

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

INQUIRY INTO WORKSAFE

Date of Hearing: 9 May 2018

Session One

Evidence provided by the Equal Opportunity Commission

Question on Notice 1: Hon Adele Farina asked if the Equal Opportunity would be prepared to provide the Committee with a copy of the submission it made to the Ministerial Review of the State Industrial Relations System?

Answer: Yes, the Equal Opportunity Commission is pleased to provide the Committee with the attached copy of its submission to the Ministerial Review of the State Industrial Relations system.

As per the final sentence, permission was given to make the submission public. The submission has been included in the material made public with the Report of the Ministerial Review of the State Industrials Relations system, and is accessible on the internet via the following link:

https://www.commerce.wa.gov.au/sites/default/files/atoms/files/equal_opportunity_commission_submission.pdf

Question on Notice 2: Hon Adele Farina asked whether each Australian jurisdiction has a dual mechanism for dealing with complaints of bullying

The Commission confirms that no State, Territory, or Commonwealth anti-discrimination legislation makes bullying in the workplace, or elsewhere, unlawful.

The Fair Work Act 2009 defines bullying as unreasonable behaviour towards [the worker] or a group of workers, and the behaviour creates a risk to health and safety.

WorkSafe WA describes bullying as repeated inappropriate or negative behaviour that undermines an individual's right to dignity at work, and creates a hazard in the workplace in the form of injury to, or harm to the health of, the individual.

Question on Notice 3: Hon Adele Farina asked if the Commission would be able to provide the Committee with a research report referred to in response to the question of whether there is a benefit in a complainant receiving an apology.

Answer: Yes, the Equal Opportunity Commission is pleased to provide the Committee with the attached copy of the Research Report 'Parties' Perceptions of Apologies in the State Administrative Tribunal and Equal Opportunity Commission of Western Australia' from a joint project of the School of Psychology and Social Science, Edith Cowan University and the Law School, University of Western Australia.

Our Ref: COM120088-04
Enquiries: _____

Confidential

Ministerial Review of the State Industrial Relations System

By email only:

Dear

Thank you for your invitation to comment on the review of the State Industrial Relations system.

Since the enactment of the *Equal Opportunity Act 1984* (the EOA) more than thirty years ago, complaints in respect of the area of work have consistently been the highest in number by a significant amount. Most of these complaints relate to direct employment, although there is a variety of other arrangements such as those relating to contractors, commission agents and partnerships. Applicants for positions are a subset of complaints related to employment. The Equal Opportunity Commission receives many complaints and enquiries regarding unlawful discrimination that include an industrial relations element, and which are beyond our remit.

Equal Remuneration

As the Acting Commissioner for Equal Opportunity I fully support my predecessors in strong advocacy of the need to redress the gap in remuneration between male and female employees in Western Australia. Consistent with this, I fully endorse a strengthening to the existing object of the IR Act: *to promote equal remuneration for men and women for work of equal value*.

The capacity for a body such as the Western Australian Industrial Relations Commission to interrogate the inequities that underpin the gap, and to provide realistic remedies to address these, would not only be beneficial to those currently under-remunerated but also strengthen the capacity of organisations to retain the services of valued female employees.

Other Matters

More broadly, looking beyond Term of Reference number three regarding equal remuneration, there are workplace situations where there is a nexus of industrial and discrimination issues and where the State industrial relations system may be able to provide timely remedy given its capacity to conduct expeditious conciliation.

The following suggestions are, I believe, consistent with the first object of the *Industrial Relations Act 1979*: *to promote goodwill in industry and in enterprises within industry*.

Family responsibilities is frequently cited as the ground of discrimination in complaints that are framed around the issue of workplace flexibility, which is not covered under the EOA. The Commission accepts such matters as a complaint and attempts to conciliate. However, it is considered that the timeframe for undertaking a preliminary investigation prior to arranging a conference, as provided for under the EOA, presents a challenge to conciliation efforts.

