

Apologies

A practical guide

Apologies — A practical guide — 2nd Edition

March 2009

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: (02) 9286 1000
Facsimile: (02) 9283 2911

Toll free (outside Sydney Metro Area) 1800 451 524
Telephone typewriter: (02) 9264 8050

Web: www.ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au

ISBN: 978-1-921131-73-8

© Crown Copyright, NSW Ombudsman, March 2009

This work is copyright, however material from this publication may be copied and published by State or Federal Government Agencies without permission of the Ombudsman on the condition that the meaning of the material is not altered and the NSW Ombudsman is acknowledged as the source of the material. Any other persons or bodies wishing to use material must seek permission.

First printed 2007, 2nd edition 2009.

Foreword

Apologies are an integral part of our everyday social interactions. As one writer famously said: 'An apology is the superglue of life. It can repair just about anything.'¹

While we have been socialised from early childhood to apologise almost automatically for minor breaches of society's norms, this does not help us to deal with situations where our mistakes, or the harm they cause, are more complex or serious.

The aim of this guide is to assist people and organisations within the jurisdiction of the NSW Ombudsman to respond appropriately and effectively to situations where actions or inaction for which they are responsible have caused harm.

I apologise to the reader for the length of the guide. Given that the length of the guide was largely unavoidable if it is to help readers avoid the many pitfalls that can occur, my apology should of course be seen as more of an expression of 'sympathy' for the reader rather than 'regret' or 'remorse' over the length of the guide.



Bruce Barbour
Ombudsman

¹ Lyn Johnston, creator of the Comic Strip "For Better or For Worse".

The key messages in this guide

- 1) Apologies are not magic potions that work in every case, but they can be remarkably effective in addressing the key needs of people who have experienced harm. There will be some circumstances where an apology will serve no good purpose, but these will be the exceptions not the rule.
- 2) If a mistake or error led to harm, an appropriate apology is often seen by complainants as an essential prerequisite for, or part of, the proper resolution of their complaint — an appropriate apology is often the main thing they really want.
- 3) The greater the harm, the greater the likely value of an appropriate apology to the person harmed.
- 4) Crafting and delivering an appropriate and effective apology can be affected by a range of variables — the more complex the situation or the more reprehensible the action or inaction that led to the harm, the more care that is likely to be required.
- 5) The more an apology addresses the needs of the person harmed, the greater the likelihood it will be effective in reducing anger, restoring a damaged relationship, and helping the person to 'move on'.
- 6) An effective apology must usually include an express acceptance of responsibility or fault for the actions or inaction that caused the harm — that is, a 'full' apology. Even if a full apology may not be justified or warranted, a sincere expression of sympathy, sorrow or regret for the suffering of others may still be the right thing to do.
- 7) Where a problem has caused harm, a 'full' apology will consist of a 'package' of actions including admissions of responsibility, explanations of cause, actions to put things right (where possible) and expressions of sorrow and remorse.
- 8) Where a problem has caused harm, a 'full' apology may also be the culmination of a 'process' of communication, investigation and negotiation.
- 9) If an apology fails — for example because of a failure to accept responsibility (a partial apology) or because it is not seen as sincere — it is unlikely that any further attempt at apologising will be effective, so try hard to get it right the first time!
- 10) A partial or otherwise inappropriate apology can do more harm than good.

Contents

Part 1 — Introduction to apologies	1
1.1 What is an apology	1
1.2 Why people apologise	1
1.3 Why is it often difficult for people to apologise?.....	2
Part 2 — Why apologise	5
2.1 To satisfy the needs of people who experience harm.....	5
2.2 To satisfy the needs and responsibilities of those who caused the problem	7
2.3 To protect the public interest and ensure good administrative practice	9
Part 3 — A simple concept but complex to apply	11
3.1 Introduction	11
3.2 Key words used in apologies.....	11
3.3 The content of an apology.....	12
3.4 Circumstances influencing the content and delivery of an apology	12
3.5 Things to be avoided in apologies	12
Part 4 — A checklist for an effective apology	15
4.1 Work out what happened and who was responsible	15
4.2 Decide whether there should be any initial communication with the people concerned	15
4.3 Decide on the options for redressing the wrong and addressing the harm	15
4.4 Consider the motivations of the people who have been wronged	16
4.5 Determine the appropriate contents of the apology.....	17
4.6 Demonstrate sincerity	19
4.7 Decide on the timing of the apology	21
4.8 Decide how the apology should be communicated	21
4.9 Document of all communications.....	23
Part 5 — Legal and insurance issues.....	25
5.1 'Full' statutory protection for apologies	25
5.2 No liability 'apologies'	27
5.3 Insurance issues	27
Part 6 — Facilitating and encouraging apologies in the public sector	29

Annexure A	31
Circumstances influencing the content and delivery of an apology.....	31
1. Subject matter.....	31
2. Cause.....	31
3. Details of the harm.....	33
4. Responsibility for the harm.....	34
5. Insurance issues.....	36
6. Parties to the apology.....	36
7. What the person harmed wants and options for redress.....	37
Annexure B	41
Exceptions to the protection for apologies in the <i>Civil Liability Act 2002</i>	41

Part 1 — Introduction to apologies

1.1 What is an apology

An apology is an expression of feelings or wishes that can include sorrow, sympathy, remorse or regret as well as an acknowledgement of fault, a shortcoming or a failing. It communicates a message that may pave the way for a reconciliation.

Nobody is perfect, and neither is any organisation — we all make mistakes. Things can and will go wrong, and there are many different ways to go about making an apology. The most appropriate form and method of communicating an apology will depend on the circumstances of the particular case, the harm suffered, and what you hope to achieve by giving the apology. This might include restoring a reputation, acknowledging the wrong done, reconciliation, or providing an assurance that a problem has been addressed and will not happen again.

There are a number of communications that go part way towards meeting the essential elements of a full apology, but are much less likely to be successful because of their limited nature — in particular, a failure to acknowledge fault.

These 'partial' apologies include:

- expressions of sympathy or empathy alone — eg I'm sorry this happened to you
- expressions of regret for the act or its outcome alone — eg I regret that this happened
- expressions of sorrow alone — eg I'm very sorry for what has happened
- an acceptance of responsibility or fault — eg I take full responsibility for what occurred — but without any expression of sympathy or regret.

1.2 Why people apologise

When people apologise, they do so for various reasons. They may be motivated by internal, personal factors or more external 'public' factors.

Internal or personally focused motivations (primarily arising out of a recognition that an action or inaction was wrong) might include:

- *politeness* — etiquette, the automatic response to minor social infractions
- *temperament or habit* — how a person usually behaves
- *self image* — a view or feeling that an action or inaction was contrary to who the person aspires to be
- *conscience* — an attempt to address negative consequences such as shame or guilt
- *regret* — a wish that some action or inaction, or the harm it caused, had not occurred
- *remorse* — a realisation that some action or inaction was wrong and that this caused harm to another
- *empathy* — feeling strongly for the suffering of others
- *ethics* — doing the 'right' or honourable thing.

External or more publicly focused motivations (primarily arising out of self-interest or coercion) might include the six Cs:

- *Containment* — a desire to contain, evade or avoid ongoing or potential negative repercussions such as embarrassment, bad publicity, damage to reputation or legal action.
- *Calculation* (or strategy) — a mechanism to regain control or influence over an issue or a situation or to undercut/reduce the level of support for the wronged party by taking the moral high ground, including reacting to external media or political pressure to apologise.
- *Credibility* — a desire to establish a positive image.
- *Convenience* — meeting the expectations of colleagues or the public that an apology should be given.

- *Compliance* — complying with directions from superiors or an employer policy or directive on disclosure and apology.
- *Coexistence* — a desire to repair/restore a relationship.

Although these various motivations range from positive to negative, the particular motivation of the person giving an apology does not necessarily impact on the effectiveness of the apology. The key factor is how well the apology meets the needs of the recipient.

If a person has internal or personal motivations for apologising, they will often have a psychological need for — and may implicitly or explicitly seek — forgiveness. When you make an apology you can ask for forgiveness, but any response to such a request is totally at the discretion of the person who has been harmed or wronged. This issue may need to be negotiated through ongoing interactions between the people responsible for and affected by a wrong/harm. If there is forgiveness, it can take many forms — from the more common responses that disagree with the need to apologise or downplay the offence/wrong (eg ‘That’s OK’), to the rarer explicit acknowledgement that harm was caused and an apology has been accepted (eg ‘I accept your apology or I forgive you’).

1.3 Why is it often difficult for people to apologise?

It is important to recognise that most people do not like to admit they are wrong — but this is a necessary precondition for a sincere apology. People may find it difficult to admit fault and apologise because of a range of internal or external reasons.

Internally focused reasons based on, for example, emotional or psychological factors include:

- *denial* — admitting being wrong or responsible for a problem is a truth many people don’t wish to face
- *inability to accept responsibility* — an inability to accept responsibility for their actions or ownership of a problem
- *weakness* — concern that giving an apology could be seen as a sign of weakness
- *avoidance* — a desire to avoid a difficult interaction with the person who was wronged
- *fear of rejection* — fear that their apology will not be accepted, that there will not be forgiveness.

Externally focused reasons based on, for example, liability or reputation factors include:

- *damage to reputation* — a fear that an apology will damage their reputation and they will suffer a loss of dignity, face or respect
- *confirmation of responsibility* — concern about confirming responsibility for something that was otherwise only speculated or assumed
- *acknowledgement of incompetence* — a reluctance to acknowledge incompetence or inappropriate behaviour
- *acceptance of liability* — fear of accepting legal liability or blame, or providing evidence that could be used against them.

A guide such as this can focus on the why, when and how (or how not to) of apologies, but the decision to accept responsibility and make a full apology comes down to the integrity, courage and personal strength of each person whose action or inaction has caused harm — or the responsible people in an organisation that has caused harm.

Example apology

Former Canadian Prime Minister, The Right Honourable Brian Mulroney, apologising to Japanese Canadians in 1988.

'Most of us in our lives have had occasion to regret certain things that we have done. Error is an ingredient of humanity, so too is apology and forgiveness. We all have learned from personal experience that as inadequate as apologies are they are the only way we can cleanse the past so that we may, as best we can, in good conscience face the future.

I know I speak for members on all sides of the House today in offering to Japanese Canadians the formal and sincere apology of this Parliament for the past injustice against them, against their families and against their heritage, and our solemn commitment and undertaking to Canadians of every origin that such violations will never again in this country be countenanced or repeated.'

Part 2 — Why apologise

2.1 To satisfy the needs of people who experience harm

When things go wrong, many of the people who experience harm or have otherwise been wronged want no more than to be listened to, understood, respected and — if appropriate — given an explanation and apology. A prompt and sincere apology for any misunderstanding is likely to work wonders. It will often avoid the escalation of a dispute and the significant cost, time and resources that can be involved. Apologies can also start a process that can lead to the resolution of a conflict or dispute, particularly if there's an ongoing issue that needs to be dealt with. Apologies can help to build trust — a necessary first step to a better understanding in a damaged relationship.

