



# APOLOGIES AND OPEN DISCLOSURE

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## Apologies have statutory protection in civil proceedings in NSW, ACT and Queensland

In 2002 New South Wales was the first jurisdiction in the common law world to legislate to protect a 'full' apology made by any person, followed closely by the ACT and more recently by Queensland. The NSW Model went on to be used as the foundation for the Canadian legal reform. So far, at least eight Canadian Provinces have passed apology legislation.

The NSW *Civil Liability Act* 2002 contains protections for apologies that include an admission of responsibility, which is often referred to as a 'full' apology. Section 69(2) of the Act specifically provides that evidence of such an apology "*is not admissible in any civil proceedings as evidence of the fault or liability*".<sup>1</sup>

An apology is defined in the Act as:

*"...an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter **whether or not the apology admits or implies an admission of fault** in connection with the matter."* (s.68). [emphasis added]

The statutory protection for 'full' apologies has three elements:

- a declaratory element – such an apology is not an admission of fault
- a relevance element – the apology can't be taken into account in determining fault, and
- a procedural element – the apology is not admissible as evidence of fault.<sup>2</sup>

In other words, 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.

While an apology cannot be used in court to prove fault or liability on the part of the person or body who made the apology, on the other hand the giving of the apology does not absolve the person or body from any potential liability – although it may help in mitigation of damages. It is important to note that although an apology and information conveyed in an apology may not be admissible, the apology may convey information that can be used to obtain information in an admissible form in other ways for use in court proceedings.

Where action is taken to rectify a problem, for example as part of a package of measures in a 'full' apology, it is relevant to note another provision of the Act that in proceedings relating to liability or 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 Act).

In the public sector context, 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 unlikely that public sector staff would give an apology in circumstances where this could be seen as an 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 individual or agency

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<sup>1</sup> Civil Liability Act 2002 (NSW), s.69.

<sup>2</sup> Per John Kleefeld, "Thinking Like a Human: British Columbia's Apology Act" [2007] UBC Law Review, 40, 798-799.

taking moral, if not legal, responsibility for his/her/its actions and the research shows that this is what many people are looking for.

It is important to note that 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 a full apology is not protected. 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.<sup>3</sup>

Although these exclusions appear at first glance to be extensive, apart from motor accidents, in practice they have little relevance to the vast majority of the day-to-day interactions affecting public officials or officials and members of the public.

Therefore, where a 'full' apology has been given, including a sincere admission of responsibility, any subsequent litigation will be limited to the quantum of damages. Even where compensation is sought, if a genuine effort has been made to offer an apology (including an acceptance of responsibility), this may act as a catalyst to make negotiations more cordial, less time consuming and less likely to end in formal proceedings.

## Insurance issues

In a publication entitled *Apologies A practical guide*, the NSW Ombudsman addresses the insurance issues that arise in the context of apologies as follows:

*"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.<sup>4</sup>
- if liability would have existed without the admission, such exclusion clauses have been held not to apply.<sup>5</sup>

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<sup>3</sup> Civil Liability Act 2002, s.67(1) and s.3B. The types of civil liability that are not covered by the protection for apologies in the Civil Liability Act can be briefly summarised as liability for:

- (a) an intentional violent act done with intent to cause injury or death (including sexual assault or misconduct)
- (b) the contraction of a dust disease, or for a personal injury allegedly caused by smoking or the use of tobacco products
- (c) the apology provisions of the Act do not apply to motor accidents, or to economic loss, non-economic loss or psychological/psychiatric injury to an injured person and liability for the compensation of relatives of a deceased person that arises from a motor accident (or transport accident as defined in the Transport Administration Act 1998) to which the Motor Accidents Act 1998 applies, or from a motor accident or public transport accident to which the Motor Accidents Compensation Act 1999 applies
- (d) damages payable by an employer for the injury or the death of a worker resulting from or caused by an injury, and compensation under various workers compensation legislation, the Victims Support and Rehabilitation Act 1996 or the Anti-Discrimination Act 1977, or for the benefit payable under the Sporting Injuries Insurance Act 1978.

<sup>4</sup> s.69(2) specifically states that evidence of an apology is not admissible as evidence of fault or liability.

<sup>5</sup> *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.

