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## The Profound Apology

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### **Overview**

The profound apology has been an essential part of abuse redress schemes adopted by a number of religious institutions in Australia for supporting victims of abuse within their organisations.

It has also been applied by the Australian Government in its response to institutional abuse within the Australian Defence Force through the Defence Abuse Response Taskforce (DART). A number of Australian State governments are in the process of adopting a similar redress scheme for dealing with abuse within their local police forces.

These schemes have not only had a transformative effect for the victims of that abuse they also have had a profound effect on those representatives giving the apology. As a result they have a powerful influence on bringing about a change of culture within those institutions.

### **Removing barriers for victims to obtain redress**

These redress schemes have a number of unique features.

Firstly, claimants are accepted into the scheme without having to prove the criminal standard of proof of beyond reasonable doubt that the abuses occurred. Some schemes have reduced the level of proof to the civil onus of the balance of probabilities while others have adopted a far lesser onus requiring the application simply to have the appearance of being plausible. This makes it easier for victims to come forward and report the abuse.

These type of claims are evidentially hard to prove because it is usually one person's word against the other. Historical claims are also difficult to sustain because of the passing of time. Dropping the onus of proof to a lower level allows the matter to be dealt with without the claimant having to re-engage with the perpetrator through the investigating process. This takes further pressure off claimants

Secondly, there is no involvement by the perpetrator of the abuse once the claim has been accepted. The apology is given by senior religious figures, military officers and police commanders on behalf of the institution in which the abuse occurred. Again this protects the claimant from having to re-engage with the perpetrator avoiding the very real potential for re-traumatisation.

The traditional restorative justice/ victim offender mediation approach of focusing on the rehabilitation of offenders through reconciliation with victims and the community at large does not apply with these redress schemes.

### **The development of abuse redress schemes within Australia**

The first significant redress scheme in Australia was the 'Towards Healing' processes set up by the Australian Catholic Bishops Conference in 1996 to deal with current and historical sexual abuse claims against church officials .

The 'Towards Healing' process was not offered as a substitute for the claimants criminal or civil rights. Victims of abuse were advised of their right to pursue civil and criminal claims. It was offered as an additional option for victims. It was a voluntary option for those who felt unable or unwilling to pursue their claims through the traditional adversarial legal processes.

These schemes are essentially a pastoral process of acknowledgement and apology with provision to offer financial reparation to victims to help them move forward with their lives. It was adopted by a number of other church bodies including the Australian Anglican Church 'Healing Steps' process and the South Australian Goodwood Orphanage redress scheme. The Defence Abuse Response Taskforce (DART) adopted a similar process for dealing with

abuse within the Australian Defence Force as has the South Australian Police Force for dealing with internal sexual abuse within the force.

### **The restorative mediation model**

The process adopted by the 'Towards Healing' protocols, the Defence Abuse Response Taskforce (DART) and the South Australian Police Force drew inspiration from the South African Truth and Reconciliation Commission. They have become an amalgam of a number of different ADR theories and practices including narrative mediation, transformative mediation and aspects of restorative justice.

Justice Albie Sachs of the South African Constitutional Court (retired in 2009) was originally against the Truth and Reconciliation Commission in South Africa because he believed that institutions such as the judiciary and the police are required to uphold the law. However he has since changed his mind. I quote from his autobiography

*"Courts are concerned with accountability in a narrow individualised sense. They deal essentially with punishment and compensation. Due process of law relates not so much to truth, as to proof. Before you send someone to jail there has to be proof of responsibility for the wicked details charged. When the penalties and consequences are grave and personalised, you need this constrained mode of processing.*

*The nation wishing to understand and deal with its past, however, is asking much larger questions: how could it happen, what was it like for all concerned, how can you spot the warning signs, and how can it be prevented from occurring again?*

*If you are dealing with large episodes, the main concern is not punishment or compensation after due process of law, but to achieve an understanding and acknowledgement by society of what happened so that the healing process can really start. Dialogue is the foundation of repair.*

*The strength of the Truth and Reconciliation Commission and the reason why it resonated so powerfully was that it was based essentially on dialogue- on hearing all the different viewpoints and receiving inputs from all sides." (Sachs 2009 P. 84)*

The approach adopted by the South African Truth and Reconciliation Commission is aligned to the narrative approach to mediation which encourages parties to tell their personal story of the conflict and reach agreement through the understanding of each other's story. Narrative mediation evolved out of the narrative therapy approach championed by Michael White and David Epston in the 1980s at the Dulwich Centre in South Australia (White and Epston 1990).

