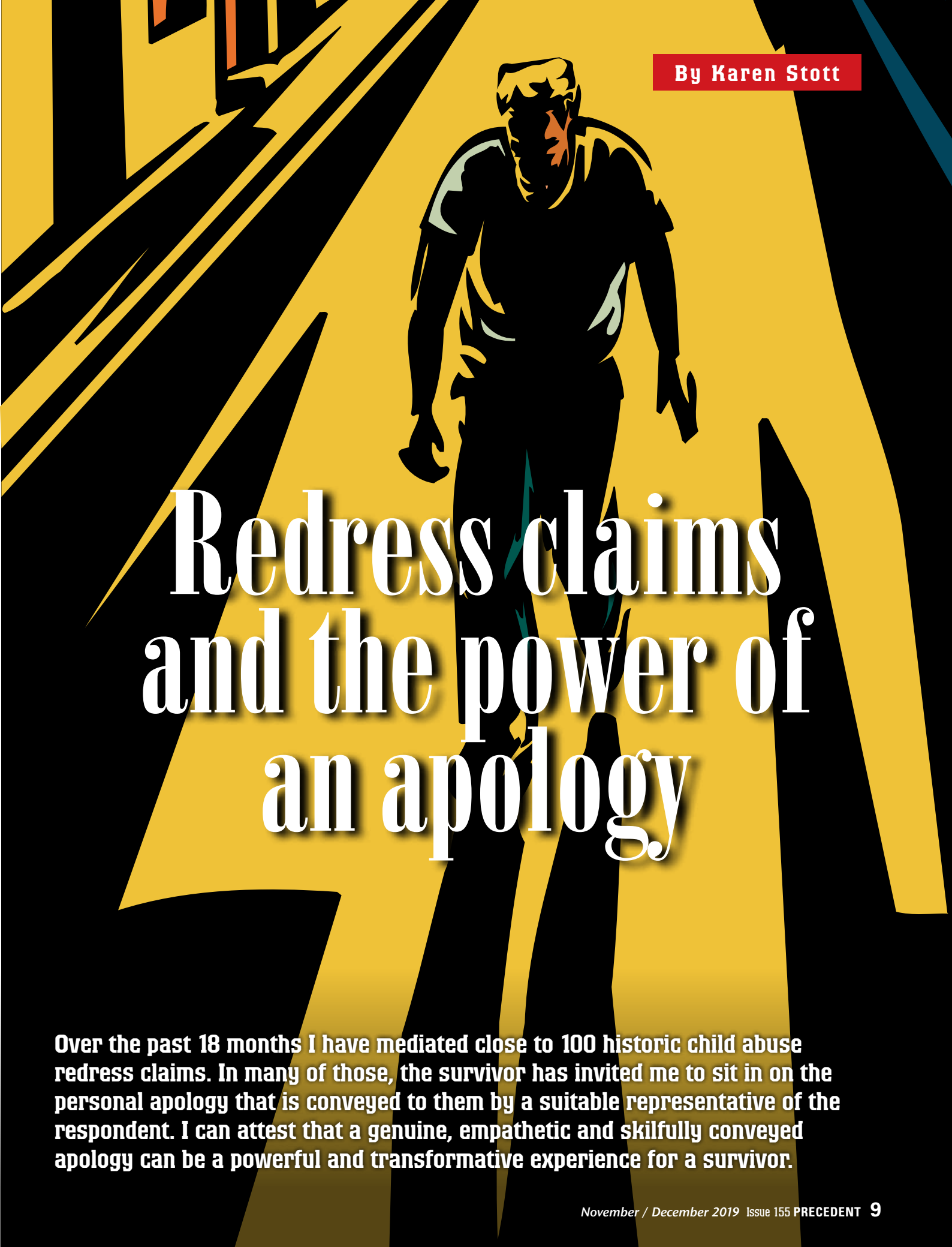




By Karen Stott

Redress claims and the power of an apology

Over the past 18 months I have mediated close to 100 historic child abuse redress claims. In many of those, the survivor has invited me to sit in on the personal apology that is conveyed to them by a suitable representative of the respondent. I can attest that a genuine, empathetic and skilfully conveyed apology can be a powerful and transformative experience for a survivor.

The Royal Commission into Institutional Responses to Child Sexual Abuse woke the nation and gave survivors recognition and a voice.

Through the countless horrific stories of the survivors who courageously came forward, our collective consciousness was forever changed. But for the volume and raw honesty of the survivors' stories, it would have perhaps been impossible to comprehend, let alone accept, that vile acts of paedophilia could have been committed on such a wide scale – by essentially every institution and organisation involving children – and over such a long period of time.