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

State government agencies in NSW would be aware that insurance, public liability and professional indemnity issues in relation to the NSW government as a whole are covered by the TMF (the Treasury Managed Fund, now SI Corp). The *Contract of Coverage* includes the following provision:

“9.3(b) *The TMF Agency ... shall not, without the consent of the Claims Managers, make any admission, ... 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]

## Impact of the statutory protection on litigation

A few years ago the NSW Ombudsman carried out a brief survey of NSW judgments over the previous 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. There did 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 the litigation context, the effectiveness of an apology can depend on when and why it was made. For example, apologies made before the institution of proceedings which are motivated by a desire to avoid those proceedings. There is clear evidence that an apology made by the defendant before the institution of proceedings can have great benefits. At best it can result in early settlement thereby avoiding costly proceedings, and if proceedings cannot be avoided may help to mitigate the damages awarded. Perhaps the best examples of instances where apologies have been made by the defendant before the institution of proceedings, which appear to have been motivated by a desire to avoid those proceedings, are seen in medical malpractice litigation.

There is striking data evidencing the effect of apology in lowering the number of malpractice suits and notices of intent to sue<sup>6</sup>.

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<sup>6</sup> Examples of apologies appears to have been made in such circumstances include: Gary John Humphries v Twt Limited (1993) FCA 577; (1993) 120 ALR 693; Edmund Bateman v Bruce Shepherd, Australian Medical Association Ltd and Reed Business Publishing Pty Ltd (1997) ACTSC 6; and Kerry Francis Bullmore Packer v The Australian Broadcasting Corporation, Kerry O'Brien, Mark Bannerman, Vivian Vivian, Peter Rothwell, Mark Avis, David Webb, Sue Spencer and Ian Carroll No. SC 620 of 1990 [1993] ACTSC 270.

There is also considerable research since the early 1990s to support the argument that the main reason why patients sue their doctors is anger, and that this anger would have been far less intense if they had received an appropriate apology.<sup>7</sup>

In addition to reviewing court judgments that refer to apologies, 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.

## **Alternative responses when mistakes are made**

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, the ACT and Queensland where there is a statutory protection for a 'full' apology, some of the differences between offering an apology as an alternative to the 'deny and defend' strategy commonly advocated by lawyers, are set out in **Annexure A**<sup>8</sup> to this paper.

Apologising allows people to do 'the right thing'. It allows for relationships of mutual trust to be restored when an injured party sees someone else accept responsibility for a mistake and take proactive steps to put it right. It also allows those injured to express their needs and negotiations towards settlement to be commenced in a non-adversarial setting. By contrast, legal action is by its very nature defensive. Individuals and/or agencies communicate as little as possible for fear of conceding liability. Apologising accepts that we all make mistakes and that those we serve generally understand this because they do too.

Some of the views set out in **Annexure A** are reflected in the May 22 2009 Newsletter of the SorryWorks! Coalition, a US not-for-profit organisation that advocates for apologies in the health sector, in the following terms:

*"...filing a lawsuit is difficult... Litigation often takes years to resolve and patients/families are forced to relive their tragedies day-in/day-out through this process. And even if the process produces a monetary award or settlement, patients/families still have a hollow feeling because apology, accountability, and yes, forgiveness are not traditionally part of the litigation process."*

In another newsletter of the SorryWorks! Coalition, the two approaches to dealing with problems were contrasted as being the difference between the 3 As and the 3 Ds. Between the one hand:

- **A**ccessibility to those harmed;
- **A**ddressing the problem; and
- **A**pologising.

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<sup>7</sup> See for example the research referenced in the Johnson School Research Project, Series #04-2011, "Does Sorry Work? The Impact of Apology Laws on Medical Malpractice", Benjamin Ho – Cornell University, Elaine Liu – University of Houston, December 2010; <http://ssrn.com/abstract=1744255>.

<sup>8</sup> NSW Ombudsman, Apologies – A practical guide, 2nd ed., May 2009, p.8. <http://www.nswombudsman.nsw.gov.au/publication/PDF/guidelines/Apologies%20Guidelines%202nd%20edition%20March%202009.pdf>.

And on the other hand:

- Distancing;
- Denying; and
- Defending.

## Benefits that can flow from apologies

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'. The potential benefits of an apology are well expressed in a quote from comic strip writer Lynn Johnston who saw an apology as "*the superglue of life* [because it] *can repair just about anything*".

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).

