

Apologies

Why apologise?

When things go wrong, many complainants demand no more than to be listened to, understood, respected and, where appropriate, provided with an explanation and apology. A prompt and sincere apology for any misunderstanding is likely to work wonders. It often will avoid the escalation of a dispute and the significant cost in time and resources that can be involved.

In the Second Reading speech to amendments to the *Civil Liability Act 2002* (the Act) the then 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, L.A. 23/10/02)

Are apologies an admission of liability?

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

The *Defamation Act 2005* contains similar protection from liability (ss 20 & 38).

How should an apology be worded?

The most appropriate form and method of communication of an apology will depend on the circumstances of the particular case, the harm suffered, and what is hoped to be achieved by giving

the apology (for example restoration of reputation, acknowledgement of the wrong done, reconciliation or an assurance that a problem has been addressed or will not recur).

In principle, the most effective apologies incorporate the following ten elements which can be grouped under the six headings – recognition, responsibility, reasons, regret, redress and release.

Recognition:

- 1. description of the wrong** – a description of the relevant problem, act or omission (the wrong) to which the apology applies
- 2. recognition of the wrong** – an explicit recognition that the action or inaction was incorrect, wrong, inappropriate, unreasonable, harmful, etc
- 3. acknowledgement of the harm** – an acknowledgement that the affected person has suffered embarrassment, hurt, pain, damage or loss.

Responsibility:

- 4. acceptance of responsibility** – an acknowledgement/admission of responsibility for the wrong and harm caused.¹

Reasons:

- 5. explanation of the cause** – a simple, plain English explanation of the reasons for or cause of the problem², or a promise to investigate the cause (which could include a reference to any mitigating circumstances, eg, whether the act or omission was not discretionary or was unintentional).

Regret:

- 6. apology** – an expression of sincere sorrow or remorse, eg. that the action or inaction was wrong or at the very least an expression of regret
- 7. sincerity of communication** – a form or means of communication of an apology is very important as such matters can indicate or emphasise the level of sincerity of the apologiser.

Redress:

- 8. action taken or proposed** – a statement of the action taken or specific steps proposed to address the grievance or problem, by mitigating the harm or offering restitution or compensation³
- 9. promise not to repeat** – a promise or undertaking that the action or inaction will not be repeated.

Release:

- 10. request for forgiveness** – a release from blame (an optional element).

What apologies are not protected by the Civil Liability Act (the Act)?

The types of civil liability that are not covered by the protection for apologies in the Act (see s 3B) can be briefly summarised as liability for:

- an intentional violent act done with intent to cause injury or death (including sexual assault or misconduct)
- the contraction of a dust disease, or for a 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 1998*) to which the *Motor Accidents Act 1988* applies, or 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 or a worker or the death of a worker resulting from or caused by an injury, and compensation under various workers compensation legislation, the *Victims Support and Rehabilitation Act 1996* or the *Anti-Discrimination Act 1977*, or for a benefit payable under the *Sporting Injuries Insurance Act 1978*.

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

1 It should be recognised that while an apology cannot be used in court to prove fault or liability on the part of the person or body who made the apology, on the other hand the giving of the apology does not absolve the person or body from any potential liability.

2 Although an apology and information conveyed in an apology may not be admissible, the apology may convey information that can be used to obtain information in an admissible form in other ways for use in court proceedings.

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

Where a matter that falls (or is thought to fall) into any of the categories listed in s 3B, an apology should not be made 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.

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

Options for redress

Guidance on 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

Insurance

The content of coverage issued by NSW SICorp (the Treasury Managed Fund) to TMF agencies provides that:

9.3 (b) *The TMF Agency shall not, without the consent of the Claims Managers, make any admission, offer, promise or payment in connection with any accident or Claim, proceedings, investigation or inquiry, **other than as part of an apology made in accordance with the Civil Liability Act 2002.*** [Emphasis added]

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Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

ISBN: 978-1-921131-37-0

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brand refresh March 2019

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 This fact sheet is one of a series produced by the NSW Ombudsman. Feedback is welcome.