Timely resolution of issues may be enhanced by a process that provides employees the ability to file for a conciliation conference where they consider their employer has failed to give reasonable consideration to their family responsibility needs. Such a process may require the current definition of industrial matters to be broadened to contemplate family responsibilities, as well as amendment to section 29 of the *Industrial Relations Act 1979* to allow individuals to file an application. In addition, it may be necessary to introduce a provision that allows for a conciliation conference only to attempt to resolve the matter.

Bullying is not a ground under the EOA, but enquires relating to bullying ranked as the fifth most common category received by our enquiry services in the 2016-17 financial year, with 92.2% of these enquiries related to the workplace. This has been a consistent trend over the past ten years.

The EOA does not have formal recognition of bullying in the workplace; however, if people believe their adverse treatment is due to one of the grounds of the Act (e.g. sexual orientation, impairment), then they may file a complaint of discrimination. As mentioned above, our process of preliminary investigation generally does not provide for the type of intervention that may be useful before matters escalate.

I suggest a system similar to the bullying provisions under the *Fair Work Act 2009* and recourse to the Fair Work Commission would assist those Western Australian employees who currently do not have access to this remedy.

I have no objection to this submission being published on the internet, and would be pleased to discuss any of the above matters in greater details.

Yours sincerely

John Byrne
Acting Commissioner for Equal Opportunity



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Research Report

Parties' Perceptions of Apologies in the State Administrative Tribunal and Equal Opportunity Commission of Western Australia

**A joint project of the School of Psychology and Social Science, Edith Cowan
University and the Law School, The University of Western Australia**

Perth, Western Australia

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Acknowledgments

The Investigators acknowledge with thanks the support and cooperation provided by the Commissioner for Equal Opportunity Ms Yvonne Henderson, the former President of the State Administrative Tribunal (SAT) of Western Australia Justice Michael Barker, the current President of SAT Justice John Chaney and former Senior Member of SAT Ms Jill Toohey.

The investigators also acknowledge the valuable assistance provided by UWA Law student Mr Daniel White.

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Executive Summary

Complainants' and respondents' experiences of the settlement of equal opportunity complaints of discrimination or harassment were investigated. The aim was to gather information on the nature and value of apologies in the settlement process. One specific aim was to learn about parties' perceptions about the value of ordered apologies.

Researchers from Edith Cowan University and the University of Western Australia worked in collaboration with the Western Australian Equal Opportunity Commission (Commission) and State Administrative Tribunal (SAT) to send invitations to complainants and respondents in discrimination and harassment matters that had been finalised in 2007 or 2008 to participate in the research. Procedures ensured that the identities of participants in the study were not known to the researchers, the SAT or the Commission. Twenty-four complainants and respondents took part in semi-structured interviews and discussed their experiences of the complaint and its resolution.

Qualitative analysis of the interview transcripts revealed some clear themes in participants' views on the value and function of apologies in the matters that involved them. The majority of complainants and respondents placed a positive value on apologies in the settlement process. That value was influenced by the authenticity of the apology in terms of its spontaneity, timing, whether it included an admission of wrongdoing, and whether it was accompanied by appropriate affect and action. Apologies were viewed as serving a number of functions: healing, affirming, satisfying needs, and pragmatism. A strong influence on complainants' perceptions of the complaint process and outcome was the degree to which the harm done to them, and the consequent effects of that harm was acknowledged. Other factors that influenced participants' experiences of the complaint process and its resolution included the involvement of lawyers and legalities – particularly respondents' fears surrounding apology-liability issues, and the ongoing effects of publicity or confidentiality of complaints.

There were no ordered apologies made in proceedings relating to the participants in this study. However, many participants made comments on the value of prompted apologies, whether made on the advice of others or in relation to ordered apologies in a hypothetical complaint similar to their own. Most complainants considered spontaneously offered apologies to have more value and to be more likely to be

sincere than ordered apologies. Some complainants, however, considered that an ordered apology could have value as a vindication of their complaint that had, moreover, been enforced by an external authority. Some respondents commented in terms of apologies saving time and money, and for little outlay.