Research in Australia and overseas supports the view that a timely, genuine and comprehensive apology avoids a sizeable amount of litigation. This can have a very positive impact, particularly in professions such as medicine where increasingly complex and delicate clinical procedures have developed, along with a society that is increasingly litigious, leading to upward pressure on the costs of medical insurance and a passage of this cost either to the consumer or the public health system.

For example, in the Ombudsman's second edition of *Apologies – A practical guide*, he highlighted the research of Jennifer Robennolt from the University of Illinois. She found that while 52 percent of claimants accepted settlement offers when no apologies were offered, this number jumped to 73 percent when settlement was offered along with an acknowledgement of fault and expression of regret. The Ombudsman of British Columbia cited similar US research to show that an apology from a medical practitioner would have stopped 30 percent of negligence claims going to court.<sup>9</sup>

From the Ombudsman's own complaint handling experience, such figures are not surprising. Many people who come to the Ombudsman know that things can never be put back exactly as they were before. However, they complain seeking a degree of justice, fairness and validation of the wrong done in their case, as well as for altruistic motives of not wishing to see whatever happened to them being visited on another. Therefore, if people feel their concerns will not be heard or not be taken seriously by an agency, the Ombudsman has found that matters escalate "*simply because of poor communication or because of inadequate publicity about the services and policies and procedures of (an agency)*".<sup>10</sup>

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<sup>9</sup> Office of the Ombudsman of British Columbia, op. cit., p.13.

<sup>10</sup> NSW Ombudsman, Effective complaint handling, June 2004, p.13.

[http://www.ombo.nsw.gov.au/publication/PDF/guidelines/Chapter%201\\_Effective%20complaint%20handling.pdf](http://www.ombo.nsw.gov.au/publication/PDF/guidelines/Chapter%201_Effective%20complaint%20handling.pdf).

Apologising addresses many human needs, from the moral urge to do the right thing, to the wish to restore a relationship, to the potentially more pragmatic aim of not wanting a matter to proceed to litigation. While saying sorry for a wrong may not prevent formal action, it will help to demonstrate that the organisation is honourable and trustworthy.

A 2009 media report demonstrated both the effectiveness of apologising for mistakes and how some individuals who may have been seriously harmed view their greatest need as being an acknowledgement of the injury caused to them, long before compensation is even considered. In a newspaper article in May of 2009, it was reported that a 31 year old man was admitted to hospital for the treatment of a foot ulcer. However, the infection in the ulcer spread, meaning that his leg was amputated. While many would expect the patient to sue for damages, the young man told the *Daily Telegraph* that: "...he [was] *not considering legal action, but [wanted] an apology to ensure it doesn't happen to anyone else...*"<sup>11</sup> The Health Minister issued an apology, saying the department would arrange for a prosthetic leg, wheelchair and home modifications.<sup>12</sup>

Important benefits that might flow to all parties from a 'full' and sincere apology include *moral benefits* from doing the right thing, as well as *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'.

I think this is well illustrated in a quote from the former Prime Minister of Canada, Brian Mulroney: "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".

There are also interactional benefits that flow from 'full' apologies, including 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. Apologies can also improve the credibility of the giver and the level of trust between the giver and receiver.

Research a few years ago highlighted certain interesting characteristics of the people who are more likely to apologise than others. 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

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<sup>11</sup> Leg lost in hospital infection, News, Daily Telegraph, 7 May 2009.

<sup>12</sup> Ibid.

- 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!

Further benefits that can flow from 'full' apologies include *personal or operational benefits* – a reduction in the likelihood and/or severity of negative outcomes. Related to this are *financial benefits* – a reduction in the chances of on-going difficulties that can seriously impact on time and resources, including litigation.

There are also *systemic benefits* – the transparency that goes with a 'full' apology, i.e. admitting there is a problem increases the chances that mistakes or other problems will then be properly addressed. As the Roman philosopher Seneca said 2000 years ago: "*The first step toward amendment is the recognition of error*". We need to recognise a problem to do anything about it – if you don't admit there is a problem you are unlikely to fix it.

## **The potential impact of apologies in resolving problems**

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. For example, how often have we seen articles reporting somebody saying something along the lines of "*All I wanted was an apology*"?

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 also:

- 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.