A 'full' apology given at the right time can provide important emotional or psychological benefits, for example:

- restoring dignity, face and reputation
- providing vindication or a sense of justice or an acknowledgement that the recipient was right
- giving peace of mind to the recipient through the giver accepting responsibility for actions or ownership of a problem (assuring the recipient that he or she is not at fault, a common feeling after a mishap), and/or through the giving of an explanation as to what occurred and why.

A 'full' apology can also have interactional benefits by increasing the level of trust between the giver and receiver which may greatly assist to maintain or restore their relationship — particularly important if there is to be on-going interaction between them.

Example apology

Former Premier of NSW, Bob Carr, apologising to the Aboriginal people of NSW in the Legislative Assembly on 14 March 1996.

'If there is to be reconciliation with justice, there must be an acknowledgement of a great wrong — something beyond the havoc wrought by the impact of our civilisation upon a people who had nurtured this continent for more than 50,000 years before 1788; something beyond the history of dispossession, disease, and disruption and the relegation of Aboriginal people to mere fringe dweller in their own land. I refer to the fundamental denial of Aboriginal identity — the pervasive assumption that Aboriginal culture, customs, languages, beliefs and traditions were worthless. That denial permeated policies and laws passed by this Parliament over more than a century. It was the ultimate dispossession: to rob a people of the value of their identity. There could be no greater wrong than that.'

'... I reaffirm in this place, formally and solemnly as Premier on behalf of the government and people of New South Wales, our apology to the Aboriginal people. I invite the House to join with me in that apology.

In doing so, I acknowledge with deep regret Parliament's own role in endorsing the policies and actions of successive governments which devastated Aboriginal communities and inflicted, and continue to inflict, grief and suffering upon Aboriginal families and communities. I extend this apology as an essential step in the process of reconciliation.'

When something goes wrong, the injured party or their family want to know what went wrong, who was responsible and how those responsible are going to address the problem. They also want to know that they will be properly cared for or compensated for damage or loss.

If things then become difficult, the problem often isn't the event that caused the damage or injury — it is the way the person was treated afterwards. This could be, for example, a failure to communicate or acknowledge that something went wrong and to admit error.² Experience in many fields indicates that people who have been harmed do not immediately seek retribution, revenge or vindication. There is usually a two stage process — between the original issue or problem and a very negative response there is usually some intervening event or conduct (sometimes referred to as a 'double deviation'). Experience indicates that this intervening event or conduct will usually relate to how the problem was dealt with, how the person was treated or how the person's initial expression of concern was handled. There will therefore usually be a window of opportunity after something goes wrong to properly address the problem and its impact in ways that are acceptable to all concerned.

If the response to the individual's concerns is respectful, positive and constructive (which can include an apology if appropriate), those concerns can often be resolved satisfactorily, enabling the person to 'move on'. If the response is rude, dismissive, negative, defensive or misleading, this is likely to result in an escalation of the problem with consequences that are detrimental to the interests of all the parties concerned.

If answers are not forthcoming, if there is a failure to acknowledge the problem and its cause or the person suspects a cover up, this is likely to result in resentment and anger. When people are angry they often want to lash out — to cause pain. Other than in circumstances where a person needs to address the direct financial impacts of an error or wrong, this is when they are likely to start to think about money as a way to inflict this pain. When up against powerful organisations or individuals, the best way for someone to fight back is often to go to a lawyer.

A good example was given in evidence to an inquiry into handling complaints in the NSW Health Department³ where Professor Clifford Hughes, Chief Executive Officer of the NSW Clinical Excellence Commission, recalled the following incident:

We had 11 patients in our unit who were given a contaminated solution that we inject into the heart to stop it while we operate. Five of those patients were to go on and to die. There was an error somewhere in the system; ...

But long before we knew what had happened, one of my senior colleagues called all the families together and he and I sat down with the 11 families and said, 'This is a terrible thing that has happened. It is awful. We are truly sorry that this has happened. We are not going to do another operation until we have got these patients out of the woods'. And we did not. We said, 'We are going to leave no stone unturned until we find out what the cause was'. We knew it was an infection; we knew it had occurred somewhere in the processing of that solution, which was beyond our control as individual clinicians. But we said sorry. None of those patients took legal action ...

Not only did none of those patients take legal action, but two of them came back to the same hospital and the same surgeons to have repeat surgery many years later because they had confidence that the clinicians were actually on their side and were empathic with them. And, surely, in this day and age we can allow our clinicians to be empathic with the people that, after all, they went to work to help.

Example apology

Mayor of San Francisco, Gavin Newsom, apologising in 2007 for an affair with the wife of his former campaign manager.

'I want to make it clear that everything you've heard and read is true. And I am deeply sorry about that, I hurt someone I care deeply about, ... his friends and family. And that's something I have to live with and something that I am deeply sorry for.'

² *A Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients*, Liebman, CB, & Hyman, CS (2004), *Health Affairs*, 23(4), 22–32.

³ Proceedings before the General Purpose Standing Committee No. 2 *Inquiry into Review of Complaints Handling within New South Wales Health*, 14 September 2006, NSW Parliament.

Example apology

David Neeleman, CEO and founder of Jet Blue, apologising for delays in 2007.

[His apology included a commitment to make things right and a Customer Bill of Rights including refunds, vouchers for future travel, and cash payments for certain cancellations, delays over booking etc.]

'We are sorry and embarrassed. But most of all we are deeply sorry ...

Words cannot express how truly sorry we are for the anxiety, frustration and inconvenience that you, your family, friends and colleagues experienced. This is especially saddening because Jet Blue was founded on the promise of bringing humanity back to air travel, and making the experience of flying happier ... We know we failed to deliver on this promise last week ...

You deserved better — a lot better — from us last week and we let you down. Nothing is more important than regaining your trust ...'

2.2 To satisfy the needs and responsibilities of those who caused the problem

From the perspective of the people responsible for the problem, failing to acknowledge that something went wrong:

- is dishonest, or at least lacking in full honesty
- is often counter productive
- can leave the person responsible 'living a lie' or experiencing feelings of inner turmoil, shame or guilt.

Benefits that can flow to the giver of a 'full' apology might include:

- *moral benefits* — from doing the right thing
- *emotional/psychological benefits* — including:
 - showing respect to the recipient
 - giving peace of mind to the recipient through the giver accepting responsibility for a problem and/or through giving an explanation as to what occurred and why
 - forgiveness, allowing both the giver and the receiver of an apology to 'move on'
- *interactional benefits* — by repairing or laying the groundwork for a restored relationship (which is particularly important where there will be on-going interaction between the giver and receiver), and improving the credibility of the giver and the level of trust between the giver and receiver
- *personal or operational benefits* — from a reduction in the likelihood and/or severity of negative outcomes
- *financial benefits* — reducing the chances of ongoing difficulties that can seriously impact on time and resources (eg, litigation)
- *systemic benefits* — the transparency that goes with a 'full' apology increases the chances that mistakes or other problems will be properly addressed.

Where responsibility is reasonably clear, an agency or relevant official may be confronted by the need to decide whether to offer a 'full' apology (including the taking of reasonable steps to 'put things right') or do nothing and wait and see if a problem results in civil litigation (at which time liability is denied and the action defended).

In NSW and the ACT, where there is a statutory protection for a 'full' apology, some of the differences between these two approaches are set out on the Table that follows. In the other Australian States and Territories where there is only statutory protection for 'partial' apologies, another factor to consider would be how any information conveyed in a 'full' apology could be used against the giver if a matter proceeded to legal action. However, presumably if a person or body gave a 'full' apology (that included an admission of responsibility), and the matter still resulted in legal action, the issue to be fought out would relate to quantum, not liability.

Voluntary ‘full’ apologies	Civil action (where liability is denied)
Objective: <ul style="list-style-type: none"> To resolve a problem To do the ‘right thing’ 	<ul style="list-style-type: none"> To avoid or limit liability
Focus: <ul style="list-style-type: none"> Focus on the cause (the wrong done — ‘<i>I am at fault</i>’) 	<ul style="list-style-type: none"> Focus on the effect (the harm caused — ‘<i>You are responsible</i>’)
Ethical considerations: <ul style="list-style-type: none"> Involves an ethical/moral judgement by the ‘responsible’ party 	<ul style="list-style-type: none"> Does not involve an ethical/moral judgement by either party
Ownership and control: <ul style="list-style-type: none"> Action initiated by ‘responsible’ party Outcome decided by the ‘injured’ party Not enforceable — voluntary acceptance of responsibility 	<ul style="list-style-type: none"> Action initiated by ‘injured’ party Outcome decided by a third party Enforceable — imposition of responsibility by the ‘State’
Approach: <ul style="list-style-type: none"> Proactive Risk management Open communication ‘Responsible’ party accepts responsibility and tries to rectify the problem (“<i>fess up and fix it</i>”, ie, admit and rectify) 	<ul style="list-style-type: none"> Reactive Reliance on legal rights Silence or guarded communication ‘Responsible’ party makes no admissions or denies responsibility (‘deny and defend’)
Outcomes: <ul style="list-style-type: none"> A relatively short process Both parties can be winners Can ‘cure’ mental anguish, emotional suffering, stress and trauma Can properly address humiliation and loss of face Can establish trust, restore a relationship and improve reputation Can resolve the conflict May lead to forgiveness 	<ul style="list-style-type: none"> A lengthy process — can take years A winner and a loser Very unlikely to ‘cure’ mental anguish, emotional suffering, stress or trauma May properly address humiliation and loss of face Will not establish trust, restore a relationship or improve reputation May not resolve the conflict Very unlikely to lead to forgiveness
Costs and other impacts: <ul style="list-style-type: none"> Little or no legal costs Harm can be addressed in a range of ways (not just financial compensation) Impacts on staff time and stress likely to be short-term 	<ul style="list-style-type: none"> Significant legal costs Harm reduced to monetary terms (often on a very artificial basis) Impacts on staff time and stress likely to be significant and on-going (particularly where responsibility/liability is denied)
Accessibility: <ul style="list-style-type: none"> Available to all (need not involve a lawyer) 	<ul style="list-style-type: none"> Only available to those with legal representation (generally)

Jennifer Robbennolt of the University of Illinois College of Law conducted research into recipients' interpretations of apologies and the effect of those apologies on their willingness to accept a settlement offer in a dispute. The hypothetical scenario was a relatively simple personal injury dispute, a pedestrian — bicycle accident.⁴

She found that:⁵

- If no apology was received, 52% of respondents were inclined to accept a settlement offer and 43% were inclined to reject the offer.
- Receiving a 'partial' apology increased the likelihood that the person would be unsure how to respond to the settlement offer — 35% inclined to accept and 25% to reject (ie a 'partial' apology was often worse than no apology at all).
- Receiving a 'full' apology increased the likelihood that the respondent would accept the offer and decreased the likelihood that they would reject it — 73% were inclined to accept and 13–14% to reject.

