable

---

The redress must be fair and reasonable to both the person detrimentally affected and the agency concerned, having regard to the circumstances of the maladministration. The requirement that redress be fair and reasonable encapsulates a range of related considerations.

#### **Decisions not based entirely on legal grounds**

Fairness can mean adopting a broad interpretation of the law rather than rigid adherence to legality. Wherever reliance is placed on legal or other technical advice, public sector staff should ensure that non-technical issues, such as reasonableness and the effect of possible decisions are not ignored. Even if there is no obligation to provide redress, there may be a moral obligation to take steps to offer redress for maladministration that has or is likely to cause detriment to an individual or a range of individuals.

The principle of fairness and reasonableness may also mean avoiding an adversarial approach in favour of mediation or compensation, without necessarily accepting liability.

#### **Equal treatment for equal circumstances**

In providing redress, a fair outcome requires that like cases be treated equally (see 5.3.4). Fair outcomes can, to a degree, be spelt out in terms of particular principles eg criteria, convention, precedence or experience, but there will inevitably be an element of contingency in each case. The challenge is to isolate these elements in as clear a fashion as possible.

#### **Decisions made without taking advantage of relative position of strength**

Redress should be determined on the basis of what is fair and reasonable in the circumstances. No agency should take advantage of its relative position of strength to avoid or reduce its obligation to provide redress. The imbalance that exists between an agency and an individual complainant relates to knowledge as well as other resources, and this is a factor which should always be taken into account (see 5.3.4).

#### **Redress must be proportional to the maladministration and the detriment suffered**

Redress should be fair and reasonable by being proportional to the degree and nature of the maladministration and the detriment suffered. Proportionality is about weighing up the problem and the solution in order to find an appropriate balance and match. This is a particularly difficult area which will always be dependent on judgment.

Maladministration and redress come in many different forms. However it is appropriate to attempt to make general connections between levels or types of maladministration and appropriate responses for the purpose of redress. For example:

- As a broad generalisation, where detriment is caused or arises out of maladministration, whatever its nature, some degree of communication and rectification will always be required.
- Generally, where the maladministration has been illegal, rectification is about returning things to a legal state. Where the maladministration has been otherwise wrong, mitigation is about returning things to a right state.
- The intent of the official who caused the maladministration may be relevant to the nature of the redress (ie certain options for satisfaction may not be relevant) but not to the degree of redress, given that the degree of detriment is generally not connected to the intent of the official.

### 3.3.3 Redress should provide a comprehensive resolution of the issue

---

#### Redress should address all justified issues raised

A comprehensive resolution is one that covers all avenues of appropriate response to people affected by maladministration and addresses all the consequences of the maladministration. Unless a response to a complaint is comprehensive and deals with all justified issues raised, second complaints are highly probable.

#### Consideration of detriment whether or not those affected have complained

Providing a comprehensive resolution also means providing redress to everyone affected detrimentally by maladministration, whether or not they have complained to the public sector agency, agency staff or the Ombudsman.

While this approach is appropriate in terms of equity, and there is no valid reason why this should not occur, there may be practical difficulties in locating the class of people affected. Training and resources are required for that task.

### 3.3.4 Redress should be responsive and procedurally sound

---

#### Adherence to ethical principles

Decisions regarding redress must be made in accordance with understood and defined ethical principles. The Commonwealth's *Scheme for Compensation for Detriment Caused by Defective Administration* establishes ethical framework principles that agencies should adhere to in administering the scheme. The Commonwealth framework focuses on the power imbalance in terms of resources and information that usually exists between agencies and people affected by maladministration. These principles include:

- Offers of compensation to people detrimentally affected by maladministration should be calculated on the basis of what is fair and reasonable in the circumstances, and agencies should not take advantage of their relative position of strength in an effort to minimise payments.
- People detrimentally affected by maladministration should be provided with adequate information on the details of any offer (including the method of calculation) and the reasons for the agency's decision to accept, partially accept or reject their claim.

- People detrimentally affected by maladministration should not be required to waive their rights where only partial settlement is made.
- Advice on the right to complain to the ombudsman should be provided.
- Agreements made in ignorance of the detrimentally affected persons rights are not fair or reasonable, and may not be valid.

Although this scheme is exclusively concerned with compensation, it is important to extend the idea of ethical redress to options other than compensation.

The principles adopted must acknowledge the 'transactional inequality' between the state and its subjects. Individuals are unequal to defending their interests by bargaining or negotiation. (Source: Birks, P., *Restitution: The future*, Federation Press, 1992, p83). This requires the state to act ethically and legally as part of the cement of democracy.