It appears that apologies, especially those that are spontaneously offered, can play a valuable role in the resolution of discrimination and harassment complaints. The results of this study indicate a relationship between complainants' satisfaction with the outcome of a complaint and apologies that are perceived as authentic. Authenticity is indicated by timeliness, the inclusion of an admission of responsibility, being accompanied by appropriate affect and action, and an empathic focus in affirming and acknowledging the harm caused. There are also indications that respondents may be more inclined to offer such apologies if they have their legal position clarified.

Parties' Perceptions of Apologies in the State Administrative Tribunal and Equal Opportunity Commission of Western Australia

Introduction

Australian equal opportunity legislation aims to eliminate, so far as possible, discrimination and harassment on specified grounds within society.¹ Further, the legislation aims to promote recognition and acceptance within the community of the equality of men and women and to promote recognition and acceptance within the community of the equality of persons of all races and of all persons regardless of their personal attributes including sexual orientation, religious or political convictions, impairment or age. To support these aims the legislation provides an opportunity for people who have been discriminated against or harassed to seek legal redress for the wrongdoing and its consequences.

Complaints about unlawful discrimination or harassment in Western Australia can be brought under the *Equal Opportunity Act 1984* (WA). The Equal Opportunity Commissioner (Commissioner) has the power to investigate the complaint and convene a conciliation conference. Complaints that fall within the jurisdiction of the Commission are allocated to a conciliation officer who conducts the investigation and attempts to conciliate the complaint. Where a complaint cannot be conciliated, or where the Commissioner considers it necessary, complaints are referred to the Western Australian State Administrative Tribunal (SAT). A complaint may also be dismissed by the Commissioner on grounds that it is frivolous, vexatious, misconceived, lacking in substance or does not involve conduct that is unlawful. In that event the complainant has the right to take their case to the SAT. When a matter proceeds by way of application to the SAT, the parties may be referred to mediation. If mediation is not appropriate or does not result in settlement of the complaint, the matter proceeds to a hearing and is resolved by a determination of the SAT.

¹ A comprehensive list of Federal and State legislation in force is set out in CCH, *Australian and NZ Equal Opportunity Commentary*, ¶2-720 and a table summarising the legislation [2-780].

A distinctive feature of equal opportunity law in Australia is the broad range of remedial orders that can be made by the various Tribunals and Boards that are invested with powers by the legislation. The orders that can be made include compensation for financial loss or injury to feelings;² that the respondent restrain from discriminatory conduct in the future; that they change their policies and practices to help prevent discrimination occurring again; and that the respondent perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant.³

There is voluminous anecdotal evidence that apologies are a common and significant term on which many civil disputes are settled.⁴ There is also a small body of empirical data from the equal opportunity jurisdiction that shows that apologies are a common term of settlement of discrimination and harassment complaints. A study by Hunter and Leonard of three Australian jurisdictions found that apologies were a term of settlement in 30.5% of the conciliated complaints in their study.⁵ A research report prepared in 2003 analysing 451 files relating to discrimination complaints in Hong Kong (which has similar legislation to Australia in this respect) established that the most commonly sought remedy in sexual and disability harassment complaints was an apology.⁶

² There are statutory limits to the amount of compensation that can be awarded, for example, in WA the maximum is \$40,000, *Equal Opportunity Act 1984* (WA) s127(b)(i).

³ For example, s127 *Equal Opportunity Act 1984* (WA), provides: "except in respect of a representative complaint or a matter referred to the Tribunal for inquiry as a complaint pursuant to section 107(1), order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant". Similar provisions are contained in anti-discrimination legislation in other Australian States and Territories.

⁴ For example, D. Shuman, "The Role of Apology in Tort Law" (2000) 83 *Jud* 180 at 180; J. Brown, "The Role of Apology in Negotiation" (2003 – 2004) 87 *Marq.L.Rev.* 665; B. Neckers, "The Art of the Apology" (2002) 81 *Mich.B.J.* 10.

⁵ See, R. Clifford, *A Review of Outcomes of Complaints under the Sex Discrimination Act 1984*, online: Australian Human Rights and Equal Opportunities Commission <www.hreoc.gov.au/complaints_information/publications/sda_outcomes.html>. R. Hunter and A. Leonard, 'The Outcomes of Conciliation in Sex Discrimination Cases' (Working Paper No. 8, Centre for Employment and Labour Relations Law, August 1995).