She concluded that⁶:

... a full apology was viewed as more sufficient than either a partial apology or no apology. An offender who offered a full apology was seen as experiencing more regret, as more moral, and as more likely to be careful in the future than one offering a partial or no apology ... the conduct of the full apologist was judged more favourably than that of offenders who offered either a partial or no apology. Participants expressed greater sympathy and less anger at the offender who offered a full apology than they did at offenders who offered either a partial or no apology. Participants also indicated more willingness to forgive an offender who gave a full apology than they did for offenders offering a partial or no apology.

2.3 To protect the public interest and ensure good administrative practice

When things go wrong, public sector agencies and their staff should accept responsibility and take 'ownership' of the problems they are responsible for. This is what good management practice dictates, ethical conduct requires and the public expects.

There are also ethical requirements and community/customer expectations on non-public sector organisations and their staff to take responsibility for the problems they have caused.

If public sector staff make full apologies this:

- ensures that staff and their agencies are held properly accountable for their actions
- ensures proper transparency in public administration
- will increase the chances that mistakes or other problems will be properly addressed (due to the transparency that goes with a 'full' apology), and
- is the appropriate ethical and moral response where an action or inaction has caused harm.

Unfortunately, we sometimes see examples of organisations or individuals who refuse to take responsibility for a problem and the harm it caused. Instead they ignore the problem or deny it exists. When the problem is obvious and responsibility clear — or reasonably perceived to be so — denying the existence of or responsibility for a problem is likely to be seen as wilful and deceptive. This can have serious detrimental effects on levels of trust and credibility.

Research has found that a relationship of trust harmed by deception never fully recovers:

*'Unlike untrustworthy actions alone, untrustworthy actions combined with deception causes enduring harm to trust', and '... deception may harm the trustee's credibility, and as a result subsequent promises may be viewed sceptically and be discounted.'*⁷

4 Robbennolt, Jennifer K, "Apologies and Legal Settlement: An Empirical Examination", Michigan Law Review, Vol 102, No 460, 2003. Available at SSRN <http://ssrn.com/abstract=708361> (at p.484).

5 As above at p.486.

6 As above at pp.487–488.

7 *Promises and Lies: Restoring Violated Trust*, Maurice E Schweitzer, John C Hershey and Eric T Bradlow, July 01, 2006 in *Knowledge @Wharton*, University of Pennsylvania.

Such responses can also have other seriously detrimental impacts for the organisation or person concerned — for example, in relation to their perceived honesty and integrity and the level of respect in which they are held. If such responses are used regularly or publicly, these detrimental effects increase significantly.

Example apology

Former President Bill Clinton, apologising to the Tuskegee survivors in 1997.

'No power on earth can give you back the lives lost, the pain suffered, the years of internal torment and anguish. What was done cannot be undone. But we end the silence. We can stop turning our heads away. We can look you in the eye and finally say on behalf of the American people, what the US government did was shameful, and I am sorry ... To our African-American citizens, I am sorry that your Federal Government orchestrated a study so clearly racist. This can never be allowed to happen again. it is against everything our country stands for.'

Part 3 — A simple concept but complex to apply

3.1 Introduction

The idea of an apology is relatively simple — that expressing sincere sorrow, regret or remorse for wrong doing and/or the harm it caused can be an effective way to help resolve a problem and restore the relationship between the giver and the receiver. However this simple idea tends to mask the complexities involved in its implementation.

The content and delivery of an apology is a particularly good example of the old adage that ‘the devil is in the detail’. For an apology to be effective, a wide range of issues need to be considered. The most appropriate content and method of communication of an apology will depend on the circumstances of the particular case and what you hope to achieve by giving the apology. For example this could be restoration of reputation, acknowledgement of the wrong done, reconciliation, or an assurance that a problem has been addressed and will not happen again.

When making an apology, there are several words that can be used to express relevant feelings or wishes — such as sympathy, sorrow, regret, remorse and contrition. Misusing these words can obscure the message or cause the recipient to misinterpret your intention. This can seriously damage the recipients’ perception of the sincerity of the apology — which in turn has a serious effect on the effectiveness of the apology to resolve a problem or restore a relationship. If a mistake is made, in many cases there is no second opportunity. A failed apology often makes the situation worse, and any further attempt to apologise faces a barrier that can be insurmountable.

3.2 Key words used in apologies

In this guide, we have given key words used in apologies the following meanings.

Key words	Focus on cause or effect	Nature of the message	Where useful
Sympathy	Effect of harm	Feeling of compassion, commiseration or empathy for suffering or misfortune	No responsibility for the cause necessary
Sorrow	Effect of harm	Feeling of sadness, distress, grief or disappointment for harm caused	Some level of involvement in or contribution to the cause (not necessarily full responsibility or control)
Regret	Cause and/or effect of harm	Wish that an action/inaction and/or the harm it caused had not occurred	Some level of involvement in or contribution to the cause (not necessarily full responsibility or control)
Remorse	Cause of harm	Feeling of fault, guilt or shame for action/inaction that the person accepts was wrong	Some form of responsibility or control over, or material contribution to, the cause
Contrition	Cause of harm	Feeling of remorse plus a wish to atone or make good	Some form of responsibility or control over, or material contribution to, the cause

3.3 The content of an apology

Depending on the circumstances, the chances that an apology will be effective are greatly increased if they address the six Rs.

- *Recognition* — including a description and recognition of the wrong and an acknowledgement of the harm caused.
- *Responsibility* — an acceptance of responsibility.
- *Reasons* — an explanation of the cause.
- *Regret* — an expression of sincere sympathy, sorrow, regret, remorse and/or contrition.
- *Redress* — an indication of the action taken, proposed or offered to address the problem and a promise that it will not reoccur.
- *Release* — a request for forgiveness (optional, but important).

For more details about these key elements of an apology, please see 4.5.

3.4 Circumstances influencing the content and delivery of an apology

For apologies to be appropriate and effective, their content and delivery will be significantly influenced by the circumstances of each case — one size certainly does not fit all.

There are a wide range of issues that you need to consider when crafting an appropriate apology.

- *Subject matter* — does the subject matter concern the original problem or how it was dealt with, or both?
- *Cause* — was the cause an action or inaction, was it intentional or unintentional and in each case was it malicious, well-meaning but flawed, an appropriate exercise of discretion, or blameless?
- *Details of the harm* — the nature, timing, seriousness, duration, cost implications and awareness of the harm by the person affected and whether the impact of the harm is public or private.
- *Responsibility for the harm* — the type, nature and degree of responsibility, and the level of certainty about this responsibility.
- *Insurance issues* — are there any and, if so, how do they impact?
- *Parties to the apology* — who should give the apology and who should receive one?
- *Options for redress*, and what the person harmed wants — what is the most appropriate form or redress, ie communication, rectification, mitigation, satisfaction and/or compensation.

For a more detailed discussion of these issues, please see sections 4.3 and 7 of Annexure A.

3.5 Things to be avoided in apologies

The effectiveness of an apology can be significantly reduced by including or leaving out things that immediately prompt the recipient to question the sincerity of the apology. It is particularly important to avoid the following types of apologies.⁸

Subject matter

- *Inaccurate apologies* — apologies that incorrectly identify the issues of primary concern to the recipient.
- *Misguided apologies* — apologies for action/inaction or harm for which there was in fact no obvious responsibility.
- *Generalised apologies* — apologies that fail to identify the relevant problem, fault or mistake eg 'I am sorry for what occurred,' or the classic 'mistakes were made.'

⁸ Several of these problems are also referred to by Dr Aaron Lazare in *On Apology*, Oxford University Press, 2004.

Content

- *Avoidance apologies*:
 - apologies that try to excuse or avoid responsibility eg *'I am sorry for what I said, but ...'* (while excuses should be avoided, an explanation may be appropriate)
 - apologies that focus on the action or reaction of the recipient rather than the conduct of the person giving the apology eg *'I am sorry you took offence at what I said'*
 - apologies that question whether there was a problem eg *'A comment was made that may have caused offence'*.
- *Conditional apologies*:
 - apologies that question whether the recipient was harmed eg *'If you were offended by what I said, then I am sorry'*
 - apologies that are untargeted and conditional eg *'If somebody was offended by what I said, then I am sorry'*
 - apologies that question whether any harm was done eg *'If what I said was offensive, then I am sorry'*.
- *Partial apologies*:⁹
 - apologies that fail to include an admission of responsibility for the problem and the harm caused, eg mere expressions of regret, sympathy, sorrow, benevolence, etc
 - apologies that use the passive voice without taking 'ownership' of the problem eg *'An offensive comment was made'*.

Delivery

- *Impersonal apologies* — eg apologies in form letters.
- *Untargeted apologies* — written apologies that do not identify the recipient eg *'To whom it may concern ...'*
- *Delegated apologies* — apologies by a person who does not have direct or reasonably perceived responsibility for what occurred eg *'On behalf of ... I would like to apologise for the offensive comments he made ...'*
- *Misdirected apologies* — apologies made to the wrong person, or apologies made to people indirectly affected but not to the person directly affected.
- *Selective apologies* — apologies made to only some of the people who were affected.
- *Serial apologies* — the same person apologising too often for different things [this can impact on the perceived sincerity of the person making the apologies].
- *Repeat apologies* — a series of apologies for the same reoccurring problem [each has less credibility than the last].

⁹ Sometimes referred to as 'non-apology' apologies.

Example apology

President and Chief Executive Officer, and Vice President, Chief Clinical Officer of US hospital in a memo to staff apologising in 2008 for a tragic medical error.

“SUMMARY: We are saddened to tell you that [name of the hospital] has made a tragic medical error for which we accept full responsibility. We have apologised to the family and are doing everything we can to support them. We also are supporting our involved staff ...

DETAILS: On Tuesday ... a patient with presumed cancer of the kidney had their healthy kidney removed, leaving the affected kidney inside their body.

This is a tragic error and [name of the hospital] assumes full responsibility. WE have apologised to the patient and to the family. We are working closely with them to support them in every way we can during this difficult and challenging time in their lives.

The error occurred in diagnosis before the surgery took place. The surgery staff followed all appropriate safety protocols, including marking the surgical site and pausing before surgery to confirm the final details. Unfortunately, the side of the affected kidney was incorrectly identified in the medical chart weeks before the surgery took place ...

This is a devastating tragedy for the family. It is also a tragedy for all of us at [name of the hospital]. We know we can say that everyone at [name of the hospital] feels this error personally and we offer our thoughts, prayers and support to the patient and family.

... We will use Root Cause Analysis to determine how we can prevent this error from ever occurring again, and we will share our findings with other hospitals so they can also learn from this experience.