### **Full explanation**

A properly responsive and procedurally sound approach to redress requires that full reasons for the decision on redress be provided to people who suffer detriment arising out of maladministration.

### **Consideration of the views of the person who has suffered detriment**

It is entirely appropriate that agencies take into account the wishes of complainants when considering redress. This does not imply that such wishes will determine the outcome, but this information is important in sorting out the problem and gaining an insight into the expectations of those who have suffered detriment. In particular it is important when considering the options that provide for 'satisfaction'.

### **Use of precedent and guidelines**

Precedent can be useful to decision-makers because it provides a degree of equity between cases of a like kind. Guidelines can also provide a degree of accountability for decision makers. Guidelines should be regularly reviewed so that they remain responsive to problems that arise and provide workable answers which 'go some way to solving the problem without creating too many problems of its own'.

Agencies should attempt to anticipate problems and take appropriate action through changes to policies, procedures or practices. This may also include, where appropriate, providing for automatic redress in identified situations.

If the maladministration that leads to detriment arises out of an honest mistake or errors of judgement in the carrying out of day-to-day duties, the emphasis should be on resolving the problem and preventing similar complaints rather than proving guilt or innocence.

### **Accountability and review**

It is important that all decision-makers are properly accountable for all decisions regarding redress and that such decisions are not themselves forms of maladministration. Decisions on redress should be reviewable and the avenues and/or processes of review should be communicated to the person seeking redress.

This accountability extends to redress resulting from confidential mediation. Chapter 4, *Public Sector Mediation* sets out guidelines on ways in which such decisions can be entered into. This helps ensure that there is no conflict between principles of confidentiality and proper public accountability.

### **3.3.5 Timely redress**

---

An important element in the provision of redress is that it be granted in a timely manner. An agency is much more likely to have the confidence of its customers and the public in general if it listens to complaints and moves quickly to resolve or deal with them appropriately.

One element often found in cases of maladministration is delay in decision-making. In such circumstances, continued delay in granting redress would only compound the detriment. Timely action is therefore an important part of any system of redress. The period of time within which redress should be offered will vary according to the level of redress. Rectifying maladministration would normally be able to be accomplished fairly quickly. Other elements of redress may take longer. For example, the need for ministerial approval for a significant amount of compensation may take longer but even here some nominated standard should be set by agencies subject to appropriate extensions where reasonable.

Consideration of redress may be delayed where an investigation is on-going or where a case is subject to further or alternative appeals procedures. However, where the facts are generally known and available to the agency it can and should make some judgments about redress. So long as any appeal is not compromised, and the principles outlined above are followed, an agency may be well advised to offer some redress. This can benefit the complainant and the agency, by pre-empting the need for appeals or alternative approaches for external review of the agency's conduct or decisions (see also 5.3.7). Communication and responsiveness should be a continuous process.

### **3.3.6 Limitations on redress**

---

#### **Time elapsed since the maladministration**

As a general principle, the obligation on an agency to make redress becomes less compelling if a substantial period of time has elapsed between the maladministration causing detriment and the complaint to the agency. This is in accord with the notion of a limitation period, which bars claims arising out of events occurring many years previously.

As time elapses, so too does recollection of events. Records may cease to be available, relevant staff may have moved on, or circumstances may have changed substantially eg the agency may no longer exist.

When confronted with a complaint relating to dated events, a concern with what is fair and reasonable in the circumstances is very important. Consideration must be given to the nature of the complaint and the reasons for the delay in making it. In addition, the disparity in power between the parties in such matters must also be taken into account.

#### **Remoteness of the damage or detriment**

The responsibility of an agency to provide redress does not extend to detriment which is too remote from the maladministration. In determining whether the detriment suffered is too remote, an agency should consider whether the detriment was sufficiently likely to result from the maladministration, or whether it was a foreseeable consequence of the maladministration.

### **Degree of contributory responsibility**

If an agency is not entirely responsible for the maladministration or the detriment arising from it, this may affect the nature and scope of the redress that should be offered by that agency. This is perhaps more clear cut when the person who suffered detriment contributed in some way to the maladministration or the degree of detriment, although it is difficult to calculate the degree of any such contribution. The more difficult case is if other third parties are partly responsible.

### **Mitigation of damage**

People detrimentally affected by maladministration have a responsibility to take reasonable steps to minimise the damage incurred. The nature and extent of redress will be affected by the extent to which both parties have fulfilled their duty to act reasonably to mitigate the loss or damage. Agencies need to minimise the damage that is occurring once they become aware of the maladministration and the detriment it is causing, and those affected need to take reasonable steps to minimise the degree of detriment that they suffer eg by bringing the problem to notice as soon as possible.

