

The power of sorry

LOCAL GOVERNMENT
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1. Introduction

I am going to talk to you about the power of sorry – the power of an apology – focussing on six key messages.

2. Apologies have statutory protection in NSW

My first key message is that in most circumstances people in NSW can make a full apology for any harm they have caused without prejudicing their legal position in any subsequent or related legal proceedings.

In my time with the New South Wales Ombudsman's Office I have observed that public officials and public sector agencies have often been reluctant to make an apology because they fear that the apology, or the very fact that it was made, may be taken as an admission of legal liability and be detrimental to their case should the dissatisfied person take legal action. From what I have heard and read, it appears that this is almost the standard response by public sector bodies, certainly across the common law world.

In 2002 New South Wales was the first jurisdiction in the common law world to legislate to protect a 'full' apology. The effect of an apology on liability is set out in s.69 of the *Civil Liability Act 2002*, which provides that an apology does not constitute an admission of liability, and will not be relevant to the determination of fault or liability in connection with civil liability of any kind. 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.

The NSW Ombudsman has recently completed a brief survey of NSW judgments over the last 10 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 judgments 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 judgments, 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.

3. The importance of taking responsibility for problems

My second key message today is that a 'full' apology – an apology that includes an admission or acceptance of responsibility or fault – can be remarkably effective in addressing the key needs of people who have experienced harm. Although they are not guaranteed to work in every case, 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'.

When things go wrong, the appropriate agency or official should accept responsibility and take 'ownership' of the problems for which they are responsible. **This is what good management practice dictates, ethical conduct requires and the public expects.**

Unfortunately, I am sure we have all seen occasions where organisations or individuals refuse to take responsibility and instead ignore a problem, deny its existence or deny responsibility for the problem or the harm it caused. When the problem is obvious and responsibility clear (or reasonably perceived to be so), denying its existence or denying responsibility are likely to be seen as more than mere blindness or ignorance – they can easily be seen as being wilful and deceptive. This can have serious detrimental effects on levels of trust and credibility. On the other hand, admitting fault and taking responsibility for a problem (ie, doing the right thing) is a prerequisite for forgiveness (analogous to a religious concept of confession and absolution).

Important benefits that might flow to all parties from a 'full' and sincere apology include:

- *moral benefits* – from doing the right thing
- *emotional/psychological benefits*:
 - 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*:
 - 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
 - improving the credibility of the giver and the level of trust between the giver and receiver
- *personal or operational benefits* – a reduction in the likelihood and/or severity of negative outcomes
- *financial benefits* – a reduction in the chances of on-going difficulties that can seriously impact on time and resources, including litigation, and
- *systemic benefits* – the transparency that goes with a 'full' apology increases the chances that mistakes or other problems will be properly addressed.

Recent research has highlighted other benefits of apologies. A US study involving 7,590 Americans was conducted by pollsters Zogby for The Pearl Outlet, which commissioned the poll after noticing that a growing number of customers were buying pearls as a way to say "sorry".

The study found that married people say "sorry" to their partners almost twice as readily as do single people. Even when they feel they are not to blame, married people are twice as likely as single, divorced or separated ones to apologise after an argument.

This same study found that high earners apologise twice as often as low earners. The study found a near perfect correlation between income and the rate of apology.

Arguments that have been put forward to explain this situation include:

- that successful people are willing to learn from their mistakes and keen to mend relationships
- that higher earners tend to be both brighter and more secure
- or that maybe higher earners apologise more because it's easy to apologise afterwards then to ask permission beforehand – and high earners ask permission less [the view put forward by the President of the Pearl Outlet as his own theory].

So, if you are a high earner and you're married, you must be an expert on the topic.