⁶ C. Petersen, J. Fong, G. Rush, *Investigation and Conciliation of Discrimination Complaints in Hong Kong: Statistical Analysis of 415 Complaint Files and*

The power to order a respondent to perform “any reasonable act” as envisaged by s127 of the *Equal Opportunity Act 1984* (WA) has been construed by a number of courts to include the power to order a respondent to apologise to the complainant.⁷ There are a number of Australian cases where orders have been made to this effect, against corporate entities and private individuals.⁸ This statutory power is a distinctive feature of Australian equal opportunity law in Australia and is a power rarely conferred by legislation in other areas of law in Australia or similar legal systems elsewhere⁹. The case law in which apology orders have been considered supports the conclusion that ordered apologies are intended to serve both compensatory and non-compensatory purposes and aim to protect the interests of the complainant and the public interest more generally.¹⁰

The reported decisions, however, reveal differing views amongst decision makers as to the value of ordered apologies¹¹ and the efficacy of ordering a corporate

Commentary, Research Report, July 2003, Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong.

⁷ See, for example, *De Simone v Bevacqua* (1994) 7 VAR 246; (1994) EOC 92-630 ; *Ma Bik Yung v Ko Chuen* [2002] 2 HKLRD 1; *Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625 (Unreported, Bowman J, 7 April 2004).

⁸ *De Simone v Bevacqua* (1994) 7 VAR 246; (1994) EOC 92-630 (against corporate employer); *Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625 (Unreported, Bowman J, 7 April 2004), (against a government entity); *Western Aboriginal Legal Service Limited v Jones & Anor* [2000] NSWADT 102 (Unreported, Rees, Silva and Luger, 31 July 2000) (against a private individual). For commentary on remedies awarded under the legislation including apology orders see Australian Human Rights Commission, *Federal Discrimination Law* (2009) <<http://www.hreoc.gov.au/legal/FDL>>, Ch 7, ‘Damages and Remedies’.

⁹ The power to order an apology for unlawful discrimination is not unique to Australia however. In Hong Kong, see the *Disability Discrimination Ordinance* s72(4)(b). In the Republic of South Africa, s 21(2) of the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* confers power on the Equality Court to make a wide range of remedies orders, including ‘an order that an unconditional apology be made’:

¹⁰ R Carroll, ‘Beyond Compensation: Apology as a Private Law Remedy’ in J Berryman and R Bigwood (eds), *The Law of Remedies: New Direction in the Common Law*, (Irwin Law, Toronto, (forthcoming 2010).

¹¹ Contrast, for example, *Chew v Director-General of the Department of Education and Training* (2006) 44 SR (WA) 174 with *Evans v National Crime Authority* (2003) EOC 93-298.

respondent to apologise.¹² There are many reasons why coercive orders of this nature are rarely made. Aside from the fact that an order of this nature might not often be sought, a prominent reason is that it is an order that interferes with the wrongdoer's freedom of expression. This interference has been held to be justified, however, where the power to order an apology is conferred by legislation, such as equal opportunity legislation which aims to protect other rights and freedoms.¹³ Another, possibly equally important reason for the scepticism about the value of apologies in law, ordered or otherwise, is the concern that they are ineffective when offered in legal proceedings.

Psychological theory suggests that apology can play a pivotal role in the resolution of disputes and in psychological healing after wrongdoing.¹⁴ This can be explained with reference to a theory of apology developed by Slocum, Allan and Allan¹⁵. Slocum and her colleagues conceptualise apology as a process that consists of one or more of three components: affirmation, affect and action. Each of these components has two categories; one that reflects a self-focus on the part of the wrongdoer and the other a self-other focus. The self-focused categories of affirmation, affect and action, are admission, regret and restitution; and the self-other focused categories are acknowledgement; remorse; and reparation respectively. Slocum et al. believe that an apologetic response with one or more of these categories may assist in the resolution of a dispute. The exact nature of the apologetic response will depend on complainants' perception of the seriousness of the harm, the level of responsibility they attribute to the wrongdoer and the prior level of trust in the relationship between the parties.