### **Avoidance of unwarranted enrichment**

The general principle of redress is that people detrimentally affected by maladministration should be put back in the position they would have been in had the maladministration not occurred. In accordance with this general proposition, redress should be proportional to the detriment suffered. Redress should not provide the recipient with advantages beyond those which are reasonable and fair.

## **3.3.7 Relevance of external actions or circumstances**

---

### **Redress may not be appropriate in certain circumstances**

The provision of certain forms of redress may be complicated pending the outcome of other processes, such as an internal or external investigation or proceedings in a court or tribunal. However, the general principle is that agencies should not postpone acceptable means of redress, even where such proceedings are on foot.

### **Judgments about legal liability**

While concerns about legal liability are an important consideration, such concerns should not be the sole or even primary consideration in assessing whether to offer redress. Agencies have a duty to correct or rectify problems arising from maladministration for which they are responsible.

Agencies should make sensible decisions to reach out of court settlements, or better still, to forestall the need for legal proceedings at all. Redress can be offered without admission of liability.

### **Codified or otherwise specified responses**

There may be cases where particular complaints will call for standard responses, particularly where those complaints have a uniform effect and occur commonly enough to be codified. Codification may take the form of a compensation or insurance scheme which operates in the event of loss of, or damage to, property.

Codified responses are commonly found in service agencies that deal with large volumes of people. For example, payments will be made where trees are damaged by power workers or where a parcel entrusted to State Rail is lost.

### Legislated responses

Redress for certain events which have affected a class of people may in some cases be covered by specific statutory provision, ie legislated responses. In such cases other forms of redress may be inappropriate or even proscribed. The statutory compensation scheme for HomeFund borrowers is an example of this.

### 3.3.8 Standard of proof for maladministration

---

In the absence of any criminality, the burden of proof for establishing maladministration is the civil standard of balance of probabilities or reasonable satisfaction, following an appropriate investigation. The rigour and length of the investigation should be proportional to the seriousness of the alleged maladministration.

The standard of proof for maladministration will vary, depending on the seriousness of the allegations or the gravity of the consequences flowing from a finding that may be made (*Briginshaw v Briginshaw* (1938) 60 CLR 336). However, the standard of proof should not change according to the category of redress being considered, although the onus to demonstrate detriment may be greater depending on the option for redress.

### 3.3.9 Unacceptable responses to detriment arising from maladministration

---

The following responses are sometimes used by agencies to avoid or limit the redress they offer to people suffering detriment arising from maladministration. These responses are often driven by a desire to save money. Unfortunately, even if they do save some money at the time, they ultimately cost public sector agencies in other ways. In particular, they provoke suspicion in and undermine the confidence of the public. This can generate more complaints, often without substance but costing in substantial time and effort, as the person affected does not have faith in any other decisions made by government agencies.

#### Examples of unacceptable responses

##### ***We don't want to set a precedent***

Why not? If the conduct concerned has been unfair or unreasonable, a precedent is exactly what is required — a precedent that the decision or action is unfair and unreasonable and that it should be fairly rectified if repeated.

##### ***We'll fix this one case but we won't (or can't afford to) fix them all. We'll fix them one by one if complaints come to our notice***

This response acknowledges that a particular individual has been treated unfairly and demonstrates a preparedness to offer redress to that individual. However, any agency offering this response is in effect saying that if no-one complains there isn't a problem. This is clearly wrong.

##### ***We'll correct the system so that this doesn't happen again, but we cannot extend a resolution to this complainant***

This response is often heard where offering redress to the particular complainant involves a cost, in terms of time, money or other resources. This attitude shows a poor commitment to the principle of fairness.



***If we were to do that, we'd create other, bigger problems***

This response is often used to avoid greater openness, such as providing reasons for decisions. The concern is that giving more information takes time and may provoke further argument from the complainant. This concern is misconceived. People are entitled to know the reasons behind decisions that are against their interest. Moreover, when a person is given reasonable information, argument is in fact less likely. Most people can 'agree to disagree' if they are satisfied that their position has been understood and considered. And if the person affected does argue, agencies should take the opportunity to see if their reasons withstand that scrutiny. If they don't, the reasons should be reconsidered. As to the argument that giving more information takes more time, agencies should consider how much time is spent responding to phone calls, letters or personal visits from dissatisfied customers who might never have called if they had understood what the agency did and why.

***What we've done is lawful and we're not legally required to do what you suggest***

This response evidences a confusion between fairness and lawfulness. An agency's goal should be to achieve both.