4. The importance of an apology in resolving problems

My third message is that if a mistake or error led to harm, an appropriate apology is often seen by complainants as an essential part of the proper resolution of their complaint – an appropriate apology is often the main thing they really want. The greater the harm, the greater the likely value of an appropriate apology to the person harmed. As one American writer put it – *'An apology is the superglue of life. It can repair just about anything'*.^{*}

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 on-going 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:

- restore dignity, face and reputation
- provide vindication or a sense of justice or an acknowledgement that the recipient was right
- allow for an acceptance of responsibility for actions or ownership of a problem – it assures the recipient that he or she is not at fault, a common feeling after a mishap.

When something goes wrong, the injured party or their family will generally want to know what went wrong, who was responsible and how those responsible are going to address the problem. They also will 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 that person was treated afterwards. This could be, for example, due to a failure to communicate or acknowledge that something went wrong and to admit error.

Experience in many fields indicates that people who have been harmed don't 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. 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.

^{*} Quote attributed to the comic strip writer Lynn Johnston.

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 or the harm it has caused, or in particular if 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. When up against powerful organisations or individuals, the best way for individuals to fight back is to go to a lawyer or the media. This is when they are likely to start seriously thinking about money, which they may see as a way to measure the pain they want to cause. I think a good example concerned the Catholic Diocese of Dallas where a civil jury awarded the plaintiffs \$119.6 million. This was reduced to \$23.4 million by agreement with the plaintiffs, who, it is reported, agreed to vacate the original verdict in exchange for an apology by the Bishop.

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 in the Table in Annexure A to my paper.

5. The essential elements of a 'full' apology

My fourth message is that, to be effective, an apology must usually include an express acceptance or admission of responsibility or fault for the actions or inaction that caused harm (that is, a 'full' apology). Research indicates that a 'partial' apology – an apology that does not include such an acceptance or admission – can do more harm than good.

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'. In particularly complex, sensitive or serious situations, for an apology to be effective a wide range of issues will usually 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 is hoped to be achieved 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.

The prerequisites for an appropriate 'full' apology should be seen as a 'package' that will often include:

- *responsibility* – acceptance of responsibility for the action/inaction and/or its outcome (as appropriate)
- *honesty* (as two former politicians from the Victoria recently wrote: "*People do forgive mistakes. What they don't forgive is being misled*".)

- *sincere remorse*
- *timeliness* – no undue delay (as another writer said: “*When you realise you have made a mistake, make amends immediately. It’s easier to eat crow while it’s still warm*”, or as another two wrote: “*The longer you wait to apologise, the sooner your weakness is perceived as wickedness*”), and
- *responsiveness* – that reasonable steps are taken to address the problem – to put things right.

It comes down in the end to what is important to the person harmed, which might be one of more of the following:

- 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), or
- the feelings that motivated the apology.

Where these prerequisites are met, not only is an apology likely to be effective in relation to the person harmed, it can also be effective to prevent or lessen adverse media comment or intervention by some watchdog bodies.

Other than in the more simple situations, in principle, to maximise effectiveness an apology should incorporate the following elements:

Firstly *recognition* – including:

- *a description of the wrong* – a description of the relevant problem, act or omission to which the apology applies
- *a recognition of the wrong* – an explicit recognition that the action or inaction that resulted in the problem was wrong – for example where Pope Benedict recently said in Sydney:

“Here I would like to acknowledge the shame which we have all felt as a result of the sexual abuse of minors by some clergy and religious in this country. These misdeeds, which constitute so grave a betrayal of trust, deserve unequivocal condemnation.”

- *an acknowledgement of the harm* – an acknowledgement that the affected person has suffered harm, eg, embarrassment, hurt, pain, damage or loss – for example where the Prime Minister said in his sorry speech to the stolen generation:

“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.”

Secondly *responsibility* – an *acceptance or acknowledgement of responsibility* – for the wrong and harm caused

Thirdly *reasons* – an *explanation of the cause* – of the reasons for the problem, or a promise to investigate the cause (but not excuses which are merely an attempt to deflect responsibility).

