



# Apologies Guide

Pursuing fairness for  
the people of NSW.

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We acknowledge the traditional custodians of the land on which we work and pay our respects to all Elders past and present, and to the children of today who are the Elders of the future.

Artist: Jasmine Sarin, a proud Kamilaroi and Jerrinja woman.

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# 1. About this Guide

This guide is about apologies: what they are, why they matter, and what to consider when preparing an apology.

It also explains when an apology will be protected by the [Civil Liability Act 2002 \(NSW\)](#) (**Civil Liability Act**).

The guide has been written by the NSW Ombudsman for NSW public sector agencies.

It does not deal with apologies that may be made as part of the National Redress Scheme implemented following the Royal Commission into Institutional Responses to Child Sexual Abuse. Information about that Scheme can be found at [National Redress Scheme](#).

## 2. What is an apology?

A simple definition of an apology is:

- an **expression** of sorrow, sympathy, remorse or regret, and
- an **acknowledgement** of fault, a shortcoming or a failing.<sup>1</sup>

Sometimes only one of those elements is warranted ie. giving a ‘partial apology’. For example, it may be appropriate only to express sorrow (“*I’m sorry this happened to you*”, but without acknowledging it was any fault of yours) or only to acknowledge fault (“*I take responsibility for what happened*” but without saying sorry or expressing regret that it did). However, it should be noted that a partial apology is less likely to be effective than a full apology as defined above.<sup>2</sup> See below under **When an apology may not be appropriate, or advice should be sought before apologising** for more information.

## 3. Why apologise?

All NSW Government agencies are obliged under the Model Litigant Policy for Civil Litigation to apologise where the State or an agency is aware that it has acted wrongfully or improperly.<sup>3</sup>

A sincere, timely apology can:

1. resolve a dispute or conflict
2. prevent the escalation of a dispute or conflict
3. help reconcile those involved in or impacted by an event
4. build or rebuild relationships of trust and confidence, and
5. address reputational issues caused by an event, for either the recipient of the apology or the person delivering it.

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<sup>1</sup> It should be noted that the ‘apologies’ that are protected under the *Civil Liability Act 2002 (NSW)* (see below under ‘Protections under the Civil Liability Act’) are broader than this definition, covering any expression of sorrow, sympathy, remorse or regret, *whether or not* there is also an acknowledgement of fault, a shortcoming or a failing.

<sup>2</sup> See PE Vines, *Apologising to Avoid Liability: Cynical Civility or Practical Morality?* (2005) 27(3) Sydney Law Review 483 which reported experiments showing participants were far more likely to accept a settlement offer if a full apology rather than a partial apology was given, and partial apologies could actually be detrimental if the injury was severe.

<sup>3</sup> Premier's Memorandum M2016-03-Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse Model Litigant Policy 3.2(k).

The importance of an apology will vary depending on the circumstances. Sometimes an apology may be the only thing someone wants whereas at other times it may be one of a number of things that person is seeking.

## 4. What may stop an agency from apologising?

Sometimes agencies perceive certain barriers to apologising. These may be legal, institutional and political, or behavioural and cultural in nature.

<b>Legal</b>	One reason why agencies and people have often been reluctant to apologise is a fear that their apology may be taken as an admission of fault either: <ul style="list-style-type: none"><li>• in the context of insurance law (for example, by affecting insurance coverage if the policy expressly prohibits the person insured from admitting fault without the consent of the insurer)</li><li>• in the context of legal liability more generally (for example, by encouraging or strengthening a claim for compensation).</li></ul>
<b>Institutional or political</b>	Agencies may be concerned about apologising if doing so would be perceived as damaging the reputation of the agency or the person apologising, or if the relevant staff in an agency feel they do not have the authority to apologise.
<b>Behavioural or cultural</b>	Apologising may be viewed as a sign of weakness, or as something that brings shame or causes someone to 'lose face'. Sometimes there may be a reluctance to apologise particularly when people feel they had done their best at the time, or they feel a sense of unfairness that they are not also recognised for good work.