The Royal Commission also helped survivors to realise that they were not alone in suffering the private sense of shame that they had been battling their whole lives. It made them feel acknowledged and absolved of the fault and guilt that they had taken on as children, unable to process or understand the complexity and betrayal at such a young age and, sadly, with no power to protect themselves. Their lack of fault seems obvious to you or me. But that simple fact has usually been anything but obvious to a survivor of child sexual, physical, and/or emotional abuse.

The Royal Commission led to a national apology delivered by the Prime Minister on 22 October 2018 and the vast majority of survivors I have met either watched it on TV or attended in Canberra. The majority of the survivors I have met attribute the national apology to former Prime Minister, Julia Gillard, because she initiated this inquiry and provided the opportunity for them to feel validated for the first time.

The salience of the Royal Commission, of course, is that it provided a platform or mechanism for survivors to come forward again, or for the first time, and to make a personal redress claim against the perpetrator and/or the liable substitute.

It also caused a revolutionary change in the way that institutions and organisations respond to such claims. One vital example is that most, or at least many, proxy respondents are now prepared to listen to, acknowledge, and attempt to remedy the past wrongs by offering a genuine, unfettered apology.

Such apologies offered through survivors' private redress claims are often coupled with meaningful monetary compensation. For the purposes of this article, however, I do not propose to explore the complex legal issues with which the parties must also contend. This would most appropriately be addressed by the specialist lawyers who act for either party.

WHAT HAPPENS AT THE MEDIATION OF A REDRESS CLAIM?

A redress claim involves two very distinct and important parts:

1. The provision of an apology; and
2. Legal negotiations and attempted agreement regarding monetary compensation.

As the mediator, I try to place a lot of emphasis on the separate nature of these two parts. This is for a number of reasons:

- An apology is extremely important. The very fact it is being offered is meaningful. The restorative effect of an apology on a claimant's sense of dignity and self-worth in the face of injustice and exclusion is fundamental to human nature (discussed further below).
- A survivor of child abuse deserves an apology, no matter what the outcome of any legal claim is.
- If the survivor is open to receiving an apology, and the 'apologist'¹ performs their role genuinely, with preparation, skill, empathy and mindfulness, an apology can be transformative, perhaps offering the first real chance for the survivor to begin healing.
- I regard it as crucial that the empowerment of the survivor by an apology not be undermined or nullified by the survivor's expectations around, or the outcome of, the compensation negotiations.

Accordingly, an apology should not be associated with money. No price can be put on a survivor's lifetime of suffering, and the legal and evidentiary challenges that are commonly faced in historic redress claims make this area fraught with difficulty on both sides. This is generally why both parties prefer to negotiate the amount of compensation rather than have a decision imposed by a judge.

The survivor ought to be offered a choice about how they would like to receive the apology. That is, either in person with the appropriate respondent, in writing, or both. This choice is a deeply personal issue, and survivors will usually feel very strongly about it. The process as a whole should allow for:

- the wrong to be acknowledged;
- the survivor to tell their story, including an account of what has changed for them as a consequence of the abuse;
- the survivor to feel respected and believed; and
- an opportunity for the survivor to be told that the abuse shouldn't have happened, and to hear the word 'sorry'.

To ask a survivor to make a choice about the way in which they receive an apology is also a small way of empowering survivors and giving them some control; control they were clearly denied at the time the abuse occurred. Survivors have often spent most of their lives following orders, being or even just feeling subservient and powerless. A claim for redress can be a turning point for them in many areas of their lives.

At the start of the mediation, I will therefore spend a lot of time (if the claimant and their team will allow me), to establish rapport with the survivor, explain the two-part process to them, listen to their story if they want to tell me, and ask them to choose how they would like to proceed.

Some survivors prefer to say little, the very participation in the mediation being painful for them. They avoid making eye contact. They are in 'flight or fight' mode due to the re-traumatising effect of re-telling their stories in the mediation process. Yet, they still have the courage to come forward.

Other survivors have been waiting a long time for the opportunity to tell their stories and they want to tell you. They open up. They are vulnerable, personable; they want to connect and they truly regard this day as a line being drawn between the trauma of their pasts and their sense of hope and dignity looking forward.

THE POWER OF LISTENING

Fascinatingly, I have observed that when survivors open up to me during my initial private meeting on mediation day (noting that it is an integral role of the mediator to really listen), they often do not feel the need to re-tell their full story again to the person giving the apology, or to the other side's legal representatives. It can be enough that they feel properly heard, and for many, for the very first time.

