

Health Insights

Saying Sorry: A Guide for New South Wales Pharmacists

Adverse events and mistakes occur in clinical practice. It is generally accepted that following an adverse incident, best practice is for pharmacists to engage with the patient or a patient's carer, explain the known facts including how the event occurred and what the consequences are for the patient. It is also considered best practice to apologise for what has occurred.

Why is it important to apologise?

It is widely accepted that apologies can have psychological benefits to a potential claimant. It can also assist in the early resolution of grievances between a practitioner or service provider.

Apologies should therefore be made in instances where a patient has expressed concern following an adverse incident.

Apologising is also an important part of demonstrating insight which is something valued by the Australian Health Practitioner Regulation Agency (**Ahpra**), the Health Care Complaints Commission, the Pharmacy Board of Australia (**Board**), and the Pharmacy Council of NSW (**Council**). Generally, it is considered by Ahpra, the Board and the Council to be a good reflection upon a pharmacist if a genuine apology is made promptly in response to a concern. This is in line with Ahpra's Shared Code of Conduct (applicable to pharmacists in all States and Territories in Australia) which requires practitioner to be open and honest in communication with patients who have been harmed by adverse events, apply the principles of open disclosure, listen to a patient's concerns and acknowledge any distress.

What should you say?

We provide the following practical guidance on making an apology:

1. **Actively listen to the complaint and demonstrate that the concern is being taken seriously.** This can be done by giving the patient or their carer an opportunity to explain how the incident has affected them and promptly responding to any complaint by ensuring the appropriate person responds to the concern. Depending on the circumstances, this may be done by the dispensing pharmacist, another pharmacist, or the pharmacy's proprietor.
2. **Express sympathy, regret and concern for the incident.** In doing so, express care and focus on the 'human response'. Avoid making an admission of liability or fault. Similarly, do not make mention of potential outcomes (such as compensation) or insurance as this may incite or encourage a claim.

3. **Use the word Sorry.** There is nothing wrong with using the word “sorry”. Ensure any expression is done empathically and sincerely. Some suggested wording includes:
‘I am very sorry to hear about this/I am very sorry that this happened. Please be assured that we take these issues seriously and your health and wellbeing is our priority. We will investigate this matter promptly so that we can understand how this happened and take steps to avoid any recurrence’.
4. **Notify PDL.** Ensure this is done as soon as possible so appropriate advice can be obtained.

Apologies and Admissions of Fault

Pharmacists may be concerned that making an apology may jeopardise their ability to defend claims or complaints made against them on the basis that the apology may be construed as an admission of guilt. Pharmacists will also be aware of the impact that an apology may have on their insurance policies as a result of non-admission of liability clauses within those policies. It is important to ensure that an apology is made in accordance with the applicable legislation to ensure that such clauses are not triggered.

Generally, apology laws aim to dissociate the act of making an apology from an admission of liability and are designed to enable the natural ‘human response’ of apologising.

Each Australian State and Territory has varying definitions of what constitutes an “apology” in these circumstances. In New South Wales (NSW), an apology is defined in section 68 of the *Civil Liability Act 2002* (NSW) (**the CLA**) to mean:

‘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.’

For the most part, the definition within the CLA mirrors the common, everyday definition of an apology. Unlike in some other jurisdictions, from a legal perspective in NSW, an apology does include an admission of fault.

All States and Territories in Australia have legislation in place that will protect remorseful parties wanting to issue an apology in civil matters, ensuring that the apology will not be admissible in a related matter, provided that it satisfies the relevant apology definition.

In NSW, this is set out in section 69 of the CLA:

69. Effect of apology on liability

(1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person —

- a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter; and*
- b) is not relevant to the determination of fault or liability in connection with that incident.*

(2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

The intent behind this section is to encourage parties to make an apology without fear of that apology being later used, against the party, as an admission of fault or liability in claims for damages.

Apology laws share common features across jurisdictions but variations exist. The NSW legislation applies one of the broader definitions of apology, making it irrelevant whether or not the apology admits or implies an admission of fault. Other jurisdictions' definitions of apologies for these purposes do not include statements containing acknowledgement of fault or liability.

From a practical perspective, the NSW legislation does consider an acknowledgment of fault as fitting within the definition of an apology. While this means that an apology including an admission of fault cannot be used to establish fault at Court, care should still be taken when making an apology to avoid an admission of fault where possible as this may still give strength to a patient in negotiating or commencing a claim.

It is also important to note that the CLA provisions apply only to civil actions, and do not apply to complaints made to a regulatory body such as AHPRA, the HCCC, the Council or the Board. These bodies may still take an admission of fault into account, even if it forms part of an apology.

What shouldn't you say?

The CLA is designed to encourage apologies, in the hope it leads to complaints being deescalated or to encourage the early resolution of disputes and an avoidance of litigation.

Care should be taken when making an apology to a customer to ensure it fits within the CLA.

When apologising, express sympathy, regret and concern for the incident and the customer's wellbeing. In doing so, avoid making an admission of liability or fault. Similarly, do not make mention of potential outcomes (such as compensation) or insurance as this may incite or encourage a claim.

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