***Here is the reason we decline your complaint***

Providing reasons is essential, but the explanation must address all elements of the complaint. It is not satisfactory or sufficient if an agency responds with a detailed analysis and refutation of one aspect of the complaint (however sound), if it completely neglects to address the rest.

*Source: 1998 Annual Report, Provincial Ombudsman, Saskatchewan, Canada.*

## 4 Developing a redress policy

---

### 4.4.1 Introduction

---

The guidelines in this chapter are intended to assist agencies and their staff in dealing with people who have been detrimentally affected by maladministration. While a rigid sector-wide policy is neither practical nor desirable, a more conscious and consistent approach to redress is essential.

We endorse the vision of the UK Parliamentary Commissioner for Administration (PCA) who, in a memorandum submitted to the Select Committee on the PCA in 1994, advocated a variety of schemes to fit the circumstances of various agencies based on a common set of definitions of types of injustice and appropriate levels of redress.

This chapter seeks to provide a clear, common philosophy of approach to the different categories of redress that also provides sufficient flexibility for agencies to take account of their own unique circumstances. Some of the specific organisational issues that need to be addressed in developing a redress policy are considered below.

### 4.4.2 Documentation

---

The redress processes adopted by agencies should be as simple to understand and operate as possible. They should be made systematic, consistent and accountable by such means as:

- integration into agency complaint handling systems (see Chapter 1, *Effective Complaint Handling*)
- development of precedents for decision-making, including the development and adoption of agency specific guidelines (see 5.4.4)
- ensuring comprehensive records are kept of all actions taken to redress detriment arising out of maladministration, particularly where compensation was paid, including detailed reasons as to why the actions were taken and how the nature and scope of the redress was decided upon
- centralisation of record keeping (at the agency level at least)
- introduction of processes for obtaining and assessing external expert advice in relation to the nature and scope of detriment suffered by complainants
- publicised appeal rights
- open access to decisions on redress (any such decisions, whether to approve or refuse redress, should be publicly defensible), and
- periodic review.

### 4.4.3 Delegations

---

Agencies should give their staff clear delegations to resolve complaints. Such delegations should:

- define responsibility for dealing with complaints based on an assessment of the types of complaints and problems that different staff are likely to be called upon to deal with
- detail the scope of staff decision-making capacity and limits on the nature and scope of redress they can provide or authorise.

#### 4.4.4 Codification

---

It may be possible for agencies to more formally codify redress options by matching the different categories of maladministration that they have experienced, or are likely to experience, to the different categories of redress that are appropriate. The beginnings of such a scheme might look like the following.

- Unreasonable conduct calls for a response which emphasises communication eg an explanation, and satisfaction eg an apology.
- Unjust conduct calls for a response which emphasises satisfaction eg an apology, mitigation and compensation.
- Oppressive conduct calls for a response which emphasises satisfaction eg undertakings for disciplinary action and compensation eg for loss of financial or other benefit.
- A mistake of fact or law calls for a response which emphasises rectification.
- Conduct which is otherwise wrong may call for a response which emphasises mitigation.

There are obvious limits to such a scheme, but it may have some potential as a device for providing decision-makers within an agency with guidance as to the redress that could be offered in particular circumstances.

#### 4.4.5 Training

---

Staff with roles or responsibilities in relation to complaint handling or redress need to be adequately trained as to the procedures to be followed, their authority to resolve problems, and the criteria to be followed in exercising that authority.

#### 4.4.6 Contracting out

---

The role and responsibilities of government business enterprises and contractors in matters of redress needs to be clarified. It is the Ombudsman's view that the activities of such bodies should be open to complaint and redress, and that the government should bear the ultimate accountability for ensuring that redress is available in such cases. This is achieved primarily through careful contract management. Please see Annexure 5C for a discussion of contracting out and agencies' responsibilities in preparing and managing contracts with private providers.

#### 4.4.7 Authorisation

---

Agencies should consider whether they need to seek legislative change to address issues of:

- authorisation to offer various options for redress, and
- expenditure of funds or waiving of debt for that purpose.

#### **4.4.8 Legal advice**

---

Agencies will often seek legal advice on whether to provide redress, or the nature and scope of the redress that should be offered. In such circumstances it is important that agencies make clear to their legal advisers (whether in-house or external) that what is being sought is an objective opinion not a 'best defence' to legal liability.

The agency needs to consider its legal position in relation to the legal remedies available to the complainant eg the possible defences to any action, and the complainant's overall chances of success. However, decision-makers should not base their decisions on narrow interpretations of the law, or on legalistic or overly technical grounds, with little or no consideration being given to the context and merits of each individual case.