This guidance is aimed at supporting agencies to overcome these potential barriers by providing information about statutory protections for apologies and how to go about giving an apology.

See below **Protections under the Civil Liability Act** and **Facilitating and encouraging apologies in the public sector**.



## 5. Protections under the Civil Liability Act

This section explains the statutory protections that are given to apologies in NSW.

Even where these statutory protections apply, before making an apology you should consider if there is an insurance policy or self-insurance scheme such as the Treasury Managed Fund that might respond to an event or incident. If so, it would be prudent to check with your insurer, claims manager or (in the case of the Treasury Managed Fund) Insurance and Care NSW (iCare) before taking steps to apologise. This can ensure that your apology will not impact your agency's ability to claim under the policy or scheme.

In a range of situations, NSW legislation **protects a person who makes an apology from the apology being treated as an admission of fault.**<sup>4</sup>

The Civil Liability Act applies only to certain civil proceedings. It has no effect in criminal proceedings.

It also does not apply to civil liability relating to:<sup>5</sup>

1. an intentional violent act done with intent to cause injury or death or that is sexual assault or other sexual misconduct
2. damages for dust diseases etc brought under s11 of the [Dust Diseases Tribunal Act 1989](#)
3. personal injury damages where the injury or death concerned resulted from smoking or other use of tobacco products
4. an award to which Part 6 of the [Motor Accidents Act 1988](#), Chapter 5 of the [Motor Accidents Compensation Act 1999](#) or Part 4 of the [Motor Accident Injuries Act 2017](#) applies
5. an award to which Division 3 of Part 5 of the [Workers Compensation Act 1987](#) applies
6. 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](#) or the [Anti-Discrimination Act 1977](#) or a benefit payable under the [Sporting Injuries Insurance Act 1978](#)
7. financial assistance for economic loss under the [Victims Rights and Support Act 2013](#).

The protections in the Civil Liability Act also do not apply to liability in defamation – although there are provisions in the [Defamation Act 2005](#) (s 20) that deal with apologies in defamation proceedings.

### How does the Civil Liability Act apply?

The Civil Liability Act defines an 'apology' broadly 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*<sup>6</sup>

<sup>4</sup> Other Australian jurisdictions that deal with civil liability have similar provisions.

<sup>5</sup> [Civil Liability Act 2002](#) (NSW) Part 10.

<sup>6</sup> [Civil Liability Act 2002](#) (NSW) s 68 (emphasis added). This definition is broader than the one used in this Guide.

The Civil Liability Act states that an apology:

- A. is not an admission of fault or liability by the person who makes the apology, and
- B. is not admissible in civil proceedings as evidence of, and is not relevant to the determination of fault or liability.<sup>7</sup>

Of course, while the apology itself cannot be used as an admission of fault or liability, having made an apology does not prevent someone otherwise being found to be at fault and liable.

## 6. Preparing an apology

There is no one way to apologise, but for an apology to be effective, it must be sincere, and an insincere apology can make a situation worse. Tailoring an apology to the circumstances is essential to demonstrating sincerity, although it cannot be guaranteed the apology will be perceived as sincere.

### Who should give the apology?

The person apologising should usually be the person who is, or is reasonably perceived to be, primarily and directly responsible for the problem. It is generally best to avoid ‘delegating’ an apology, or delivering an apology on behalf of someone (ie *“on behalf of...I would like to apologise for...”*).

But in some circumstances – such as where that person cannot be identified, does not accept that they are responsible or refuses to apologise – if the employer accepts responsibility, the agency head or other relevantly senior officer would generally be the most appropriate person to give an apology.<sup>8</sup> This may also apply in circumstances in which further interactions between parties, even for the purpose of an apology, would not be appropriate.