¹² Contrast, for example, *Grulke v K C Canvas Pty Ltd ACN 057 228 850 with Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625 (Unreported, Bowman J, 7 April 2004).

¹³ For example, *Wagga Wagga Aboriginal Action Group v Eldridge*, (1995) EOC 92-701.

¹⁴ See, for example, Allan, A. (2007). 'Apology in civil law: A psycholegal perspective'. *Psychiatry, Psychology and Law*, 14, 5-16.

¹⁵ Slocum, D., Allan, A., & Allan, M. M. (Submitted). An emerging theory of apology, *Australian Journal of Psychology*.

There is some research that supports the assertions that apologetic responses by wrongdoers can lead to the resolution of differences and psychological healing,¹⁶ but there has been very little research to establish whether these benefits are also found when apologies are offered in legal proceedings.¹⁷ In particular there is an absence of empirical evidence that demonstrates whether an ordered apology is an effective remedy.

The aim of the research presented in this report was to study the perceptions of parties who are involved in discrimination and harassment proceedings in the SAT and Equal Opportunity Commission using qualitative methodology.

Method

The research was guided by a phenomenological framework¹⁸ to examine the subjective experience of parties in equal opportunity proceedings with reference to apology. As the aim was to examine and richly illustrate participant's experience and perspective on apology, qualitative methodology was deemed the most appropriate. As Polkinghorne (p.72)¹⁹ explains, the purpose of qualitative inquiry "is to disclose and make manifest the shared and personal characteristics of the experiential lives of human beings" (p. 72). Aligning with qualitative methodology, interviews were conducted and transcribed and a thematic content analysis of the transcripts was carried out using a grounded theory approach.²⁰

¹⁶ Id.

¹⁷ Allan, A. (2008). Functional apologies in law. *Psychiatry, Psychology and Law*. 15, 369-381

¹⁸ Ashworth, P. (1996). Presuppose nothing!: The suspension of assumptions in phenomenological psychological methodology. *Journal of Phenomenological Psychology*, 27(1), 1-25.

¹⁹ Polkinghorne, D., E. (2006). An agenda for second generation of qualitative studies. *International Journal of Qualitative Studies on Health and Well-being*, 1, 68-77

²⁰ Strauss, A., & Corbin, J. (1998). *Basics of qualitative research: Grounded theory procedures and techniques*. Newbury Park, California: Sage Publications.

Participants

Participants were recruited with assistance from the SAT and the Commission. People who had settled a complaint in either or both the Commission and SAT in the years of 2007 and 2008 were identified. These people were sent a letter and invitation to participate in the study which outlined the purpose of the research, what participation would involve and who to contact if there was an interest in participating (see Appendix A). Interested parties were invited to contact the research assistant. It was explained that participation was entirely voluntary, and participants retained the right to terminate their involvement at any time. Participation in an interview subsequent to the above explanation constituted informed consent.

Twenty four participants were interviewed, 10 males and 14 females. Their ages ranged from 39 – 70 years (average age 55). There were 13 complainants and 11 respondents, and nine of the respondents were corporate respondents (for more information regarding the participants see Appendix B).

Materials

A semi-structured interview schedule was developed to guide the interviewer. It encompassed the major domains that were expected to be relevant and specific questions that could be used to encourage participants to expand on their replies (see Appendix C).

Procedure

The research team did not know the identity of those who expressed interest in the study and the Commission and the SAT did not know who had accepted the invitation to participate. Interviews were conducted either in person or by telephone. The majority of participants (20) chose to be interviewed by telephone as this was more convenient, especially for Chief Executive Officers and directors of organisations or those living in remote locations or interstate. One complainant had a hearing impairment and, at his request, the interview was conducted via email. The questions were sent to him one at a time after he had responded to the previous question. Participants were asked questions concerning the matter they

were a party to and about their perceptions of apology in anti-discrimination proceedings (see Appendix B). At the end of the interview participants provided information regarding their gender, age, and country of birth.