When assessing compensation to cover non-financial damage eg pain, suffering and inconvenience, if the agency has no policy on compensation levels to be provided in such cases, it may be relevant to seek legal advice as to what the courts have awarded for comparable damage.

Legal advisers will also play an important role in guiding agencies on providing redress without admission of liability.

## Annexure A: The meaning of ‘maladministration’

---

The meaning of maladministration or ‘wrong conduct’ under the *Ombudsman Act 1974*. Working definitions of terms used in s.26 are as follows.

### Contrary to law (s.26(1)(a))

---

- Decisions or actions contrary to:
  - an Act or Regulation
  - the common law
  - a lawful and reasonable order from a person or body authorised to make such an order
- Failure to comply with:
  - obligations under an Act or Regulation
  - the common law
  - a legally binding document or contract
- Continuation of practices or procedures which the courts have found to be unlawful
- Decisions or actions ultra vires, ie not authorised (the decision-maker had no power to make the decision or to do the act)
- Breach of natural justice/procedural fairness, including:
  - failure to give or inadequate notice
  - failure to give or inadequate opportunity to be heard
  - bias
- Incorrect
  - interpretation of the law
  - application of the law
- Legal requirements or procedures not observed
- Improper exercise of a delegated power:
  - decision or action not authorised by delegation
  - fettered discretion/acting under the direction or at the behest of another, ie acting under ‘dictation’
- Criminal or corrupt conduct
- Decisions or actions induced or affected by fraud
- Acceptance of bribes or secret commissions
- Unauthorised disclosure of confidential/secret/private information
- Breach of trust or fiduciary responsibilities

### Unreasonable (s.26(1)(b))

---

- Decisions or actions:
  - inconsistent with adopted guidelines or policy and that inconsistency is not adequately explained
  - inconsistent with other decisions or actions which involve similar facts or circumstances
  - made or taken without obvious relationship to the facts or circumstances

## ***Options for redress***

- not justified by any evidence
- partial, unfair or inequitable
- made or taken by a person with a conflict of interests
- arbitrary
- so unreasonable that no reasonable person could so decide or act (ie irrational)
- unconscionable
- based on information that is factually in error or misinterpreted
- unreasonably delayed
- Inconsistent decisions or actions not adequately explained
- Policy applied inflexibly without regard to the merits of individual cases
- Application of procedure which fails to achieve the purpose for which it is intended
- Relevant considerations not adequately taken into account
- Irrelevant considerations taken into account
- Important facts omitted from reports or deliberations, or ignored
- Denial of procedural fairness, including inadequate:
  - notice of proposed action, decision or hearing
  - advice as to rights
  - reasons for decisions or actions
  - consultation
  - opportunity to be heard
- Failure to give notice of rights where reasonable to do so
- Wrong, inaccurate or misleading advice leading to detriment, whether inadvertent or deliberate
- Failure to apply an Act, Regulation or the common law
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority) including restraints imposed upon persons or property that are not necessary to preserve and protect rights of others
- Abuse of power, eg use of power for unauthorised purpose
- Failure to rectify identified mistakes, errors, oversights or improprieties
- Failure to appreciate impact on the public or an individual, or giving undue weight to agency's convenience, interests.
- Failure to properly comprehend complaint or to respond appropriately to complaint
- Breach of trust
- Failure to properly investigate
- Negligence or the absence of proper care and attention

## **Unjust (s.26(1)(b))**

---

- Decisions or actions:
  - not justified by any evidence
  - partial, unfair or inequitable
  - made or taken by a person with a conflict of interests
  - arbitrary

- so unreasonable that no reasonable person could so decide or act (ie irrational)
- unconscionable
- Refusal of otherwise valid claims based on minor procedural defects
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority)
- Abuse of power
- Negligence or the absence of proper care and attention
- Unfair or inequitable application of law so that burden or benefit does not reach all those to whom it is intended to apply

### **Oppressive (s.26(1)(b))**

---

- Decisions or actions:
  - unconscionable
  - punitive, harsh, cruel or offensive
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority)
- Abuse of power/discretionary authority
- Imposition of unreasonable preconditions to the provision of a legal entitlement
- Intimidation or harassment
- Use of superior position or knowledge to place a person at an unreasonable disadvantage or to obtain compliance with wishes in respect of an otherwise unrelated matter

### **Improperly discriminatory (s.26(1)(b))**

---

- Inconsistent application of laws, policies, etc. when there is no reasonable, justifiable or appropriate reason to do so
- Inconsistent application of policies or practices
- Distinctions applied not authorised by law, or failure to make a distinction which is authorised or required by law
- Failure to perform duties impartially and equitably

### **Law or practice unreasonable, unjust, oppressive or improperly discriminatory (s.26(1)(c))**

---

- Application of law or practice does or will produce a result that is unreasonable, unjust, or oppressive.