Those of us privileged to work in health care know that there are many opportunities to do great good for patients. Unfortunately, in the course of providing care, there are also opportunities to make errors. We work continuously to eliminate errors and will not rest until we reduce them to zero. Internally, we encourage you to talk in your teams about our opportunities to do great good and how we can avoid and entirely eliminate medical errors ...

The patient and family have chosen to remain at [name of the hospital] for their recovery. We have discussed this communication with them and they know that we are sharing this information with [name of the hospital] employees.

Part 4 — A checklist for an effective apology

4.1 Work out what happened and who was responsible

The first step is to work out what happened and who was responsible. It is very important to identify at the outset the nature and scope of a problem and whether the organisation, or someone within the organisation, was responsible. You may need to conduct an inquiry or an investigation.

In many cases some assessment will be needed to see if an apology is the appropriate response and, if it is, to enable you to properly structure a meaningful and effective apology. You may need to have some initial contact with the person concerned. This may also help you to get a sense of whether they want or would be open to an apology.

If it was the organisation or a person within the organisation that was responsible, you need to ask:

- Is this responsibility certain, highly likely, more likely than not, or merely a possibility?
- Were they fully or only partially responsible for the wrong?

If neither the organisation nor its staff were in any way responsible for the wrong, an explanation should be provided but no apology given — although it may be appropriate to express sympathy.

It is also important to establish the full nature and scope of the harm caused to the person concerned and the relationship between that harm and the wrong — ie the degree to which the harm is referable to or caused by the wrong.

4.2 Decide whether there should be any initial communication with the people concerned

The second step is to determine if it is important to communicate with the person concerned and, if so, when and the content of the communication. For example if it is necessary to conduct inquiries into the cause of and responsibility for the problem, this should generally be communicated to the person concerned. This initial communication could include an expression of sympathy for their plight or circumstances, which does not admit fault or responsibility.

If an apology is requested or demanded, or is otherwise warranted, and the case is complex and/or sensitive, it may be important to discuss the issue with the intended recipient. This will help you to:

- Reach a common position on the nature and scope of the wrong that occurred and the details of the harm experienced.
- Identify or clarify what the person wants from the apology and believes is appropriate to address or redress the wrong.

The particular content and method of communication necessary for an apology to be effective can be significantly influenced by the perceptions, needs and motivations of the person who has (or perceive they have) been harmed by a wrong. Before giving a formal apology, it will often be necessary for there to be preliminary discussions, written communications or even negotiations — possibly conducted by a third party.

4.3 Decide on the options for redressing the wrong and addressing the harm

The third step is to consider options to try to redress the wrong and address the harm. Often a mere expression of sorrow, remorse or regret alone will not be sufficient to resolve a dispute or a problem. Such an expression needs to be accompanied by, or packaged with, an acceptance of fault or responsibility as well as information about how the giver of the apology intends to try to redress the wrong and address the harm it caused.

Depending on the nature and scope of the harm, and the motivations of the person wronged, a range of options for redress may be appropriate.

These options can be grouped into five categories:

- communication
- rectification
- mitigation
- satisfaction
- compensation.

These categories are discussed in more detail in section 7 of Annexure A.

4.4 Consider the motivations of the people who have been wronged

The fourth step is to consider the motivations and needs of the person harmed by a wrong. They may want or expect an apology (including an admission and acceptance of responsibility) for a range of reasons.

These reasons could include one or more of the following:

- *Reassurance* — that something was a mistake and not indicative of an attitude or approach eg an 'I'm sorry for the delay' when a person has been left waiting for attention at the front counter for an unreasonable period of time.
- *Restoration of reputation* — to save or restore face, dignity, reputation, respect or honour eg a public retraction and apology for a defamatory comment in a newspaper.
- *Reason, explanation or communication* — an explanation of what happened and why.
- *The 'right thing' ie a sense of justice* — there is a principle at stake that the individual is not prepared to compromise, so the person responsible must do the right thing.
- *Recognition or acknowledgement of hurt* — an acknowledgement that the recipient was harmed.
- *Revenge, humiliation or punishment* — a desire to humiliate or punish those responsible, to make them suffer.
- *Responsibility*:
 - an admission that somebody else was responsible for the wrong and that the recipient was right, or at least was not in the wrong or otherwise at fault
 - an acceptance of responsibility by those responsible to rectify the problem or compensate for the harm.
- *Rectification* — to ensure that a problem will not re-occur, either for the recipient of the apology, other people or both.
- *Reparation or redress* — to be returned to the position they would have been in but for the wrong or to achieve some other form of redress, such as symbolic compensation.
- *Resolution* — a first step towards resolving a conflict or dispute, to enable a fresh start to a relationship.

The particular content and method of communication necessary for an apology to be effective can be significantly influenced by the perceptions, needs (both physical and psychological) and motivations of the person or people who have been harmed by a wrong.

The essential elements of an effective apology reflect what people affected by a problem are likely to believe to be a fair and reasonable response. When things go wrong, there is considerable congruence between the appropriate response dictated by good management practice and what people affected by the problem are likely to expect. If an organisation or person has properly responded to a problem, giving an apology can therefore be seen as merely being transparent about that response.

When things go wrong

What good management practice dictates	What people affected by the problem expect
Recognition <ul style="list-style-type: none">• Recognition that there is or was a problem — what went wrong and the harm caused.	Recognition <ul style="list-style-type: none">• Recognition that there is or was a problem — what went wrong and the harm caused.
Responsibility <ul style="list-style-type: none">• Acceptance of responsibility for the problem.	Responsibility <ul style="list-style-type: none">• Acceptance of responsibility for the problem.
Reasons <ul style="list-style-type: none">• Identification of the cause of the problem.	Reasons <ul style="list-style-type: none">• An explanation of the cause of the problem.
Regret <ul style="list-style-type: none">• Recognition of feelings or wishes of sympathy, sorrow, regret or remorse.• Expression of those feelings or wishes in an apology.	Regret <ul style="list-style-type: none">• Sincere expression of feelings of sympathy, sorrow, regret or remorse — an apology.
Redress <ul style="list-style-type: none">• Rectification of the problem.• Implementation of adequate action to ensure that the problem does not happen again.	Redress <ul style="list-style-type: none">• Rectification of the problem• Implementation of adequate action to address the problem (or a promise to take such action) and an undertaking that the problem will not be allowed to happen again.

4.5 Determine the appropriate contents of the apology

The fifth step is to craft the apology. To be effective, an apology may need to incorporate each of the following ten elements:¹⁰

Recognition

- *Description of the wrong* — an adequate description of or statement about the relevant problem, act or omission (the wrong) to which the apology applies.¹¹
- *Recognition of the wrong* — a clear, explicit and unequivocal recognition that the action or inaction was wrong, for example it was incorrect, inappropriate, unreasonable, harmful etc (an acknowledgement of the grievance from the other party's perspective is a particularly important element of a full apology).
- *Acknowledgement of the harm* — an acknowledgement that the affected person has suffered harm eg embarrassment, hurt, pain, damage or loss. An expression of empathy and an indication of respect for the person's feelings about the wrong and the harm.

Responsibility

- *Acceptance of responsibility* — an acknowledgement of responsibility for the wrong and harm caused (the second particularly important element of a full apology).

¹⁰ See also the NSW Ombudsman Public Sector Agencies fact sheet 1: *Apologies by Public Officials and Agencies*, April 2003, 2nd edition printed October 2006.

¹¹ It is best if both parties have a common understanding of what went wrong and what would be an appropriate response, which may require a preliminary discussion, communication, or negotiations possibly by a third party.

Reasons

- *Explanation of the cause* — a simple, plain English explanation of the reasons for or cause of the problem,¹² or a promise to investigate the cause. It may be appropriate to indicate any mitigating circumstances, for example that the person or organisation responsible had no choice but to act in that way or that the action or inaction was unintentional.^{13,14}

Regret

- *Apology statement* — an expression of sincere sympathy, sorrow, remorse and/or contrition (the third particularly important element of a full apology) or, at the very least, an expression of regret.
- *Sincerity of communication and action* — the content, form and means of communication of an apology is very important as it can indicate or emphasise the level of sincerity of the apologisee (see 4.6 below).

Redress (or rectification)

- *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 compensation.¹⁵
- *Promise not to repeat* — a promise or undertaking that the action or inaction will not happen again.¹⁶

Release

- *Request for forgiveness* — a release from blame or the reconciliation of a relationship. This is an optional but important element in a full apology.¹⁷

The content and delivery of an apology must be tailored to address the particular circumstances of each case and the needs of the person affected. Including each of these elements in an apology will not guarantee that the apology will be successful, but not including them will decrease the chances of success.

¹² Although the information conveyed in an apology should not be admissible in civil proceedings NSW or the ACT, the apology may convey information that can be used to obtain information in an admissible form for use in court proceedings.

¹³ If the wrong was solely caused by events outside the control of the organisation, its staff, or was caused by a third party, then it may be appropriate to express sympathy, sorrow and/or regret without making any admission of responsibility.

¹⁴ It is totally inappropriate to say "*I am sorry, but ...*" followed by an explanation as to why what was done was correct or justified. What is more appropriate is to say "*I am sorry because ...*".

¹⁵ 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 NSW Civil Liability Act).

¹⁶ Particularly where there will be an ongoing relationship or the two parties are likely to interact at some point in the future.

¹⁷ The giving of forgiveness is the clear sign of a successful apology, and at the very least an apology can prepare the grounds for forgiveness. Forgiveness does not mean that the problem, wrong or hurt will be forgotten, merely that it will be remembered without bitterness — that is, will not be held against the giver, will not be brought up again, will be 'let go' and the person will move on. Forgiveness cannot be demanded and must be earned.

4.6 Demonstrate sincerity

The sixth step is to ensure, in appropriate circumstances, that the content and delivery of the apology demonstrates sincere remorse. Remorse focuses on regret for the action or inaction that caused the harm, not regret over the consequences of the action or inaction.

Sincerity is an essential requirement for an effective apology, other than in some cases where harm principally involves damage to reputation or 'face'. For this reason, it will usually be important that an apology is a voluntary act, not due to compulsion, obligation or pressure.

As a judge said in one Australian case, *'I do not consider it appropriate to compel the respondent to articulate a sentiment that he plainly enough does not feel'*¹⁸. In another case the judge said *'prima facie the idea of ordering someone to make an apology is a contradiction in terms'*¹⁹. However, whether or not an apology was a voluntary act is not a crucial issue in all cases, for example:

- where the harm relates to embarrassment, loss of face, damage to reputation or the like, or
- where the issue of responsibility is seen as particularly important and an apology that includes an acceptance of responsibility is what the 'injured party' wants.

It comes down in the end to what is important to the person harmed, for example:

- the **fact** of the making of the apology
- the **content** of the apology (for example an admission of responsibility or an explanation of why something occurred)
- the **feelings** that motivated the apology, or
- a combination of the above.