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. This is a central theme in articles published in Sorry Works@ Coalition newsletters, for example:

*“...plaintiffs' attorneys file lawsuits when doctors cover up and hide potential errors...the cover up is what gets the patient/family angry, and later angers a jury. The cover up – not so much the error – is often the crux of a case. The cover up is what makes the doctor look guilty even if an adverse event was not caused by error.”<sup>13</sup>*

*“Like defence lawyers, personal injury lawyers know that the vast majority of med-mal cases - meritorious as well as non-meritorious - are rooted in anger; anger that is generated when patients and families believe they cannot get information or the truth from their providers.”<sup>14</sup>*

*“A growing body of evidence in the peer reviewed medical literature shows that patients and families primarily file lawsuits against doctors because of anger, not greed.”<sup>15</sup>*

There will 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.

When people are angry they often want to lash out – to get revenge, to cause pain or to force those they see as responsible to explain what happened. 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 thinking seriously about money, which they may see as a way to measure the pain they want to cause, or at a minimum to get enough money to be able to pay the lawyer!

## **Things to be avoided in apologies**

The things that should be avoided in an apology can be summarised under the headings of subject matter, content and delivery<sup>16</sup>:

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13 August 2010

14 18 May 2008

15 7 July 2009

16 Taken from: Apologies, a practical guide, published by the NSW Ombudsman in May 2007. Several of the problems are referred to by Dr Aaron Lazare in 'On Apology', Oxford University Press, 2004.

## 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.
- *Generalized 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'.

## Content

- Avoidance apologies:
  - apologies that try to excuse or avoid responsibility eg, 'I am sorry for what I said, but...' (although 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:
  - apologies that fail to include an admission of responsibility for the problem and the harm caused, eg, mere expressions of regret, sympathy, sorrow, 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.
- *Repeat apologies* – a series of apologies for the same reoccurring problem [think Ministers responsible for railways!].

If you can't remember each of the items in this reasonably long list of don'ts, at least remember the key naughty words to be avoided. As they say in the classics, no 'ifs' no 'buts'. There should also be

no 'any' (particularly when used with 'if'), no 'then', 'may', or for that matter any other words used to qualify or limit the message.

## The essential elements of a 'full' apology

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.

What is required for an apology to be effective 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)
- the feelings that motivated the apology, such as the apparent motive and degree of regret, or
- the level of sincerity evident in 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*. This includes:

- a *description of the wrong* – an honest and fulsome 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
- 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*. This is the core element of the apology, being a *statement* expressing sincere sympathy, sorrow, remorse and/or contrition. The *sincerity* of this communication will generally be absolutely essential, and whether or not it is present will be closely analysed by the recipient of the apology. I have set out some thoughts on the issue of sincerity in **Annexure B** to this paper.

But where sincerity is essential for an apology to be effective, indicators of sincerity are likely to include:

- whether the focus of the apology is on the needs and feelings of the person wronged or the consequences of the action on that person, not on the apologists reputation or relationship with the person
- whether the objective of the apology is clearly to respond to the needs of the person wronged, rather than merely to appease that person or to attempt to justify what occurred
- whether there is an acceptance or acknowledgement of responsibility for the wrong and harm, not an attempt to deny responsibility or imply that the person wronged was in some way responsible for the harm that occurred.

I should note here that sincerity is not always an essential requirement – it depends on the needs of the recipient of the apology. Sometimes the mere fact of an apology will be enough, particularly if the harm caused was to reputation – to ‘face’. I think a case in 2002 amply illustrates this point. It involved a magistrate suing a newspaper for defamation arising out of an article which implied the magistrate was soft on crime and unfit to be a magistrate. She was reported on several occasions as saying that all she wanted was an apology – clearly sincerity wasn’t an issue, just public acknowledgement. When it was not forthcoming she sued and was awarded \$250,000.<sup>17</sup>

The fifth element of a full apology is *responsiveness* or *redress*, which would include:

- a statement of the *action taken or proposed* to put things right, which might involve money, actions or promises to fix, etc
- 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
- *timeliness* – no undue delay – as one writer said: “*When you realise you have made a mistake, make amends immediately. It’s easier to eat crow while it’s still warm*”

**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, where they are important their exclusion is likely to decrease the chances of success. Which elements of an apology are essential will in practice depend on the nature of the need of the person or persons harmed.

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<sup>17</sup> Law Report, ABC Radio National, 11 June 2002

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

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.

## **Failure is not an option**

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.

## **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, if it addresses the real needs of the recipient
- 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.

## ANNEXURE A

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

## FACTORS IMPACTING ON PERCEIVED SINCERITY OF APOLOGIES

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

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