### **Improper motives (s.26(1)(d))**

---

- Decisions or actions:
  - for a purpose other than that for which the power was conferred, ie the intent of a law, policy or procedure is ignored or disregarded in order to achieve a particular outcome
  - motivated by favouritism or personal animosity
  - for personal advantage
  - made or taken by a person with a conflict of interests
- Misuse of confidential information to obtain improper advantage

## ***Options for redress***

- Bad faith
- Dishonesty
- Seeking or accepting gifts or benefits in connection with the performance of official duties
- Misuse of public property, official services or facilities
- Favouritism or promotion of personal objectives other than those which merit and equity dictate

## **Irrelevant grounds/ considerations (s.26(1)(d))**

---

- Relevant considerations not adequately taken into account
- Irrelevant considerations taken into account
- Policy applied inflexibly without regard to merits of the case
- Abuse of power
- Exercise of discretionary power at the direction or at the behest of another, ie acting under 'dictation'
- Actions influenced by irrelevant remarks or other inappropriate information recorded on files

## **Mistake of law (s.26(1)(e))**

---

- Mistake of law:
  - incorrect interpretation of the law
  - incorrect application of the law
- Ignorance of the law

*Note: A mistake of law can be distinguished from acting contrary to the law as the former is an attempt to follow the law but is based on a mistake.*

## **Mistake of fact (s.26(1)(e))**

---

- Decisions or actions based on information that is factually in error or misinterpreted
- Important facts omitted from reports or deliberations, or ignored
- Failure to properly investigate
- Failure to properly listen to complainant's version of the facts
- Failure to read file or other documentation correctly

## **Failure to give reasons (s.26(1)(f))**

---

- Statement of reasons not given:
  - when required by law
  - when it is otherwise reasonable to do so
- Statement of reasons given but inadequate because:
  - all relevant issues are not addressed
  - the relevant criteria on which the decision is based are not stated
  - the relevant findings or material questions of fact are not stated
  - the reasons are not comprehensible to the likely recipient



## **Otherwise wrong (s.26(1)(g))**

---

- Negligent conduct
- Result of decisions or actions is uncertain
- Previously unavailable or unknown facts become known which cast doubt on the correctness of original decisions or actions
- Failure to give effect to lawful government or agency policy
- Rudeness or lack of courtesy
- Failure to give accurate, frank, impartial, complete and/or timely advice
- Failure to honour commitments
- The use of an inappropriate manner in dealing with the public
- Knowingly sending members of the public on a fruitless enquiry
- Failure to return phone calls and correspondence
- Failure to respond to reasonable requests
- Failure to meet acceptable or industry standards for public administration, good judgment, integrity and the like.

# Annexure B: Public Sector Agencies Fact Sheet

## Public Sector Agencies fact sheet No 1



## Apologies by Public Officials and Agencies

### Why apologise?

When things go wrong, many complainants demand no more of an agency or its representatives than to be listened to, understood, respected and, where appropriate, provided with an explanation and apology.

Where an apology is warranted it can have great impact if given immediately and in a sincere manner. Even in unclear situations, the act of apologising can be a potent way to appease an aggrieved person. Regardless of who is in the wrong, a prompt and sincere apology for any misunderstanding is likely to work wonders. It often will avoid the escalation of a dispute and the significant cost in time and resources that can be involved.

### Are apologies an admission of liability?

In the past public sector agencies and public officials were reluctant to give apologies as this could be taken as an admission of liability leaving them open to action through the courts from a person seeking compensation. However, amendments to the *Civil Liability Act 2002* (the Act) which came into force on 6 December 2002 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 (other than the categories of civil liability excluded by s.3B of the Act).

While an apology can no longer be used in court to prove fault or liability on the part of the person or body who made the apology, on the other hand the giving of an apology does not absolve the person or body from any potential liability.

The Act recognises that an apology is a positive action that can actually go some way towards remedying the hurt suffered by an aggrieved person. In the Second Reading speech the Premier explained the benefits of an apology:

*'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.'*

(Hansard, Legislative Assembly 23/10/02)

### How should an apology be worded?

An apology is defined in the Act as '*an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter*' (s.68 of the Act).

There are many different ways to make an apology. The most appropriate form and method of communication of an apology will depend on the circumstances of the particular case, the detriment suffered, and what is hoped to be achieved by giving the apology (for example restoration of reputation, acknowledgement of the wrong done, reconciliation, assurance that a problem has been addressed or will not recur).