People can demonstrate sincere remorse by, for example:

- Making themselves vulnerable — emotionally, psychologically and/or morally — by accepting, admitting or taking clear, explicit and unequivocal responsibility for a problem, admitting fault or error.
- Communicating shame, anxiety, guilt, pain, humiliation or other suffering by words alone (whether written or personally delivered or both), or by words and deeds. This might include evidence or assurances that full and appropriate steps have been taken to address a problem, to ensure a problem does not re-occur and/or to compensate the person harmed.
- Demonstrating empathy — expressing sincere regret, sadness, sorrow or sympathy for the harm/suffering being experienced.

¹⁸ Branson J in *Jones v Toben* [2002] FLA 1150 at 107.

¹⁹ Hely J in *Jones v Sully* [2002] FCA 1080 at 245.

Sincerity in an apology can be demonstrated or conveyed in a number of ways. On a continuum between more and less sincerity, indicators of the level of sincerity in an apology would include:

Factors impacting on the perceived sincerity of apologies

	More sincerity	Less sincerity
WHY		
• Objective	To assist recipient [to respond to pain and suffering, to address needs, to allow recipient to move on]	To assist apologiser [to appease recipient, to justify action looking for exoneration or release from blame]
WHAT		
• Focus	Focus on consequences for recipient [to try to address the recipient's needs]	Focus on consequences for apologiser [on apologiser's relationship with the recipient, on apologiser's reputation, etc]
• Responsibility:		
– Cause	Acknowledged by apologiser [responsibility for the wrong and the harm caused]	Not acknowledged by apologiser [responsibility ignored, denied or placed on recipient]
– Culpability	Accepted by apologiser [recognition the action or inaction was wrong and caused harm]	Not accepted by apologiser [culpability ignored, denied or discounted]
• Response:		
– Redress	Offered by apologiser [compensation voluntarily offered or paid, or other action taken or proposed to put things right]	Not offered by apologiser [insufficient or no compensation offered or paid, or other action taken voluntarily]
– Rectification	Action taken by apologiser [reasonable steps voluntarily taken or proposed to prevent repeat]	No action taken by apologiser [little or no action taken or proposed voluntarily]
WHO		
• Delivery	Delivered by person responsible [either by the person directly responsible or by a person seen as responsible for that person or for the organisation]	Delivered by unconnected person [by a person with little or no connection to the cause of the harm]
WHEN		
• Timing	Offered soon after event [or as soon as facts are clear]	Unreasonably delayed [for no good reason]
HOW		
• Communication	Face to face	Impersonal form letter

At the end of the day, it all comes down to how you feel and what you believe. Sincerity comes from the heart — so if sincerity will be important to the recipient, if you don't mean it, don't say it.

4.7 Decide on the timing of the apology

The seventh step is to decide when would be the most appropriate time to make the apology.

Apologies should generally be given at the earliest practical opportunity. Although it is best to apologise as soon as a wrong is identified, it may be important to delay a full apology to allow time for inquiries or an investigation to establish the nature and cause of the problem, and to allow one or both parties time for cool reflection and to calm down. As Dr Gregory Tillett (an author and lecturer in ADR) stated in a recent symposium, 'Most people need to ventilate before they can negotiate'.²⁰

The best time to make an apology depends on the nature and seriousness of the wrong and the harm caused.

- *Breach of etiquette* — in commonplace social interactions not involving deliberate hostile acts or serious impacts — such as bumping in the street, short delays in attending to customers at a counter or interruptions to a conversation — apologies should be offered immediately.
- *Minor private offence* — if the event or interaction is 'private' in nature and involves a less serious personal offence — such as rudeness, anger or insensitivity — apologies should be offered immediately.
- *Serious private offence* — if the event or interaction is 'private' in nature but involves a more serious personal offence — such as a betrayal of trust, lying or cheating — it may be best to delay an apology. This will allow time for cool reflection and for initial discussions, communications or negotiations (possibly through third parties) about the appropriate content and method of communication of the apology.
- *Serious public offence* — if the event or interaction is 'public' in nature:
 - where the wrong or harm caused would reasonably be perceived by the aggrieved party or third parties to be serious and responsibility or blame is clear — apologies should be offered immediately
 - where the wrong or harm caused would reasonable be perceived by the aggrieved party or third parties to be serious, but responsibility or blame is not clear — the aggrieved party, and if necessary the wider audience who are aware of the event/interaction, should be informed that inquiries are being made or an investigation is being held and the result will be conveyed to them at the earliest opportunity. This advice could be accompanied by expressions of sympathy or regret that do not amount to a full apology and acceptance of responsibility.

4.8 Decide how the apology should be communicated

The eighth step is to decide who should make the apology, who should receive an apology and how it should be communicated.

Apologies must be given by the right person — that is, the person who committed or is responsible for the wrong that caused the harm or by a person who is clearly perceived as speaking on behalf of the organisation that is responsible for the wrong and resulting harm.

An apology must be given to the right person — the person who was harmed. Apologies to third parties generally only work for governments or large corporations as no forgiveness can be given.

²⁰ 6th National Investigations Symposium, Sydney, 2 November 2006 in discussions following delivery of a paper "*Mediated through plastic: Dispute resolution by telephone*".

Example apology

The Hon Kevin Rudd, Prime Minister of Australia, apologising for the 'stolen generation', February 13, 2008.

"The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.

We apologise for the laws and policies of successive parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians. We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country. For the pain, suffering and hurt of these stolen generations, their descendants and for their families left behind, we say sorry. To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry. And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.

We the parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation. For the future we take heart; resolving that this new page in the history of our great continent can now be written.

We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians. A future where this parliament resolves that the injustices of the past must never, never happen again. A future where we harness the determination of all Australians, indigenous and non-indigenous, to close the gap that lies between us in life expectancy, educational achievement and economic opportunity."

"There comes a time in the history of nations when their peoples must become fully reconciled to their past if they are to go forward with confidence to embrace their future. Our nation, Australia, has reached such a time."

"... the stolen generations are not intellectual curiosities. They are human beings, human beings who have been damaged deeply by the decisions of parliaments and governments. But, as of today, the time for denial, the time for delay, has at last come to an end. The nation is demanding of its political leadership to take us forward. Decency, human decency, universal human decency, demands that the nation now step forward to right an historical wrong. That is what we are going in this place today."

"Until we fully confront that truth, there will always be a shadow hanging over us and our future as a fully united and fully reconciled people. It is time to reconcile. It is time to recognise the injustices of the past. It is time to say sorry. It is time to move forward together.

To the stolen generations, I say the following: as Prime Minister of Australia, I am sorry. On behalf of the government of Australia, I am sorry. On behalf of the parliament of Australia, I am sorry. I offer you this apology without qualification. We apologise for the hurt, the pain and suffering that we, the parliament, have caused you by the laws that previous parliaments have enacted. We apologise for the indignity, the degradation and the humiliation these laws embodied. We offer this apology to the mothers, the fathers, the brothers, the sisters, the families and the communities whose lives were ripped apart by the actions of successive governments under successive parliaments."

"I know that, in offering this apology on behalf of the government and the parliament, there is nothing I can say today that can take away the pain you have suffered personally."

The Hon Kevin Rudd, Prime Minister of Australia, apologising for the ‘stolen generation’, February 13, 2008.

Example apology cont'd

“Mr Speaker, today the parliament has come together to right a great wrong. We have come together to deal with the past so that we might fully embrace the future. We have had sufficient audacity of faith to advance a pathway to that future, with arms extended rather than with fists still clenched. So let us seize the day. Let this not become a moment of mere sentimental reflection. Let us take it with both hands and allow this day, this day of national reconciliation, to become one of those rare moments in which we might just be able to transform the way in which the nation thinks about itself, whereby the injustice administered to the stolen generations in the name of these, our parliaments, causes all of us to reappraise, at the deepest level of our beliefs, the real possibility of reconciliation writ large: reconciliation across all indigenous Australia; reconciliation across the entire history of the often bloody encounter between those who emerged from the Dreamtime a thousand generations ago and those who, like me, came across the seas only yesterday; reconciliation which opens up whole new possibilities for the future.”

If the wrong and harm experienced are public — particularly if reputation, honour, pride or face is involved — the apology should be public or at least in writing so that recipients can make it public if they want. If the harm is a more private matter, the apology should also be communicated privately.

The form or means of communication of an apology is very important as it can indicate or emphasise the level of sincerity of the giver. A written apology implies time, effort and personal investment in its preparation, but a face to face apology may be more appropriate if a person wants to express the depth or intensity of their pain, embarrassment or anger directly to the person involved. If an apology can be adequately expressed in a short letter, a handwritten apology generally will have a more powerful impact than a typed one.

Depending on the circumstances, the most effective method of apologising may be to give a verbal (face to face) apology, followed up by a written apology that goes into more detail.

Remember — if a verbal apology is appropriate, it is important to be prepared for the ensuing conversation that could reflect a negative reaction, at least initially.

4.9 Document all communications

It is important to ensure that all communications between the parties to an apology (whether by face to face conversation, telephone conversations, emails, faxes or letters) are accurately documented and that full records are kept.

Proper documentation and recordkeeping are of course important whether or not the apology in question is protected by statute. In either case it can be of vital importance to have evidence of what was actually said or otherwise communicated about the events that caused harm.

Part 5 — Legal and insurance issues

5.1 ‘Full’ statutory protection for apologies

Civil liability generally

In March 2001 the NSW Ombudsman suggested to the NSW government that statutory protection be introduced for public sector staff making apologies to help resolve complaints. The government decided that this was a good idea and that the protection should apply generally across the whole community.

New South Wales introduced a broad statutory protection for apologies through amendments to the *Civil Liability Act 2002* that came into operation on 6 December 2002. In 2002 New South Wales was the first jurisdiction in the world to legislate to give legal protection for a full apology made by any member of the community — that is, one that includes an admission or acceptance of fault or responsibility²¹. At the time of writing full statutory protection for apologies is also now in force in the Australian Capital Territory (*Civil Law (Wrongs) Act 2002*), British Columbia (*Apology Act 2006*), Saskatchewan (*The Evidence Act*), Manitoba (*The Apology Act 2007*), Alberta (*Alberta Evidence Act*), and Nova Scotia (*Apology Act 2008*).

The NSW Act provides that you can, in most circumstances, apologise without prejudicing your legal position in any related civil proceedings.

Apologies are defined in the Civil Liability 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 — emphasis added)

The general effect of an apology on liability is set out in section 69 of the Act.

69 Effect of an apology on liability

- (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.

In other words, the apology provisions of the Act 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. Further, evidence of an apology is not admissible in a court hearing as evidence of fault or liability.

