

WHY APOLOGISE?

When preparing a response to a complaint consider whether an apology should form part of the response.

If you make a mistake in a civilised society it is expected that you will apologise to the wronged person. This protocol often falls down when insurance is involved because many people equate an apology and an admission of liability as being the same thing.

Insurance policy

People are familiar with insurance policies which provide that an insured must not make an admission of liability without the insurer's consent. The LPLC policy has such a clause (cl 25). Because the insurer is agreeing to defend and indemnify the insured practitioner from any claim within the scope of the policy, it is important that it has the opportunity to assess and defend the question of liability. This can be prejudiced if the practitioner admits liability without the insurer's consent and before it has had the chance to make its own assessment of the claim.

In some instances, insured practitioners get so upset at the situations their clients end up in that they admit liability, when on an objective assessment the practitioner may have done nothing wrong. The need for independent objective assessment is often necessary to work out where legal responsibility lies.

Admission of liability v apology

The Victorian Ombudsman's report, *Apologies 2017*, says there is no one size fits all for apologies. According to the Ombudsman, any apology should be genuine and sincere and tailored to the circumstances. The elements of a good apology can include a recognition of the harm caused, an admission of responsibility or fault, regret or sympathy, a reason for what happened, what is being done to redress the situation and a request for forgiveness. But an apology does not always require all these elements.

The Victorian Ombudsman makes the point that an apology without an admission of liability is often considered a partial apology, but is better than none provided it sounds sincere.

Legislation

Appendix B of the *Apologies* report contains a table of jurisdictions in Australia where legislation protects apologies. Full apologies (including admissions of liability) given in relation to civil liability of any kind are protected from use in court in NSW, Queensland and ACT. Apologies in any civil proceedings are protected in South Australia. In Victoria only partial apologies in

proceedings involving death or injury of a person are protected (s14J *Wrongs Act 1958*).

In Victoria in defamation cases an apology does not constitute an express or implied admission of fault and is not admissible in evidence of fault or liability (s20 *Defamation Act 2005*).

Benefits of an apology

There are many benefits of apologising to a client including: the moral benefit of doing the right thing and the emotional benefit of showing respect to the recipient. There can also be a financial benefit as an apology can reduce ongoing animosity which in turn may lessen the time taken to resolve the issue.

For practitioners, giving an apology may prevent a client from taking any further action against the practitioner, improve the client's perception of the practitioner or be more likely to result in a settlement offer being accepted.¹

When and how to apologise

LPLC can assist practitioners draft an apology where it will help to resolve claims. Here is an example of an apology settled by LPLC in conjunction with a practitioner that does not contain an admission of liability.

"I am extremely sorry for what has happened. I can only imagine the stress and anxiety this is causing you. The conduct of the staff member was unforgiveable, however it is simply not possible for any law firm to monitor every action of its staff."

Practitioners should contact LPLC's risk and claims solicitors for assistance in formulating the terms of an apology as part of their risk management and claims prevention strategies when problems arise. ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

1. See Jennifer Robbennolt, *Apologies and Legal Settlement: An Empirical Examination* (2003) 102(3) *Michigan Law Review* p460 and Victorian Ombudsman's report, *Apologies 2017*.

TIPS

- Take time to carefully consider any complaints.
- There are many benefits to a sincere apology.
- An apology can be prepared in a form that does not amount to an admission of liability, but practitioners dealing with potential claims should check with LPLC to ensure an apology has LPLC's consent.