In principle, the most effective apologies are given promptly and sincerely and incorporate the following elements:

- **Scope** - a description of the relevant act or omission to which the apology applies
- **Detriment** - recognition that the affected person has suffered some detriment (which could include embarrassment, damage or loss) and acknowledgement of the types of detriment suffered (including both detriment immediately caused by the act or omission and any consequential detriments)
- **Cause** - an explanation as to how the act or omission came about <sup>1</sup>
- **Responsibility** - an acceptance of fault, responsibility or accountability (which could include a statement as to whether the act or omission was discretionary or unintentional)
- **Apology** - an expression of sorrow, sympathy or regret or of a general sense of benevolence or compassion,
- **Action taken or proposed** - the statement of the action taken or specific steps proposed to address the grievance or problem and to ensure it will not recur. <sup>2</sup>

### Notes

<sup>1</sup> Care should be exercised in relation to any statements as to how an act or omission occurred because, although the protection extends to the apology and information conveyed in the apology would not therefore be admissible, the apology may convey information that can be used to obtain information in an admissible form in other ways for use in court proceedings.

<sup>2</sup> In proceedings relating to liability for negligence, the subsequent taking of action that would (if taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk or constitute an admission of liability in connection with the risk (s.5C of the Act).

In the limited circumstances (discussed below) where the protections of the Act do not apply to an apology, it may still be appropriate to offer an expression of sympathy or regret.

## What is the effect of an apology on liability?

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

*'(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.'* (s.69)

## What apologies are not protected by the Act?

The protections under the Act do not apply to all civil proceedings. The types of civil liability that are not covered by the protection for apologies (as set out in s.3B of the Act) can be briefly summarised as liabilities 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
- c) personal injury allegedly caused by smoking or the use of tobacco products
- d) 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 1988*) to which the *Motor Accidents Act 1988* applies
  - from a motor accident or public transport accident to which the *Motor Accidents Compensation Act 1999* applies
- e) damages payable by an employer for the injury of a worker or the death of a worker resulting from or caused by an injury.
- f) compensation under the *Workers Compensation Act 1987*, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*, the *Workers' Compensation (Dust Diseases) Act 1942*, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977* or for a benefit payable under the *Sporting Injuries Insurance Act 1978*.

An apology should not be made in any matter that falls (or is thought to fall) into any of the categories listed in s.3B until legal advice has been obtained. This approach is recommended because an apology provided in such a matter may act as an admission of liability and may therefore breach a contract of insurance held by the agency. When legal advice is sought by an agency in such circumstances, the agency should clearly ask its legal adviser to consider whether a 'without prejudice' offer of an apology could still be made, as it may facilitate an agreement between the parties that settles the matter.

Where even an expression of sympathy or regret is considered too sensitive to issue, subject to legal advice, a statement could still be offered that:

- describes or explicitly acknowledges the grievance or alleged problem (but only in general terms without referring to causation or acknowledging liability), and
- states the action taken or the specific steps that are proposed to help address the grievance or alleged problem.

## What does this mean for public officials?

The most common instances where it would be appropriate for a public official to give a prompt and genuine apology will be where a member of the public has been given wrong information, or provided with poor service or where the conduct of the public official falls within the domain of maladministration.

An apology may also be made in circumstances where a member of the public alleges that they were defamed. In such cases, however, an apology should not be made until an agency has obtained legal advice as there are many technical issues that apply and the manner and expression of the apology can affect any potential future proceedings.

Although the range of exclusions from the operation of the apologies provisions of the Act appears at first glance to be extensive, in practice the exclusions have little relevance to the vast majority of the day-to-day interactions between public officials and members of the public.

## Other options for redress

Guidance on other options for dealing with persons who have been detrimentally affected by maladministration can be found in *Options for Redress - Guidelines for redress for detriment arising out of maladministration* at: [www.ombo.nsw.gov.au/publications/Publist.pdf/guidelines/Redress.pdf](http://www.ombo.nsw.gov.au/publications/Publist.pdf/guidelines/Redress.pdf)

## Contact details

Level 24 580 George Street  
Sydney NSW 2000

Inquiries 9–4 Monday to Friday  
Other times by appointment

General inquires: 02 9286 1000

Toll free (outside Sydney metro): 1800 451 524

Tel. typewriter (TTY): 02 9264 8050

Facsimile: 02 9283 2911

Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

Web: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

Telephone Interpreter Service (TIS): 131450  
*We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.*

First printed April 2003.

## **Annexure C: Contracting out**

---

The government is increasingly moving to privatise or contract out a range of services and functions previously the responsibility of the public sector.