The protections under the Act do not apply to all civil proceedings. Although in most cases the NSW legal system now can’t make you sorry you’ve said sorry, there are still some circumstances where an apology might still be a problem. This could be in relation to, for example, traffic accidents, intentional violent acts intended to cause injury or death, sexual assault or other sexual misconduct, or workplace injuries. There is a full list of the exceptions to the protections in s.69 in Annexure B.

Although an apology cannot be used in court to prove fault or liability on the part of the person or body who made the apology, the giving of the apology does not absolve the person or body from any potential liability — although it may help in mitigation of damages.

Making apologies inadmissible in civil proceedings does not result in any detriment to the rights or interests of members of the public. In the absence of such a protection it is extremely unlikely that public sector staff would give an apology in circumstances where this could be seen as an

²¹ Subject to several exclusions from the protection in s.3B of the *Civil Liability Act 2002* — see Annexure B.

admission of liability. The practical consequence of this legislation should be that more public sector staff will be encouraged to say 'sorry' and more members of the public are likely to feel satisfied that their grievance has been taken seriously. An apology shows an agency taking moral, if not legal, responsibility for its actions and the research shows that many people will be satisfied with that. The introduction of the protections for apologies over time should therefore lead to a change in culture and have a very beneficial effect.

The NSW Ombudsman has recently completed a brief survey of NSW judgements over the last ten years, concentrating on the period since the Civil Liability Act came into force. This work was centred on cases where some mention was made of an apology. The vast majority of these cases related to defamation, contempt of court and anti-discrimination matters. Only a small number of judgements referred to section 69 of the Civil Liability Act, and it had no bearing on the outcome. There does not appear to have been any change in the number of references to apologies in some form since the introduction of the Civil Liability Act.

In addition to reviewing judgements, the Ombudsman has continued to monitor media coverage as well as the actions of the public authorities to assess the impact of a statutory protection for apologies. This analysis has clearly demonstrated that there has been no detrimental impact on the rights of the public to pursue litigation, or any other impact, as a result of the inclusion of a statutory protection for apologies.

Since the incorporation of apology provisions into the NSW Civil Liability Act, every other state and territory has followed the NSW lead and brought in legislation that provides varying levels of protection for apologies or expressions of regret in relation to civil liability.²² While the scope of the protection provided in each jurisdiction varies significantly, it appears that a simple 'I am sorry' will in most circumstances be protected in all Australian States and Territories.

Developments in the United States

In the USA, at time of writing, over 30 States had adopted apology type legislation. While approximately 20 of these have legislated since 2003 to provide full protection for apologies, in each case this is limited to apologies given in the context of the provision of health care. A further eight have legislated to provide partial protection for apologies — ie only for apologies that do not include any admission of responsibility or fault — made by any person, and four have legislated to provide such partial protection only in the context of the provision of health care.

Liability in defamation

An indication that the Commonwealth, state and territory governments in Australia see the protections in the NSW Civil Liability Act as working well is that statutory protections largely equivalent to the provisions in the NSW Act were incorporated into all defamation laws when they were comprehensively reviewed in 2005. This means that an apology made for an allegedly defamatory comment is protected and cannot be used in defamation proceedings as evidence of fault or liability.

The NSW *Defamation Act 2005* now contains similar protection from liability to that in the Civil Liability Act:

20 Effect of apology on liability for defamation

- (1) An apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published 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 defamatory matter alleged to have been published 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.
- (3) Nothing in this section limits the operation of section 38.

²² The ACT adopted legislative protections similar to those in NSW.

38 Factors in mitigation of damages

- (1) Evidence is admissible on the behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that:
 - (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter; or
 - (b) the defendant has published a correction of the defamatory matter, ...

5.2 No liability 'apologies'

Expressions of sympathy without admission of fault

In 2000–01 the Australian Council for Safety and Quality in Health Care commissioned an open disclosure project to support open disclosure by health care providers to patients and their carers following an adverse event. As part of that project a legal review was undertaken by Corrs Chambers Westgarth which explored the relevant legislative, common law and related issues that may serve to either inhibit or facilitate the open disclosure process.²³ The review concluded that there were few if any legal impediments to an 'appropriate' apology,²⁴ consisting merely of an expression of sympathy or sorrow and/or bare admissions of fact, without any admission of responsibility, fault or liability.

Case Law

There is case law to indicate that even if a person makes an apology that includes an acceptance or admission of fault or responsibility, this will not necessarily be regarded by the courts as an admission that creates legal liability in civil proceedings:

... care ... needs to be taken in identifying the precise significance of admissions, especially when made by someone who has a private or commercial reason to seek to retain the goodwill of the person or persons to whom the admissions are made ... And it is always necessary for the fact-finder to consider precisely what it is that is being admitted. If the driver of a motor vehicle says to an injured passenger: 'I am sorry, I let you down', that may not mean much, or anything. If the driver says: 'I am sorry, I was going too fast', that may be very significant. The statement that the appellant '[failed] in its duty of care' cannot be an admission of law, and it is not useful as an admission of failure to comply with a legal standard of conduct. There is no evidence that the author of the statement knew the legal standard.²⁵

It may readily be accepted that what is said after an event may constitute an admission of relevant facts. Tendering an apology for what has happened ... may, in some cases, amount to such an admission. But there is always the risk that what is said after an event is informed only by hindsight, and the speaker's wish that the clock might be turned back.²⁶

5.3 Insurance issues

If something goes wrong, the person responsible or their employer may wish to rely on an insurance policy. These policies may contain provisions prohibiting the insured from making any admission, offer or promise either in relation to a 'claim' or, in any circumstances, without the written consent of the insurer.

When confronted by such clauses in insurance policies, it is important to note that:

- As evidence of an apology is not admissible in any civil proceedings (see s.69 of the Civil Liability Act) as evidence of fault or liability, it is therefore difficult to see how evidence of an admission made in the context of an apology could be admitted in any proceedings for a breach of a contractual obligation under an insurance policy (s.69(2) specifically states that evidence of an apology is not admissible as evidence of fault or liability).

²³ This review was concluded at the start of 2002, before any of the legislative protections for apologies were brought in by the various Australian States and Territories.

²⁴ *Open Disclosure Project: Legal Review (2002)* (which predated the inclusion of apology provisions into the NSW *Civil Liability Act 2002*) prepared by Corrs Chambers Westgarth for the Open Disclosure Project (at p.33).

²⁵ *Dovuro Pty Ltd v Wilkins* [2003] HCA 51 (11 September 2003), at para 25 (Gleeson CJ).

²⁶ *Dovuro Pty Ltd v Wilkins* [2003] HCA 51 (11 September 2003), at para 173 (Hayne & Callinan JJ).

- If liability would have existed without the admission, such exclusion clauses have been held not to apply.²⁷

However, it would still be good practice to consult with any relevant insurer before introducing an open disclosure or apology policy for an organisation and before making an apology in circumstances where a demand or request has been made that will have significant financial implications.

Some insurance policies, such as medical professional indemnity insurance, preclude the making of an admission, offer or promise in relation to a 'claim' covered by the insurance policy — again other than with the written consent of the insurer. Examples of such policies would be those issued by Australasian Medical Insurance Limited which define claim to mean 'a demand for, or an assertion of a right to seek compensation or damages; or ... an intimation of an intention to seek compensation or damages'²⁸. Professionals in private practice who are covered by insurance with such exclusion clauses might therefore not be precluded from apologising before any demand for or intimation of an intention to seek compensation or damages. When things go wrong the victim and/or the victim's family do not usually immediately think about compensation or damages. These issues often only arise when the original problem is seen as not having been dealt with appropriately, or when the likely general financial implications have 'hit home'.

In NSW the government is a self insurer through the NSW Self Insurance Corporation (formerly the Treasury Managed Fund). Insurance, public liability and professional indemnity issues in relation to the government as a whole — including public patients in public hospitals, the almost 90,000 staff in the NSW public health system and the approximately 100,000 staff of the Department of Education — are covered by the NSW Self Insurance Corporation (SICorp). SICorp has recently published its new Contract of Coverage which includes the following provision:

9.3 (b) *The TMF Agency [being NSW Government budget sector agencies, etc] 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 injury, other than as part of an apology made in accordance with the Civil Liability Act 2002.* [Emphasis added]

[Note 18: Any admission of fault made as part of such an apology is not admissible in any civil proceedings as evidence of fault or liability. Please refer to Appendix 4 for the Public Sector fact sheet No 1 produced by the NSW Ombudsman in relation to apologies.]

In the unlikely event that SICorp refused cover, the employing agency (or the Crown) would still be liable for torts committed by employees within the scope or course of their employment. This would be based on non-delegable duty of care, common law vicarious liability or the *Law Reform (Vicarious Liability) Act 1983*.

²⁷ *Broadlands Properties Ltd and Broadlands Estates Ltd v Guardian Assurance Co Ltd* (1984) 3 ANZ Insurance Cases 60–552 at 78, 304 and the Commonwealth *Insurance Contracts Act 1984*, s.54.

²⁸ Eg, Professional Practice Indemnity Insurance Policy at cl.7.1; Professional Indemnity Insurance Policy, at 8.1; and Professional Indemnity Plus Run-off Insurance Policy, at 8.1.

Part 6 — Facilitating and encouraging apologies in the public sector

In Australia and the USA the awareness of the importance of apologies has grown significantly over the last four to five years. Although views seem to differ on the best way to facilitate and encourage apologies, statutory protection for apologies is an important way to remove what is widely perceived in the public sector (as well as in many professions) to be the major impediment to the giving of a full apology — legal liability. However addressing the legal liability issue will not, by itself, guarantee that full apologies are given in appropriate circumstances.

To facilitate and encourage apologies in the public sector, relevant staff need to:

- be aware that they will be legally protected from liability if they do apologise — particularly important in risk averse environments such as public sector agencies (and professions such as medicine and the law)
- know the circumstances in which they are authorised by their employer or the government to make an apology
- be prepared to admit they have made a mistake
- accept that making an apology is the right thing to do and believe that an apology may serve a good purpose
- know when and how to make an appropriate apology.

Statutory protection for apologies only addresses the first issue. The other four need to be addressed by the management of a public sector agency. Management needs to make sure there is a strong ethical culture throughout their organisation, and adopt and implement a robust open disclosure and apology policy. An open disclosure and apology policy could include matters such as:

- the scope of the policy, ie to what events and circumstances does the policy apply
- the objectives of the policy
- the procedure to be followed by staff when they become aware that a mistake may have been made, or a complaint is made alleging that a mistake has occurred (eg who should be notified, what inquiries should be carried out before any disclosure is made and apology given, etc)
- the events and circumstances in relation to which apologies can be given, and the events and circumstances in which the agency believes apologies should be given
- the information to be disclosed at the outset when things go wrong or when a complaint is made, and to whom it should be disclosed²⁹
- the content of apologies, including the types of admissions that can be made and the associated information that should be conveyed (eg details of the event or circumstance concerned; the cause of the problem, if known; the known or anticipated effect on the person(s) to whom the apology is to be given; the actions to be taken to rectify the problem and/or prevent its reoccurrence; any systemic issues highlighted by the problem, etc)
- the preferred methods of communicating apologies for different types of problems (eg face to face/telephone/email/correspondence; by the CEO/senior manager/manager/person responsible etc)
- responsibility for the giving of apologies and any necessary delegations of authority to give apologies, offer redress, etc
- the forms of redress that may be relevant to the types of events and circumstances likely to arise where an apology is warranted
- responsibility for coordinating the apologies process within the organisation, and
- the records that are to be made and retained.