The redress schemes developed by Australian religious institutions, the Australian Defence Force and others are also in alignment with the transformative approach to mediation in that the purpose is not to seek resolution of the immediate problem but to seek transformation and healing (Morineau 2016, P 58) and the empowerment and mutual recognition of the parties involved (Baruch Bush and Folger 1996). The focus is therefore on healing through re-empowering the victims of the abuse through the recognition and acknowledgement by the institution of the wrong done to them and the expression of sorrow for the harm caused.

The traditional restorative justice model involves reconciliation between the alleged perpetrator and the victim. In the above redress schemes however the perpetrator takes no part and is in effect replaced by the organisation in which the abuse occurred. The institution, in effect, stands in the shoes of the perpetrator.

### **The role of monetary compensation and the apology**

*“There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of a reputation, on the one hand, and determining a sum of money as compensation, on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award and less restored by a lower or one. It is the judicial finding in favour of the integrity of the complainant that indicates his or her reputation not the amount of money he or she ends up being able to deposit in the bank” (Sachs 2009, P 99)*

This quote from a judgment by Justice Albie Sachs in a defamation case is also relevant in looking at the comparative reparative value of an offer of financial compensation with an offer of a personal apology in abuse cases.

All too often the focus for institutions and especially their legal advisors is the calculation of a sum of money that can assuage their legal and/or moral liability to the complainant. In other words, how much money is needed to be paid to resolve the claim. This can be seen in the call by a number of religious institutions for a national redress scheme that will independently assess the amount of damages.

For claimants' lawyers, particularly those that prefer to pursue class actions on behalf of multiple claimants, the aim is to maximise the dollar return for their clients and themselves through negotiating a lump sum settlement. It is a punitive approach seeking money for the loss, suffering an injury. From this monetary perspective the apology can be seen as merely a tactical means of reducing damages by the institution.

The result is a mindset geared towards enlarging or restricting the amount of damages to be awarded (Sachs 2009, P 102). For lawyers, who traditionally cultivate professional distance from their clients in order to deal with the emotional effects of conflict on themselves personally, this can prove an attractive and safe process. No messy emotions to deal with by the legal profession. For many lawyers the apology is seen as a second or even third order issue or ignored altogether as irrelevant to the ultimate success of the monetary claim.

What is needed is far more balance in the relationship between the apology and money awards.

Many victims of abuse are seeking more than just money. They are seeking to repair that part of their humanity that was violated by the abuser. The opportunity of a face-to-face meeting with a senior representative of the institution in which the abuse occurred is a way of re-establishing a human connection and an important first step. The provision of monetary compensation is an important but secondary consideration on this path towards some form of personal healing.

### **Outcomes for the face-to-face meeting**

The facilitated meeting between the victim of the abuse and the representative of the institution aims to achieve the following:

- an opportunity for the complainant to be heard with respect and dignity
- acceptance and acknowledgement of the harm to the complainant
- offering both a personal and a formal apology to the victim
- an offer of financial assistance and/or reparation to help the complainant move forward with their lives

At the heart of this meeting is the provision of a formal apology. It is important that the apology is given appropriately and sensitively. Preparation of both the complainant and the representative of the institution is essential.

### **The essential ingredients that underpin a profound apology**

An apology can be given on many levels from a general acknowledgement at one end of the spectrum to a profound apology at the other end.

The profound apology requires a number of essential ingredients. The first, and most important, is preparation. For both the person giving the apology and the one receiving, time is needed to prepare physically and emotionally for the meeting. This is best done with the assistance of a skilled professional mediator to facilitate the process.

The first step in the preparation is an assessment by the mediator as to whether such a meeting will breach the mediator's implied duty to '*do no harm*' (Rooney & Ross 2007 P 12). This 'do no harm' principle is particularly relevant if the person wanting to give the apology is the same person who has caused the original harm. There is a real danger that the original harm can be compounded by the process. This applies particularly to cases of sexual and extreme physical abuse. Those cases are excluded from the apology process which is instead given by the institutions within which those abuses occurred.