To be clear, however, by no means does my role usurp that of the person giving the apology. Perhaps the survivor still regards that person as a trigger. Despite this understandable ambivalence, these survivors are often then able to 'move forward' to receive the apology, and later to proceed with the negotiations. Interestingly, I have found this in a wide range of non-redress litigated matters and with the parties on any side. The power of feeling heard is truly remarkable.

For other survivors, the need to tell their story to the person giving the apology, and also be heard by 'the other side', is strong. Some choose to have a joint opening address, which I conduct with an emphasis on ceremony and very differently from a legal dispute of any other nature. Some will address everyone in the room and tell their story – briefly or at length.

Every single redress claim is different. The important thing is the way they are conducted: what happens on the day is unique to the survivor, their choices and feelings. It really can be, and most often is, a self-actualisation process.

HUMAN NATURE AND THE KEY ELEMENTS OF AN APOLOGY

On becoming a mediator, I was introduced to some basic concepts of neuroscience and what it can teach us about human behaviour. It is both enlightening and highly relevant for any stakeholder to a negotiation. Here are some of the fundamental drivers of human behaviour in conflict situations:

- fairness (a sense of justice);
- community (a sense of belonging);
- status;
- autonomy; and
- certainty.

The need for certainty is so strong that the human motivation to avoid the risk of danger or uncertainty takes precedence over the motivation to pursue the chance of a reward or financial gain.

To me, this preference explains how:

- the conflict or trauma came into being; and
- it might be resolved through constructive communications at a mediation.

I witnessed this first-hand often enough as a plaintiff medical negligence lawyer, in my litigation days. When it comes to a redress claim for child abuse, the power of a genuine apology takes on a much deeper meaning.

I am borrowing from the experts in this area and notably, Chris Marshall.² Marshall speaks of 'The seven Rs' when it

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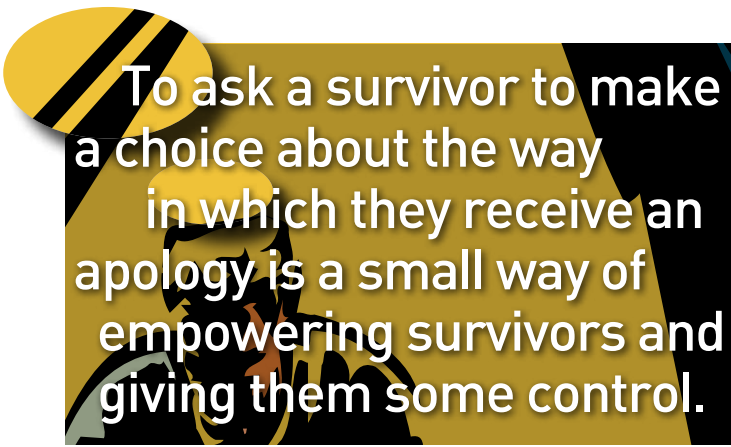
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comes to personal, moral apologies as well as formal, public apologies, as follows:

1. Recognition of the wrong.
2. Responsibility taken for it.
3. Reasons given.
4. Remedy offered.
5. Reassurance given that steps have been taken to prevent the same mistakes from being repeated.
6. Request, for example, what else would help you?
7. Respect, demonstration of.

Marshall speaks of the impact of formal apologies that are delivered genuinely, personally and in detail, as being hugely profound and emotional.

This all rings true to me as an observer, because I find that when the person apologising at these redress claims conducts themselves in this way, the impact on the survivor is visceral. You can see the vulnerable child in the adult survivor, and you can witness a change in their demeanour, manner, posture – everything. There is a real sense of justice restored and perhaps for some, a sense of dignity.

THE SURVIVORS WHO I WILL NEVER FORGET

To ensure the individuality of each survivor's mediation, to remain 'mindful' and 'present', and to take care of my own mental health, I make a conscious effort after a mediation to do a 'brain dump' of the facts and details of that person's day. No redress claim was the same, but the common thread of the themes that arose was stark.

Participating in the redress process exposes you to what feels like the very essence of humanity, and some survivors leave an imprint on my memory. I welcome that and I am thankful for it. Here are just a few.

The middle-aged survivor who was supported on mediation day by his estranged adult son, who grew up not knowing his father because of early problems in the marriage – so common. The survivor literally had no money; again, so common. Recently reunited, the son had a suit custom-made for his father to wear on the day, so that his father would not be there in the only clothes he owned and could fit into: sweatpants and a jumper. The survivor and his son were by far the best-dressed people on the day, sitting around the table in the city with all the lawyers. The survivor wanted to open up. He wanted everyone to hear. He spoke for nearly

one hour, telling his story. His son had no idea what his father had been through and was clearly upset to learn about it, for the first time. It was an incredibly bonding experience for the father and son. The inter-generational trauma caused by child abuse runs deep. And the survivor after that day really did appear to enjoy the rest of the process and to cope well with the negotiations. He left unburdened and contented. My concern continues for his son.