Practical training should be provided to staff at all levels on the importance of apologies, and when and how to make them.

²⁹ Eg, see the *Open Disclosure* policy of NSW Health — PD 2006–069.

Annexure A — Circumstances influencing the content and delivery of an apology

1. Subject matter

Most apologies arise in circumstances where somebody has experienced or is likely to experience some form of actual or perceived harm. Harm warranting an apology can arise in three separate circumstances:

- harm caused by some particular action or inaction
- harm caused by how the original action/inaction (or a complaint about it) was dealt with or addressed
- both harm arising out of an action/inaction and harm arising from how the problem was dealt with.

When something goes wrong, the people affected don't immediately seek retribution, revenge or vindication. This is usually a two stage process — between the original issue or problem and a very negative response there is usually an intervening event or conduct. This event or conduct usually relates to how the problem was dealt with, how the person was treated and/or how their initial expression of concern was handled. If answers are not forthcoming, if there is a failure to acknowledge the problem that was caused, or if the person suspects a cover-up, this is likely to result in resentment and anger.

In terms of preventing a problem from escalating, it is important to realise that when things go wrong there will usually be a window of opportunity to properly address the problem and its impact in ways that are acceptable to all concerned.

If you are considering giving an apology for harm, it is important to identify at the outset (and to acknowledge in the apology) whether the harm arose out of the original action or inaction, or out of how the original action or inaction was dealt with — or both.

2. Cause

2.1 Intended or anticipated harm arising out of action or inaction

Intended or anticipated harm arising out of an action or inaction could be:

- *malicious, mischievous, or a breach of an undertaking or promise* — ie the harm was intended or reasonably anticipated³⁰
- *an appropriate exercise of discretion* — the harm was anticipated but the action/inaction was reasonable in the circumstances eg based on government policy, the availability of resources or a valid assessment of the overall public interest
- *blameless* — eg the harm was anticipated but the action/inaction was unavoidable or mandatory due to legal requirements or necessity.

It is important in a formal apology to:

- identify and describe the relevant problem, act or omission (the wrong) to which the apology applies
- explicitly recognise that the problem was due to an action or inaction that was incorrect, wrong, inappropriate, unreasonable or harmful
- acknowledge the nature and degree of the harm that the person has suffered.

These issues have a significant effect on how an apology should be drafted. A clear cut example would be that the level of remorse that needs to be demonstrated for an apology to be effective in relation to an intentional malicious act is far greater than where harm was an unintended outcome of a reasonable act.

³⁰ If such an action was motivated by an intention to cause injury or death, or sexual assault or other sexual misconduct, in NSW this is conduct which is specifically excluded from the protections for apologies found in the *Civil Liability Act 2002* (s.3B — see Annexure B).

If harm results from a malicious action or inaction, an apology would be most unlikely to serve any good purpose unless the perpetrator has realised the error of his or her ways and is ready and able to communicate to the victim remorse for the action or inaction that is genuine and sincere and to express sorrow for the harm caused.

If harm was anticipated but arose from an appropriate exercise of discretion (ie it was reasonable in the circumstances because it was in line with government or agency policy or was dictated by the availability of resources — eg the compulsory acquisition of a home for a valid public purpose) it would not be appropriate to express remorse or contrition as the problem was not caused by any fault or error. However it would be appropriate to express regret and sorrow for the harm.

If harm has arisen from a blameless action or inaction, it is best to provide an explanation that refers to mitigating circumstances such as the lack of discretion available to the person or organisation responsible for the action or inaction that caused harm (eg where the action or inaction was unavoidable or mandatory due to legal requirements or necessity). Expressions of regret are likely to be most appropriate for blameless acts. Given that remorse involves an acceptance or belief that what occurred was wrong due to fault or error, it would not be appropriate to express remorse for harm caused by blameless actions or inaction — particularly where external factors caused or seriously contributed to the problem. In such circumstances an apology should focus on sorrow or sympathy for the harm and an explanation why the action was blameless.

2.2 Unintended or unanticipated harm arising out of action or inaction

Unintended or unanticipated harm arising out of an action or inaction could be:

- *well-meaning but flawed* — due to:
 - competence problems eg deficient/inadequate levels of experience or skill, human error or negligence
 - service delivery problems eg delays, interruptions of service, denial of service and overcharging
 - judgement problems eg taking no action or the wrong course of action due to inexperience, or based on inaccurate or insufficient information or the misinterpretation of available information, or misunderstandings
 - conduct problems eg the attitudes and/or responses to problems and complainants displayed by the people involved, rudeness etc
 - systems / management problems eg inadequate coordination or information sharing, red tape, lack of resources, mismanagement, forgetfulness, accidental loss of files etc
- *an appropriate exercise of discretion* — the harm was unanticipated but the action/inaction was reasonable in the circumstances eg in the overall public interest
- *unintended* — due to an accident, such as unexpected equipment failures or external factors.

If the harm was the result of well-meaning but flawed action or inaction — ie controllable or avoidable fault or error were factors — it would generally be appropriate to express the apology in terms of remorse for the action or inaction and sorrow for the harm caused. It would also be important to provide an explanation (but not an excuse) why the problem occurred — emphasising whether it was due to competence, judgement, conduct or systems/management problems. This also impacts on who should accept responsibility for the problem and the harm caused.

If the harm was caused by an appropriate exercise of discretion — and the harm was unanticipated and the action or inaction was reasonable in the circumstances — it would be appropriate to express regret and sorrow for the harm.

Unintentional harm could also be due to accidents such as unanticipated equipment failures. In these cases it may be appropriate to express the apology in terms of sincere regret that the action or inaction occurred or that appropriate action was not taken, and sorrow for the harm that resulted. If such accidents could reasonably have been anticipated and avoided — eg by appropriate ongoing maintenance — this would be a systems/management problem warranting an expression of remorse and/or contrition.

However, if the unintentional action or inaction that caused harm was blameless and due to external factors outside the control of the person contemplating making an apology, it would only be appropriate to express sympathy (and to explain what happened) but not to apologise.

3. Details of the harm

3.1 Nature of the harm

The harm could be, for example:

- to reputation, embarrassment or 'face'
- personal injury
- psychological injury
- physical damage or loss
- commercial damage or financial loss
- denial of rights
- loss of access to amenities, income or opportunities.

The nature of the harm will impact on the actions that should be taken, promised or offered to address the problem and — if appropriate — to make sure it does not happen again. The available options are discussed later under the heading 'What the person harmed wants and options for redress'.

3.2 Seriousness of the harm

Harm can range from minor to serious. This will have a significant impact on the content and delivery of the apology and, most probably, on the need for corrective action to be taken — this may include the payment of reasonable compensation.

3.3 Timing of the harm

A distinction may need to be drawn between circumstances where the harm has or is currently occurring, circumstances where the harm is certain to manifest itself in the future, and circumstances where harm could reasonably be expected in the future.

In terms of an assessment of appropriate redress, this distinction will impact on the ability to find out the true nature and scope of the harm and its full cost or other implications.

3.4 Duration of the harm

Harm may be a single event or an effect of limited duration or it may be ongoing. This has implications for the steps that may need to be offered and/or taken to mitigate ongoing harm. It may also have implications for the accurate identification and quantification of the harm.

3.5 Awareness of the harm by person affected or to be affected

The person affected (or likely to be affected) may be aware or unaware of the nature and scope of the harm. If they are unaware this may be because:

- the harm has not yet occurred — but some harm is likely to occur
- they are not aware of the problem and/or its likely effect — eg the apology is to be included in the notification about the problem and/or its likely effect.

Their level of awareness of the nature and scope of the harm will have an impact on the timing and content of an apology.

3.6 Cost implications of the harm

The cost implications of harm can vary significantly, depending on whether a problem has one off or ongoing cost implications.

3.7 Knowledge or impact of the harm

An important distinction needs to be drawn between harm of a public nature that damages reputation or causes embarrassment or loss of face, and harm of a private nature. This distinction has a significant bearing on how an apology should be delivered — harm of a public nature generally warrants a public apology and vice versa.

If a public apology is warranted, part of the apology package may also require a response of a more private nature for personal or sensitive issues — such as those related to medical care.

Depending on the circumstances, for example the seriousness of the harm, a private apology may require a face to face delivery or could be achieved through an appropriate letter, or both.

3.8 Level of certainty

If something goes wrong, there is often considerable uncertainty as to the cause and effect. This can have significant implications on who was responsible. Alternatives include:

- certainty as to the cause and effect
- certainty as to the cause but uncertainty as to effect
- uncertainty as to the cause but certainty as to effect
- uncertainty as to the cause and effect.

Such uncertainty may be temporary, pending the outcome of inquiries, or it may be permanent due to lack of evidence, confusion etc. If the cause of the problem is uncertain, it may be difficult to apportion responsibility.

If there is uncertainty, in the short term it may be appropriate to issue an initial 'holding' response that acknowledges the problem, expresses sorrow or sympathy for the harm, indicates that inquiries have begun, and promises that there will be further communication once the outcome of inquiries is known. Once those inquiries have been completed, if there is sufficient certainty about the cause of and responsibility for the problem, an appropriate full apology can be made.

Levels of certainty can impact on which key words are appropriate (see 3.2 in Part 3). For example, it may be appropriate to express remorse for a problem where the cause and responsibility are clear, but this would not be appropriate if this was sufficiently unclear for there to be real doubt or confusion. In such circumstances it may be more appropriate to express regret or sorrow.

4. Responsibility for the harm

4.1 Nature of responsibility

Responsibility for harm may be:

- *direct*
- *indirect*
- *administrative* — eg CEO or other relevant senior officer responsible for the conduct of staff in the organisation
- *political* — eg ministerial responsibility for the cause of a problem or a failure to address it
- *symbolic* — eg government responsibility for the action/inaction of a previous generation or administration.

Example apology

Premier of New South Wales, Mr Morris Iemma, apologising in Parliament on 25 October 2007 for the responsibility of previous governments.

'... The currency of reconciliation is word, gesture and symbol: above all, words, because there is no eloquence in silence. Silence equals denial, and denial repeats and entrenches the very crimes it seeks to veil and excuse. That is why perhaps the most profound word ever spoken in this Parliament was "sorry", breaking a 200-year wall of silence here in the colony where Aboriginal civilisation, as it had been known for 60,000 years, began to meet its end.'