### Who should receive the apology?

The person/s receiving the apology might be those directly harmed (for example a patient harmed by medical error) and those indirectly harmed (for example relatives of the patient affected by the medical error).

Ensure that the apology is not made to the wrong person, or to only some but not all of the people who were relevantly affected in the same or substantially similar ways.

### What to avoid

The effectiveness of an apology can be affected by anything that leads to questions about its sincerity. Some things to avoid are set out below.<sup>9</sup>

- Giving an apology only because you are told to or have been criticised for failing to apologise.
- Generalising or failing to identify the relevant event (ie *“I am sorry for what occurred”* or *“mistakes were made”*).
- Incorrectly describing the event or not identifying the issues of primary concern to the recipient.

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<sup>7</sup> Civil Liability Act 2002 (NSW) s 69.

<sup>8</sup> See also PE Vines, *The Value of Apologising within a Moral Community: Making Apologies Work* (2017) 7(3) *Oñati Socio-legal Series* 370, 374.

<sup>9</sup> Several of these are also referred to by Dr Aaron Lazare in *On Apology*, Oxford University Press, 2004.

- Questioning whether there was a problem (“A comment was made that may have caused offence”) or whether there was harm (“If you were offended by what I said, I am sorry”).
- Trying to excuse or avoid responsibility (“I am sorry, but...”).
- Focusing on the recipient’s reaction (“I am sorry you took offence at what I said”).
- Using the passive voice without ‘owning’ the problem (“an offensive comment was made”).
- Using a form letter that does not identify the recipient or uses impersonal language (“To whom it may concern...”).
- Repeatedly apologising for the same thing, without ever taking steps to fix recurring problems.

## 7. Things to consider when preparing the apology

There is no one-size-fits-all apology, and no set process for delivering one. Things to consider include:

<p><b>Subject</b></p>	<ul style="list-style-type: none"> <li>• What are you apologising for – the event itself, the detriment it caused, how it was dealt with, or all of these things?</li> <li>• Ensure you understand the subject of the apology clearly. There is a difference between apologising for an initial error, and apologising for what was or wasn’t done once the error was identified.</li> <li>• Identifying the subject of the apology may require a preliminary discussion between the parties, possibly with the assistance of a third party.</li> </ul>
<p><b>Explanation</b></p>	<p>An explanation will usually be warranted, but it should not be presented as an excuse. This may be an explanation of how the circumstances came about, or a commitment to investigate.</p> <p>Consider whether the thing you are apologising for was intentional, unintentional, well-meaning but flawed, malicious, an inappropriate exercise of discretion, breach of an undertaking or promise, or something else?</p> <p>This may also be relevant to the degree of remorse to be expressed.</p> <p>The explanation may reference problems with, for example:</p> <ul style="list-style-type: none"> <li>• Competence – deficient/inadequate levels of experience or skill, human error or negligence.</li> <li>• Service delivery – delays, interruptions of service, denial of service, overcharging.</li> <li>• Judgement – taking no action or the wrong course of action due to inexperience, inaccurate or insufficient information or the misinterpretation of available information.</li> <li>• Conduct – the attitudes and/or responses to problems and complainants displayed by the people involved, rudeness etc, and</li> <li>• systems/management – inadequate coordination or information sharing, red tape, lack of resources, mismanagement, forgetfulness, accidental loss of files etc.</li> </ul> <p>While you should avoid making ‘excuses’, it may be appropriate to explain mitigating circumstances – for example, the person or agency had no choice but to act in a particular way or that what happened, though flawed, was well-intentioned.</p>