This assessment is carried out through pre- facilitation meetings with both the giver of the apology and the receiver. The aim is to assess not only the emotional readiness of both to engage with each other but more importantly whether they both have the capacity to relate to each other on a personal level. It is the ability of the two people to connect personally

with each other that is at the heart of the profound apology. Without this connection the depth of the apology is greatly lessened.

The key to achieving this connection comes through the conduit of the mediator. The mediator must first develop a personal connection with each of the giver and the receiver. This is done through an unfocused conversation with each of them separately starting with the question *“How do you feel about meeting (other person) in a few weeks time?”* The mediator will then explore in conversation form how the parties are feeling at this moment in time. This enables the mediator to build a personal relationship with each party.

For the person receiving the apology it will include the following question *“If the meeting with the person giving the apology turns out to be okay and that sometime in the future things start to feel better than they are now - what would it look like?”* This question is designed to test whether the receiver is capable of looking forward to the future or not. If the person receiving the apology cannot see any future then the mediator will need to explore more deeply the issue of capacity.

The next step in the pre-facilitation process is to ask both the giver and the receiver of the apology to prepare for the meeting by the paradox of not preparing. This helps create dissonance in their thinking and for the person giving the apology draws them away from the rational intellectual plane which is essential for them to connect personally with the person to whom they are giving the apology. Both parties are given formal instructions not to prepare but to simply come along to the meeting with an open mind.

The next step of the preparation is for the mediator to outline the facilitation process so that both parties are aware of what will happen when they meet. The facilitation starts with a short introduction by the mediator who will then ask the receiver of the apology the following question: *“What thoughts are going through your mind as you are sitting here today?”* The person giving the apology will be asked to sit and listen while the mediator engages in a general conversation with the receiver similar to that which occurred between them in the pre-facilitation meeting.

The mediator's role is to create a safe space for the receiver of the apology to say whatever they wish to say at that point. This allows the time and space for the giver of the apology to obtain a sense of that person through observing the conversation.

When the mediator feels that the time is right they will then turn to the giver of the apology and ask them the following question *"You have now had an opportunity to hear from (the receiver). What thoughts are going through your mind as you are sitting here at the moment?"* This will hopefully allow the giver to respond to the receiver at the same emotional level. At this point the words used by the giver are not as important as the tone and feeling of what they say. This is where the opportunity for a personal connection takes place.

The next step in the process is to call a break in the session and allow each party to have some time out. The session then resumes with a focus and a group discussion on how the receiver of the apology might move forward with their lives. This changes the conversation from the past to future. It is during this conversation that, at an appropriate time, the giver of the apology makes the formal declaration of apology.

In situations in which the person giving the apology also represents an institution, whether it is a religious body, the military or the police force, then there needs to be, in addition to a personal apology, a formal apology on behalf of that organisation. This apology is quite different and distinguishable from the personal apology given earlier.

The wording of the formal apology is important. The following wording is an example

*"I would now like to give you a formal apology on behalf of (the institution). I represent that institution today and I speak on behalf of all members of that institution past and present. On behalf of (the institution) I want to say to you 'sorry'. What happened to you should not have happened. And I say this on behalf of (my fellow bishops, fellow officers etc). It is important that I have met you today. I will take back the message and the lessons of your story to my institution and I will apply them in all my future dealings. I want to thank you for coming today as I know it must be difficult for you. If I can be of any further help in the future you can always contact me."*



In summary a profound apology is built on both parties connecting deeply at a personal level. This is done through the story being heard in a way only the receiver of the apology can give it -that is through an 'in the moment' narrative conversation. The second and equally essential part of the profound apology is the formal expression of that sorrow. This English word 'sorry' has a profound psychological effect on the person receiving it if given from the heart.

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[https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2915346](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2915346)

Also available to download at: <http://gregrooney.com.au/wp-content/uploads/2016/04/The-Profound-Apology-1.pdf>

**French Translation:** Les excuses prononcées par une institution dans un contexte d'abus sexuels ou physiques at <http://gregrooney.com.au/wp-content/uploads/2016/04/Les-excuses-prononcées-Greg-Rooney.pdf>

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