The Indigenous survivor who had spent much of her young adult life homeless – always running away from home. We weren't sure if she would actually be attending because she 'went off the grid' in the week before the mediation date. But her solicitor had an amazing rapport with her client, as empathic professionals in this area do. She showed up on the day, back from the bush. She'd been on the train since the very early hours of the morning just to get there on time. The person who gave the apology was incredible. She was knowledgeable about Indigenous peoples and culture; she listened; she was empathic, she was genuine. She understood why the survivor kept running away. She explained just how differently things are done now. Her words to the survivor were deeply moving. The survivor was able to speak, and to be consoled. She could feel the dignity and kindness with which she was being treated. It calmed her. She took it all in and it looked to me as though this really meant something to her.

The middle-aged female survivor who arrived at the mediation with a warm smile, looking happy, healthy, naturally polished, at ease. If you tried to imagine what a survivor of child sexual abuse endured for many years, including being called a 'slut' at age eight when she tried to tell her mother what was happening, you would not conjure in your mind a lady who looked and presented like this. She brought some of the few photos and mementos from her childhood because she wanted to show the person giving the apology who she was. She came to the mediation ready to receive an apology and ready to forgive. The person who gave the apology listened, she asked about other people in the survivor's family and life who are also owed an apology. They spent one hour together. They talked about her memories and parts of her life – good and bad. They held hands. There were tears. There was a real bond between the two, who had never met each other before that day. The survivor was able to say: 'I forgive you'. And she meant it. She had also been able to make peace with her mother as an elderly woman before her death; the mother had sought her daughter's forgiveness. She left the mediation that day saying that she firmly regarded this day as a line being drawn, and that she could now divest her anger and look to the future with a new sense of calm.

The middle-aged man living on his own in regional NSW, whose wife 30 years ago, in the early stages of their marriage, fraught with his alcoholism, begged him to 'set her free if he loved her'. He has not seen or heard from her since, nor their two children. Living the life of a hermit (as so many survivors do), he came to the mediation saying that he has no friends and no family and is hoping that this mediation will give him something worth living for. He had plans after that day to buy himself a caravan and join the 'grey nomads' if he could. Although he appeared to be a man of few words, he

did want to have a joint opening and to speak. Once he got started, he really opened up. His story was deeply moving. He had endured a long life of suffering, battling drug addiction, in and out of prison following those critical years of abuse as an adolescent. He requested an apology in writing – and did not want a face-to-face apology. But I think the compassion that he felt in the room when he spoke at the joint opening, and the empathic words spoken to him in response by the ‘other side’, served the same purpose. He resolved his claim that day, as so many are determined to do. They can’t stomach the prospect of it continuing indefinitely. By the time the mediation concluded, the quickest way of getting to the airport was by train, so I walked him to the right platform and saw him off. My last memory of him is smiling and waving back at me as the train departed. My heart ached for him being so alone. I hope he does go and get that caravan and start the new life that he spoke about.

To recount these stories, I did not need to refer to any notes. These people and their stories stand out in my consciousness without the need for prompting.

HOPE FOR THE FUTURE

The power of an apology offered in a redress claim is a sign of the times. Apologies represent an inspirational shift from the atrocities of the past being allowed to go unchecked, towards reconciliation as a matter of course.

This is how society now expects all stakeholders to respond and, from what I have seen, they are doing it. Quite simply, but fundamentally, the difference it makes in the lives of the survivors can be everything. ■

I am by no means an expert on this topic and many have written about it authoritatively before me. See, for example, the joint article by K Hogan-Ross, W Blacker, L O Connor and R Royle, ‘ADR in historical sexual abuse cases’, *Precedent*, Issue 141, July/August 2017, 41–44. See also K Alexander, ‘I have a job where I say sorry’, *Sydney Morning Herald*, 18 October 2018, <<https://www.smh.com.au/politics/federal/i-have-a-job-where-i-say-sorry-20181024-p50bmy.html>>. In writing this article, I did not make reference to other papers, studies or the law as I wanted to share my own unique experience and observations as a mediator.

Notes: 1 This is a common term ascribed to the representative of the respondent who is appropriately qualified and suited to offer an apology to the survivor. In using that term, I intend it to be interpreted in a very different sense from the way in which it is most typically understood: ‘a defensive person who makes excuses’. 2 C Mitchell, ‘Apology in dispute resolution’, University of Wellington. Webinar presented to the Resolution Institute, December 2018.

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