



## **9. GOVERNANCE**

Policy 9.1

Apologies – By Council

Version 2

## **9. GOVERNANCE**

### **9.1 APOLOGIES - BY COUNCIL**

#### **OBJECTIVE:**

To provide for circumstances where it would be appropriate for Council or an appropriate member of staff to give a prompt and genuine apology where a member of the public has been given wrong information, or provided with poor service or where the conduct of the Council or its staff falls within the domain of maladministration.

#### **POLICY:**

##### **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. 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 councils and their staff were often 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, 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).

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.'*

## 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*'.

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>

## 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 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.

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<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. In the limited circumstances (discussed overleaf) 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.*

- 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 192*, 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 council. When legal advice is sought by a council in such circumstances, the council 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.

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

### **WHAT DOES THIS MEAN FOR COUNCIL?**

The most common instances where it would be appropriate for council or an appropriate member of staff 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 council or its staff 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 legal advice has been obtained and considered 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 councils or their staff and members of the public.

(Acknowledgement: Information in Part provided by NSW Ombudsman Council Fact Sheet No 5.)

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