'... I am not talking about direct, personal culpability. Few of those responsible for the failed policies of the pre-referendum era remain. None of us was alive when the worst things happened. In fact, my ancestors were tilling the Calabrian soil half a world away when the First Fleet arrived. Despite those truths, we are all diminished by the fact that Aborigines are strangers in their own land, and we are all responsible — not guilty, not personally liable, but nonetheless responsible.

We are collectively and morally responsible because the benefits of dispossession have flowed to us, because we as the Government and Parliament of New South Wales are the direct legal heirs of Governor Phillip and his colonial successors, and because the past has left wounds, material and spiritual, that fall upon us to bind and to heal. In that spirit I join my colleagues from every party and faction, from every corner of this State, in reaffirming this Parliament's commitment to the process and the goal of reconciliation, It is time we ensured that not another generation of elders dies before that journey is complete. The first peoples of this land have waited long enough.'

Although it is best that the person primarily and directly responsible for the cause of a problem is the one who apologises, in the circumstances set out in the last three dot points above it may be appropriate for some other person — such as a CEO, minister or government — to apologise.

4.2 Degree of responsibility

The degree or level of responsibility can potentially vary from full/sole responsibility for harm, to partial responsibility shared with either a third party or with the person harmed. Any responsibility shared with the person harmed may be in relation to the original problem or in relation to subsequent conduct. For example while a person may be responsible for the action or inaction that caused harm, the situation may then have been made worse by the harmed person:

- failing to mitigate the harm
- inappropriately responding in ways that exacerbate the harm
- inappropriately interacting with the person who caused the harm eg retaliation, abuse etc.

In these circumstances, the person who is responsible for the original harm may be wary of apologising or believe that resolution of the dispute requires apologies from both sides.

In this case, it would be important to try to negotiate reciprocal apologies or at least certain changes in behaviour. Any apology should also include a very clear description of the action/inaction to which it relates.

4.3 Type of responsibility

Responsibility may be for the cause (of the harm) but not the effect (the harm) or for both cause and effect.

A person may be responsible for what caused a problem, but not for the harm caused — for example where the cause was an appropriate or blameless act, whether or not the consequences were anticipated or expected. Alternatively, a person may be responsible for both the cause of a problem and the harm caused — for example where the harm was caused by action/inaction that was malicious or well-meaning but flawed.

4.4 Level of acceptance of responsibility

The responsibility for a problem can be accepted at different levels. A rough hierarchy could be:

- 'It is my fault — I said it'
- 'I made a mistake when I said ...'
- 'I didn't mean to say ...'
- 'I didn't realise that what I said implied ...'
- 'I didn't know that what I said was wrong' or 'I thought what I said was correct.'

It is important to ensure that the words used in an apology are pitched at the appropriate level of responsibility.

5. Insurance issues

Insurance policies may inhibit an admission of responsibility, fault or liability either in relation to a claim or in all circumstances. Please see Part 5.3 for more details about insurance issues.

6. Parties to the apology

6.1 Who should give an apology

The person who apologises should preferably be the one who is, or is reasonably perceived to be, primarily and directly responsible for the problem. There are however circumstances where the person directly responsible either cannot be identified, does not accept that they are responsible or refuses to apologise — but the employer accepts responsibility. In these circumstances the CEO or another appropriate senior officer of the organisation would generally be the most appropriate person to give an apology (see also Part 4.1).

6.2 Who should receive an apology

The people who should receive an apology may include those:

- *directly harmed* — eg a patient harmed by medical error
- *indirectly harmed* — eg relatives of the patient affected by the medical error.

Deciding who should receive an apology is not always that simple and clear cut. Although it is generally relatively easy to identify the people directly harmed by an action or inaction, it may be more difficult to identify anyone who was indirectly harmed — such as the relatives of a patient harmed by medical error or a student treated inappropriately by a teacher.

It is often not enough to just respond to a complaint from a person harmed or from a person about harm experienced by a relative or friend, assuming that these people are the only ones directly or indirectly harmed. Some examples of the complications that can easily arise include:

- separated parents where the primary caregiver complains, but the other parent is equally concerned
- parents of a patient harmed by medical error where siblings are also detrimentally impacted.

It is important to try to identify all parties that may have been indirectly harmed by some action or inaction to find out if they also warrant an apology.

7. What the person harmed wants and options for redress

Although an appropriate statement of sympathy, sorrow, regret and/or remorse is nearly always a useful and necessary part of providing redress, these statements often have to be supplemented with other things as part of a full apology.

There are a wide range of possible options for redress that can help achieve a fair and reasonable resolution. The general principle is that, wherever practicable, people harmed by a wrong — including a failure to meet expected standards of care or service, incompetence, misconduct and negligence — should be put back in the position that they would have been in had the wrong not occurred. Often this will not be practicable, particularly if the harm is not amenable to quantification in financial terms. In these circumstances, people harmed by maladministration should be offered other options aimed at satisfying their legitimate concerns in ways that are reasonable and fair to all concerned.

If a wrong has led directly to harm that can be readily quantified in financial terms, compensation is generally the core of the appropriate response. However if this is not possible or the harm is the indirect result of a wrong, other options for redress should be considered.³¹

The range of options for redress can be grouped under five areas — communication, rectification, mitigation, satisfaction and compensation.

7.1 Communication

The first option for redress is to communicate with the person who has suffered detriment as a result of a wrong — an integral part of a full apology. Communication involves a two-way process of listening, discussing, explaining and negotiating.

Options include:

- providing an explanation, and information about the facts of the case and legal options
- giving reasons for decisions
- discussing with the person who has been wronged the outcomes that they believe are necessary to provide or ensure appropriate redress
- reaching an agreement through mediation, conciliation or other informal approaches to resolution.

7.2 Rectification

The second option for redress is for the organisation or responsible person to act to correct the original action or inaction — another integral part of a full apology. When harm has resulted or is anticipated to result from an agency's maladministration, rectification is generally the agency's foremost obligation.

Options include:

- reconsidering conduct or a decision and taking any necessary action, stopping action that should not have been started, or cancelling an intended action
- ensuring compliance with law, procedure, practice or policy
- ensuring compliance with obligations, whether legal or otherwise
- correcting records that are incomplete, inaccurate, out of date or misleading
- resolving a dispute or breakdown in a relationship.

7.3 Mitigation

The third option for redress is to mitigate the adverse consequences of a wrong — ie to take practical action to alleviate problems caused by, arising, or likely to arise out of a wrong. Mitigation involves attempting to deal with the consequences of the wrong.

³¹ These are not firm or fixed categories and various options for redress may fit into more than one category. A detailed discussion of each category of options can be found in *Options for Redress*, NSW Ombudsman, 2006 [see www.omb.nsw.gov.au].

Options include:

- accepting responsibility to fix the problem
- stopping action that has, is, or will cause further harm
- publishing an apology for, and correction of, defamatory matter
- correcting records that are incomplete, inaccurate, out of date or misleading
- repairing physical damage to property, or replacing damaged or lost property
- refunding fees or charges or waiving fees, charges or debts
- providing assistance and support.

7.4 Satisfaction

The fourth option for redress is to satisfy, through non-material means, the reasonable concerns of the person who has suffered harm. This 'satisfaction' may include actions of a symbolic nature such as an apology. It is different to mitigation or compensation because it does not involve providing a material benefit to the person who suffered the wrong. 'Satisfaction' is the core element of a full apology — which can include an expression of sorrow or remorse, an admission of fault or responsibility.

An important distinction needs to be drawn between circumstances where an apology is:

- demanded
- requested as part of negotiations to address a problem or resolve a dispute
- not raised as an issue by people who have been harmed.

If an apology is demanded, this is likely to be in situations where a person believes their dignity or reputation has been damaged — a loss of face — or they have been otherwise publicly embarrassed.

People who 'demand' an apology are, not uncommonly, looking for:

- restoration of their reputation or face and/or a diminution of the apologiser's reputation or face³²
- vindication — they were right and the apologiser was wrong
- an admission of responsibility for the fault and/or the harm caused.

Such demands normally focus on the form of the apology, not on the sincerity of its content or delivery. The person is likely to want the apology to be given formally, publicly, and either by the person directly responsible for the harm or a senior officer who is reasonably perceived to represent the organisation. Apologies in such circumstances may be effective even if they are not seen as being particularly sincere or having been given voluntarily.

Apologies may be requested either in relation to face or dignity issues or in relation to more personal and private harm. Such requests are very likely to be made during formal or informal negotiations undertaken to address the problem or resolve an existing or potential dispute. To be effective, such apologies must be seen to be genuine and sincere and to have been given voluntarily.

The fact that a person may not have requested an apology does not mean that an apology volunteered in such circumstances would not be effective.

³² Some commentators refer to this in terms of 'status'.

7.5 Compensation

The fifth category of redress that should be considered is whether it is appropriate to pay compensation for harm sustained directly or indirectly as a result of a wrong. Compensation can include a monetary 'equivalent' for a loss or an 'adequate substitute' for it.

Options include:

- restitution for loss or damage to property, loss of earnings or financial or other benefits, or injury or damage to health
- reimbursement for costs or damage incurred arising out of the wrong — eg medical costs resulting from injury or damage to health
- satisfaction or appeasement for damage to reputation or humiliation, worry, distress or inconvenience — including 'bother' ie the inconvenience of having to complain in the first place.

Annexure B — Exceptions to the protection for apologies in the *Civil Liability Act 2002*

The protections for apologies in the NSW *Civil Liability Act 2002* do not apply in the following circumstances:

3B Civil Liability excluded from Act

- (1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
 - (a) civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct ...,
 - (b) civil liability in proceedings of the kind referred to in section 11 (Claims for damages for dust diseases etc to be brought under this Act) of the *Dust Diseases Tribunal Act 1989* ...,
 - (c) civil liability relating to an award of personal injury damages (within the meaning of Part 2) where the injury or death concerned resulted from smoking or other use of tobacco products ...,
 - (d) civil liability relating to an award to which Part 6 of the *Motor Accidents Act 1988* applies ...,
 - (e) civil liability relating to an award to which Chapter 5 of the Motor Accidents Compensation Act 1999 applies (including an award to and in respect of which that Chapter applies pursuant to section 121 (Application of common law damages for motor accidents to railway and other public transport accidents) of the *Transport Administration Act 1988* ...,
 - (f) civil liability relating to an award to which Division 3 of Part 5 of the *Workers Compensation Act 1987* applies ...,
 - (g) civil liability for 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 a benefit payable under the *Sporting Injuries Insurance Act 1978* ...



NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General inquiries: 02 9286 1000
Facsimile: 02 9283 2911

Toll free (outside Sydney metro): 1800 451 524
Tel. typewriter (TTY): 02 9264 8050

Web: www.ombo.nsw.gov.au