The interviews were recorded and later transcribed verbatim. After the transcriptions had been checked by a member of the research team the sound files were deleted. Transcripts were distinguished by a unique code and de-identified to ensure optimal protection of the privacy of participants.

In most cases the interviews did not evoke strong emotions, other than slight anger. However some participants expressed sadness or distress as they reflected on their cases. Participants who became upset were asked if they wanted to discontinue the interview and were offered a break. Interviews were only concluded when the interviewer was sure that the participant was not in distress and in need of further support. In one case a corporate respondent become too upset to continue the interview alone and was assisted by his business partner who was also involved in the case.

Data Analysis

The transcriptions were analysed using a thematic analytical process based on the methods of Charmaz²¹ and Strauss and Corbin, respectively²². NVivo 8, a qualitative analysis software program, was used to store, manage and classify the data. This provided an efficient workplace in which to analyse the data, identify themes and gain insight from which to draw meaningful conclusions.²³ Procedures such as peer debriefing, member checks and auditing were conducted in order to ensure the credibility and trustworthiness of the data.²⁴

²¹ Charmaz, K. (2006). *Constructing grounded theory: A practical guide through qualitative analysis* London: Sage.

²² Strauss, A., & Corbin, J. (1998). *Basics of qualitative research: Techniques and procedures for developing grounded theory*. Thousand Oaks: Sage.

²³ QSR International. *What is Qualitative research*. Retrieved on 5th of November, from: <http://www.qsrinternational.com/what-is-qualitative-research.aspx>

²⁴ Bromley, H., Dockery, G., Nhlema, B., Orton, L., Smith, H., Theobald, S., & Tolhurst, R. (2003). Glossary of qualitative research terms: the qualitative research and health working group, Liverpool School of Tropical Medicine.

Results and Findings

Seventeen categories of themes were identified in the interview data (see Table 1). Six of these were core categories that frequently appeared in the data and explained the variation in most of the themes. The other 11 were subordinate categories that represented expressions of aspects of the core categories.

Table 1 *Core and Subordinate Categories in the Data*

Core Categories	Subordinate Categories
Value	
Function	Healing Affirmation ¹ Needs Pragmatism
Lawyers and Legalities	
Authenticity	Spontaneity Timing Affirmation ¹ Affect Action
Affirmation	
Confidentiality	Public knowledge Enforced confidentiality

Note: ¹ Affirmation is a core category but is indicated as a subordinate theme in this Table because it overlapped substantially with the Function and Acceptability core categories.

Value

The value that an apology had for participants in this study can be loosely placed into three groups; those who viewed an apology in these circumstances as having positive value, those who viewed it as having a negative value, and those who viewed it as having neither. An apology had a positive value for the majority of the

participants. This was true in the case of complainants and respondents. One complainant stated:

I mean the value of an apology would have been gold, I mean it would have been just so nice to hear. (12)

A respondent who understood the positive value an apology could have for complainants said:

I am a great believer in the art of apology. (13)

It does, however, appear that some respondents are positive about apologies for pragmatic reasons:

Umm, well I had no problem with apologising, it doesn't cost anything. (6)

Apology was valued negatively by one subset of respondent participants because they viewed it as an admission of liability. They considered an apology to be a legal risk:

But I think everybody's worried about the point that John Howard was making about apologies, where it puts you to a liability issue...If you say, "oh I'm sorry I did this to you", you're admitting liability. (14)

Apologies held an even greater degree of negative value for those respondents who did not feel that they had committed any wrongdoing:

I would have refused [if ordered to apologise] and gone to the next court, gone higher up... I hadn't done it, so why should I apologise for something I hadn't done. (19)

A small group of participants that included both complainants and respondents attributed neither positive nor negative value to apologies within the context of their case. Complainants in this group did not ask for an apology.

I didn't care so much about the apology, I mean it was like a little bit of a bonus, but I had other fish to fry. (1)

I did not seek an apology and did not value it. An apology was irrelevant to the motivation of my complaint and the circumstances in which the discrimination occurred... My reason for lodging a complaint

was a carefully considered and calculated way to achieve permanent improvement to services provided by the respondent. (7)

Function

Those participants for whom an apology held positive value considered them to be functional, but in different ways. Four themes regarding apology function were identified in the data.