Since the private sector is not subject to accountability mechanisms such as the Ombudsman and Freedom of Information, this development has significant implications on the capacity of members of the public to obtain redress for decisions or actions that affect them. For example, unless specifically reserved through legislation, members of the public will no longer have access to administrative law rights and remedies to seek information about the service, complain about defects in the way the service was delivered or about non-delivery, have information about them protected from disclosure that they do not know about, and to find out about and correct information about them that is incorrect or misleading.

Private law remedies, even where available, generally come at a cost beyond the means of most citizens. Competition and choice provide insufficient redress to people who have suffered maladministration. The individual may get better service elsewhere but may still not have their original problem and the issues that arose from it addressed.

A series of inquiries into the practices of contracting out and competitive tendering have unanimously concluded that the rights of individuals to seek redress in relation to government funded services should not be diminished by contracting out.

The Ombudsman has consistently adopted the view that whatever the method of service provision used, the relevant government agency remains accountable for its performance. This position is based on two premises. The most important is public funding. The fact that public money is being used in contracting out and in running Government Business Enterprises means that affected members of the public deserve accountability for the use of that money. The second basis for holding government agencies accountable for the provision of services is the continuing public trust.

Flowing from this is that any change from direct to contracted provision of services ought not to undermine the ability of individuals to seek redress for decisions or actions for which government is accountable.

A variety of proposals have been put forward to ensure that redress is available for people affected by the actions of private service providers. These include the extension of existing administrative law mechanisms to cover private contractors, giving citizens the ability to sue on the contract between the government and the provider, and the establishment of new remedies.

Unless and until the legislature chooses to act on such proposals, contracting agencies have a responsibility to ensure that members of the public who might be adversely affected by the manner in which a service is delivered have a right to redress, and that the redress mechanism is simple and accessible. The three main options for an agency are:

- to compel the contractor to provide redress through enforcement of the contract
- to provide redress to the citizen itself and then pursue the contractor for any costs, or
- to provide redress to the citizen itself without obtaining reimbursement.

From an examination of these options it is clear that a good contract is of prime importance. Agencies must think very carefully about the contracts they enter into with contractors. A good contract will anticipate and contain measures to deal with contingencies that can affect the performance of the contractor as well as the circumstances of the service users.

In framing and negotiating these contracts it will be useful for government agencies to put

themselves in the shoes of a potentially dissatisfied service user and consider all potential problems and situations which could give rise to such dissatisfaction. They will then have to consider appropriate remedies for these problems and situations and ensure that the contract makes adequate provision for them.

The agency needs to specify the level of service delivery and quantitative and qualitative service standards in the contract. Government agencies should ensure that contractors have proper complaint handling procedures and that the information gathered by contractors under these procedures is also fed-back to the government agency.

Another critical factor in achieving an acceptable level of customer service is to require contractors to inform service users about the contractor's complaint handling procedures. This will ensure that service users are properly informed about their rights, how they should complain and how their complaints will be handled.

There is also some merit in the idea that the agreed service standards should be communicated to service users together with published guidelines as to the redress that contractors will provide in relation to particular types of complaints.

There must be provision in the contract for an adequate level of monitoring of the service delivery, as part of the agency's contract administration responsibilities.

The contract also needs to set out the amount and quality of information that the contractor must provide to service users. Such rights of access may only be meaningful if there are appropriate record keeping obligations.

Some thought should also be given to the extent and circumstances in which the government agency can require the contractor to provide documents to the agency in relation to FOI requests being handled by the agency. Far too often those involved in the contracting out process hide behind 'commercial-in-confidence' as a reason for denying the public access to information.

What is needed is a careful assessment by government agencies as to whether there are legitimate and substantial reasons for keeping things secret. There are sometimes legitimate reasons for keeping sensitive commercial information confidential, and the FOI legislation throughout Australia explicitly recognises this.

The Royal Commission inquiry into the commercial activities of the former Western Australian government noted that 'effective accountability was a casualty of [the government's] entrepreneurial zeal'. The Commission noted:

*In a system of government such as our own, power is given to elected and appointed officials alike to be exercised for the benefit of the public. Of course, in any particular case, the question whether a proposal serves the public interest is the very stuff of politics, requiring open and vigorous debate. This makes for a healthy society. But when government seeks to 'live by concealment' — it can be anticipated that instances will occur where official power and position are both misused and abused. But what our inquiry has revealed is how lamentably lacking are the safeguards against misuse and abuse to which the public should be entitled.*

This inquiry illustrated the conundrum — if the public sector accountability mechanisms are diminished or eliminated, what takes their place? Experience has shown that a climate of secrecy is conducive to corruption, incompetence, inefficiency and maladministration.