<b>Impact</b>	<ul style="list-style-type: none"> <li>• Consider the impact of the event about which you are apologising, in particular:</li> <li>• The <b>nature</b> of any detriment (physical, psychological, reputational, embarrassment etc).</li> <li>• The <b>seriousness</b> of any detriment.</li> <li>• The <b>timing</b> of any detriment – it may have already occurred, be currently occurring, or occur in the future.</li> </ul>
<b>Responsibility</b>	<p>Responsibility for the event may be <b>direct or indirect</b>. Indirect responsibility may be:</p> <ul style="list-style-type: none"> <li>• administrative – where a agency head or other relevant senior officer is responsible for the conduct of staff</li> <li>• political – where there is ministerial responsibility for the cause of a problem or a failure to address it, or</li> <li>• symbolic – where a government takes responsibility for the action/inaction of a previous generation or administration.</li> </ul> <p>The <b>extent</b> of responsibility can be full or partial (shared with a third party or the person to whom the apology is being given). Where there is only partial responsibility, any apology should include a clear description of the specific conduct to which it relates.</p> <p>There are also various <b>degrees</b> of responsibility. A rough hierarchy might be:</p> <ul style="list-style-type: none"> <li>• <i>“what I said was wrong and...”</i></li> <li>• <i>“it is my fault – I said it”</i></li> <li>• <i>“I made a mistake when I said...”</i></li> <li>• <i>“I didn’t mean to say...”</i></li> <li>• <i>“I didn’t realise that what I said implied...”</i></li> <li>• <i>“I didn’t know that what I said was wrong” or “I thought what I said was correct”.</i></li> </ul> <p>Ensure that the words used are appropriate to the degree of responsibility.</p>
<b>Redress</b>	<p>Consider what action will be taken or is proposed to be taken to address the circumstances to which the apology applies. This may include action to mitigate any ongoing harm, to offer restitution or compensation, or to commit to avoid the same thing happening again (and outline the steps taken or to be taken).</p>

**What does the recipient want or expect?**

Consider what the recipient may want or expect from an apology, and whether those expectations will be met (it may be that they cannot be met).

What they want might include:

- an explanation of what happened<sup>10</sup>
- reassurance that something was a mistake and not indicative of an attitude or approach
- restoration of reputation
- vindication on a point of principle
- recognition or acknowledgment of hurt
- revenge, humiliation or punishment
- an admission that someone else was responsible for the wrong and/or an acceptance of responsibility to rectify the problem or compensate for the harm or committing to ensuring that it will not happen again
- rectification or reparation – to be returned to the position they would have been in or achieve some other form of redress, such as symbolic compensation, or
- resolution or reconciliation<sup>11</sup> – a first step to resolving a conflict or dispute, to enable a fresh start to a relationship.

Even it is apparent that the person wants more than an apology, and this cannot be satisfied (eg. imposition of punishment, or receipt of compensation), if an apology is warranted it should be given.

**How should the apology be given?**

***Should there be an initial communication before the apology?***

This may be appropriate where:

- It is necessary to inquire into the cause of and responsibility for the problem – the initial communication could include an expression of sympathy which does not acknowledge responsibility.
- The matter is complex or sensitive – it may be important to discuss the issue with the intended recipient to help reach a common position on the nature and scope of the event and detriment. This will help identify what the person wants from the apology and what they believe is appropriate.
- The apology is being made to a child, person with disability, person with diverse needs or a person experiencing vulnerability – particular care may be required in preparing the apology, and if the apology is to be given in-person consideration should be given to involving a support person.

There may be other instances where preliminary communication or discussion may be appropriate before preparing and giving an apology.

<sup>10</sup> Although the information conveyed in an apology should not be admissible in civil proceedings in NSW, the apology may convey information that can be used to obtain information for use in court proceedings. See eg *Khowly v Amoud* [2020] NSWSC 1445, [103] (where a party said 'I'm so sorry, I didn't see you', the words 'I didn't see you' were admissible), but compare *Westfield Shopping Centre Management Company Pty Limited v Rock Build Developments Pty Limited [No 2]* [2013] NSWDC 306 (where a whole email containing an apology was ruled inadmissible).

<sup>11</sup> At the very least an apology can prepare the ground 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.