Fourthly *regret* – including:

- an *apology statement* – being an expression of sincere sympathy, sorrow, remorse and/or contrition – for example where the Prime Minister said:

“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.”

- *sincerity of communication and action* [some thoughts on this issue are set out in Annexure B to this paper].

Fifthly *redress* – including:

- a statement of the *action taken or proposed* to put things right
- a *promise not to repeat* – a promise or undertaking that the action or inaction will not be repeated – of course if it is repeated, that will severely damage the credibility of the apologist in relation to any subsequent attempt at an apology.

Finally *release* – a request for forgiveness or a release from blame. A request for forgiveness is an optional but important element in an apology as forgiveness can have immense power, for example to heal emotional wounds and sooth anger allowing people to move on with their lives. I am not talking here about forgetting, but about understanding and acceptance – about no longer feeling resentment.

While the inclusion of each of the above elements in an apology will not guarantee that the apology will be successful, their exclusion is likely to decrease the chances of success.

6. ‘Apology’ is a simple concept, but there can be many pitfalls in implementation

My fifth key message is that while apologies are a simple concept, there can be many pitfalls in implementation due to the large number of potential variables that can impact on their effectiveness. The more complex the situation and the more reprehensible the action or inaction that led to harm, the more care that is likely to be required in crafting and delivering an apology. Conversely, too much ‘care’, or too much choreography – the less the perceived humility and sincerity. It is often best to see an apology as part of a ‘package’ of actions, and as part of a ‘process’ – not just a quickly delivered statement of regret.

7. Failure is not an option

My final message for today is that if an apology fails – for example because of a failure to accept responsibility or because it is not seen as sincere – it is unlikely that any further attempt at apologising will be effective.

8. Conclusions

In conclusion, I want to leave three thoughts with you today:

- firstly, an appropriate 'full' apology can be remarkably effective in resolving problems in ways that are fair and reasonable
- secondly, 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, and
- thirdly, where a problem has caused harm, a 'full' apology may also be the culmination of a 'process' of communication, investigation and negotiation.

I will end with a quote from the former Prime Minister of Canada, Brian Mulroney, referring to the importance of apologies: *"Most of us in our lives have had occasion to regret certain things 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"*.

ANNEXURE A

Voluntary 'full' apologies	Defended 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 Communication 'Responsible' party accepts responsibility and tries to rectify the problem (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/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/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)

ANNEXURE B

Factors impacting on perceived sincerity of apologies

	More Sincerity	Less Sincerity
WHY <ul style="list-style-type: none"> 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 <ul style="list-style-type: none"> Focus Responsibility: <ul style="list-style-type: none"> Cause Culpability Response: <ul style="list-style-type: none"> Redress Rectification 	On consequences for the recipient [to try to address the recipient's needs] Acknowledged by apologiser [responsibility for the wrong and the harm caused] On apologiser [recognition the action or inaction was wrong and caused harm] Offered by apologiser [compensation voluntarily offered or paid, or other action taken or proposed to put things right] Action by apologiser [reasonable steps voluntarily taken or proposed to prevent repeat]	On consequences for the apologiser [on apologiser's relationship with the recipient, on apologiser's reputation, etc] Not acknowledged by apologiser [responsibility ignored, denied or placed on recipient] Not on apologiser [culpability ignored, denied or discounted] Not offered by apologiser [insufficient or no compensation offered or paid, or other action taken voluntarily] Not by apologiser [little or no action taken or proposed voluntarily]
WHO <ul style="list-style-type: none"> Delivery 	By person responsible [either by the person directly responsible or by a person seen as responsible for that person or for the organisation]	By unconnected person [by a person with little or no connection to the cause of the harm]
WHEN <ul style="list-style-type: none"> Timing 	Soon after event [or as soon as facts are clear]	Unreasonably delayed [for no good reason]
HOW <ul style="list-style-type: none"> Communication 	Face to face	Impersonal form letter

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