	<p><b>Public or private?</b> If the event and detriment have been in the public domain, the apology may need to be public or at least written so that recipient can make it public if they want. If the event was a private matter, the apology should be private.</p> <p><b>Written or oral?</b> 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. In some cases, a face-to-face apology should be followed by a more detailed written apology.</p>
<p><b>Timing</b></p>	<p>The timing of the apology may depend on the nature of the event, any detriment caused and a range of other factors.</p> <p>Apologies should generally be given at the earliest practical opportunity, particularly where the consequences are serious and the responsibility is clear. However, a delay may be required to inquire into what has happened and allow one or both parties time to reflect.</p> <p>Other factors to consider:</p> <ul style="list-style-type: none"> <li>• <i>Minor private offence</i> – if the event was private in nature and involved a less serious personal offence (e.g. rudeness, anger, insensitivity), an apology should be offered immediately.</li> <li>• <i>Serious private offence</i> – if the event was private in nature but involved a more serious personal offence (e.g. betrayal of trust, lying, cheating), consider delaying an apology to allow time for initial discussions about the appropriate content and method of communication of the apology.</li> <li>• <i>Serious public offence</i> – if the event was public but responsibility is not clear, the person affected (and if necessary the wider public) 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 should be accompanied by an expression of sympathy or regret that does not amount to a full apology and acceptance of responsibility.</li> </ul>
<p><b>Record-keeping</b></p>	<p>Document communications between parties to an apology. Regardless of whether the apology in question is protected by statute, it may be important to have evidence of what was said or otherwise communicated about the event.</p>

## 8. When an apology may not be appropriate, or advice should be sought before apologising

There may be circumstances where an apology is not appropriate, or when advice should be sought before making an apology. Some of these are considered below.

### **Where there is uncertainty and inquiries are ongoing**

If there is uncertainty and inquiries into what happened are ongoing, it may be appropriate to issue an interim response that acknowledges the event, expresses sorrow or sympathy, indicates that inquiries have begun and commits to further communication once the outcome of inquiries is known. Once those inquiries have been completed, a further communication must be made and, if there is sufficient certainty about the cause of, and responsibility for the problem, an apology can be made.

### **Where there has been no fault, shortcoming or failure**

In some cases a person may be adversely affected by a decision or other action that involves blameless conduct – such as where the agency had no discretion to do otherwise than what it did, or where what was done was an entirely appropriate exercise of discretion. In those circumstances, it would be more appropriate to offer an expression of regret or sympathy, together with an explanation, rather than an apology that includes an acknowledgement of a failing or flaw. (Note that, while this is not an apology as we define it in this guide, it would still attract the protections under the Civil Liability Act.)

### **Where the Civil Liability Act does not apply**

Where the Civil Liability Act does not apply, it would be prudent to seek advice from the relevant insurer (if relevant) or legal adviser before apologising.

In some cases, and depending on legal advice, it may be possible to make a “without prejudice” offer of an apology, as it may facilitate an agreement between the parties that settles the matter. Alternatively, and again depending on legal advice, it may be possible to offer a communication that:

- describes or explicitly acknowledges the grievance or alleged problem (but only in general terms without referring to causation or acknowledging liability)
- states the action taken or the specific steps that are proposed to help address the grievance or alleged problem<sup>12</sup>, and
- in some cases, if there has been malicious conduct, an apology may not be appropriate, unless the perpetrator is ready and able to communicate genuine remorse.

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<sup>12</sup> In proceedings relating to liability for negligence, the subsequent taking of action that would (if taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk, or constitute an admission of liability with the risk (s 5C of the *Civil Liability Act 2002* (NSW)).

## 9. Facilitating and encouraging apologies in the public sector

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

- be aware of when and how they will be legally protected from liability if they do apologise
- 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 a sincere apology is the right thing to do and may serve a good purpose, and
- 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 by ensuring there is a strong ethical culture throughout their organisation, as well as by adopting and implementing a robust policy of openness, transparency about mistakes, and willingness to apologise.