Healing.

Some complainants believed that receiving an apology would enhance their healing and help them to move on and achieve closure.

I just want the apology and the right to teach ... it would just have made me feel more at peace with all that happened. Sort of like closure. (3)

Well an apology would have been great... It would have saved me that mental anguish for nearly two years... When you start doubting yourself and you have had enough and you're up against a brick wall and you want to top yourself. That's what an apology would have avoided. (5)

I think the apology would have helped me in my own healing. (12)

Affirmation.

Many complainants valued apologies because they believed apologies validated their experiences and vindicated them taking action. This was such a strong theme that it will be reported separately as a core category.

Needs.

Some respondents who valued apologies considered an apology the right thing to do under the circumstances because it addressed the needs of the complainant.

Absolutely, we apologised anyway, I certainly did because what had happened to her was dreadful. (13)

We were certainly apologetic from the point of view if at any stage she had felt that as a student from (the university) she wasn't being respected or her needs

were not being met, or that we had in any way you know caused her distress. (15)

*I think that was the most important part [an apology].
I think that's what the person was looking for really.
(23)*

The focus of these respondents on the needs of the complainants is a good demonstration of what Slocum, et al.²⁵ refer to as a self-other focus. Their research also showed that apologies with this focus are more likely to be accepted than those that have a self-focus only.

Pragmatism.

In contrast, some respondents had a self-focus on apology. Their decisions to apologise were pragmatic and made after rational consideration to achieve a desired outcome, in other words, were made for an instrumental purpose.

That was suggested by the employee in Perth and then through the Equal Opportunity Commission who then conveyed it to our lawyers, who then conveyed it to me...We didn't want to spend any more time or money...As she was going away, we just wanted to facilitate the going. (6)

A similar comment was made about a hypothetical ordered apology:

If we were ordered to do it, and it was a means to settle a dispute that had the potential to run on and be very costly in terms of time and resources, I would probably go along with it. (24)

Lawyers and Legalities

Lawyers' advice influenced participants' decision making.

I was told by the advocate not to suggest anything about an apology because I would never get it. (3)

Some respondents, however, demonstrated a self-other focus towards the complainant and made the decision to apologise without seeking legal advice. For

²⁵ Slocum, D., Allan, A., & Allan, M. M. (Submitted). An Emerging Theory of Apology, *Australian Journal of Psychology*.

example:

In this case we didn't have any lawyers or any other advice and the apologies given were voluntary. (24)

Nevertheless, most respondents who offered apologies were wary of admitting liability and were therefore cautious about how the apology was formulated:

You can apologise without admitting liability because you wouldn't want to say anything that would then incriminate you in something that you may not have actually done. So you've got to be very careful about it, but you cannot always, but quite often you can usually generally make them feel better about it without actually admitting liability. (16)

Generally respondents were reluctant to offer written apologies:

...we wouldn't put that sort of thing in writing. (13)

You're very circumspect about what you put in your written documentation because further down the track that becomes a legal document which can be misconstrued, so I think you, you have to be very careful. (15)

Authenticity

Authenticity of apologies was very important to complainants. Five sub-categories emerged from the data as influences on whether the complainants perceived an apology as authentic. They were: spontaneity, timing, affirmation, affect, and action.

Spontaneity.

For most complainants, spontaneous apologies that were offered voluntarily were viewed as more acceptable because they believed them to be more authentic:

A voluntary apology comes more from the heart, doesn't it, but if you've got your arm up your back you will do anything won't you? You will confess to anything if somebody's sort of got a red hot poker, saying, "I'm going to stick this in your eye mate". (4)

I can see a clear difference there [between ordered and voluntary apology], umm because an ordered apology could be seen like they don't really mean it,

you know umm. I think a voluntary apology would be the best course of action. (12)

They did, however, point out that even apologies that appear to be spontaneously offered might not be truly voluntary. They could have been made for instrumental reasons, such as providing respondents with a way of escaping a problematic situation:

...they were backed into a corner they, you could call it voluntary, but they were more or less forced to do it, they weren't instructed by the commissioner, but I think that was the best outcome for them. (10)

There were differences of opinion amongst participants as a whole regarding the value of non-spontaneous apologies (including ordered apologies). These were variously viewed as unacceptable, acceptable, or desirable. Some participants considered non voluntary apologies as insincere, meaningless and therefore unacceptable:

Um I don't think you can ever order anyone to apologise because all they can say is, "no I won't". An apology is not sincere and it's not going to work if it's been ordered...If someone did that to me, I'd go (sigh) well that was a, you know like a slap across the face apology. It has to be voluntary otherwise it's not going to work. (16)

Other participants, however, saw non-spontaneous apologies as sufficient because they served a function. For instance, they could help them move on.

Oh yes I was just pleased to get an apology of any sort, I wouldn't expect it voluntarily. ... The apology helped because then I went back to being a normal resident. (8)

Additionally, the underpinning motivation for a non-spontaneous apology was not problematic for some complainants:

I would have no concern if the respondent's lawyer had advised the respondent to apologise. That is an internal matter for the respondent. The respondent is entitled and should be encouraged to obtain whatever advice the respondent wants. (7)

Some participants considered ordered apologies to be desirable, despite being non-spontaneous, because they provided public validation and personal vindication²⁶.

Their complaint is being legitimized and accepted by somebody else...Whooohooo somebody agrees with me. (1)

I would have had it put up on their website, put up on the notice board that [name deleted] been apologised to, and that's it. (4)

These participants felt that ordered apologies send a powerful message to society about the behaviour of respondents, and that this was particularly important in the case of corporate respondents:

Yes, you are ordered to make an apology, then that would have really rubbed their noses in it. (4)

Having an organisation ordered to apologise is a recognition by a body of authority within our community, court, that says this organisation was wrong... sends a very clear message to the community that this organisation was wrong whether they believe it or not, that apology being ordered for that organisation is one way of doing that. (13)

It appears that complainants considered ordered apologies to constitute a public validation of the discrimination or harassment against them and a vindication of their complaint.

Timing.

Some participants thought that apologies were more authentic if they were offered soon after the wrong had occurred:

²⁶

Case law shows that in awarding remedies under equal opportunity legislation Australian courts take into account not only the practical benefit of the order to the complainant but also the benefits of the order to the community. These benefits include the symbolic value of judgments that denounce discriminatory and racially offensive conduct, and the educative and deterrent value of judgments in which courts enunciate legislative principles. See for example, *Jones v Toben* (2002) 71 ALD 629, [112] (discussed in Carroll, R. The Ordered 'Apology' as a Remedy under Anti-Discrimination Legislation in Australia: An Exercise in Futility? Submitted for publication)

I appreciated that the apologies were given very early, were unprompted, sincere and appropriate to the facts and circumstances. A late apology, or a reluctant or forced apology or an apology that did not address the issues appropriately may have made it more difficult to reach a conciliation agreement. (7)

Had we known about it in the first instance, dealt with it properly and apologised to her and actually, you know, dealt with the whole situation within you know 24, 36 hours of it occurring, the whole thing would have been put to bed. ... If you do that quickly and promptly it is very effective because in most instances people want that recognition and if you do it promptly, people are fine. (13)

For other complainants, the receipt of an apology was more important than its timing.

You know if it were offered at any time, even in the last four years definitely, [it would have meant a lot]. (5)

Affirmation.

Whether complainants accepted an apology was strongly influenced by whether those apologising admitted the wrongful behaviour and consequences. Admission as a kind of affirmation is also a component of Slocum, Allan and Allan's²⁷ model. As a prominent theme, affirmation will be discussed below as a core category.

Affect.

The affective component of Slocum, Allan and Allan's²⁸ theory is also useful in explaining an influence on perceptions of authenticity. Complainants expected an expression of sorrow as part of an authentic apology.

And you know some sort of feeling of remorse, regret, you know ... (1)

²⁷ Slocum, D., Allan, A., & Allan, M. M. (Submitted). An Emerging Theory of Apology, *Australian Journal of Psychology*.

²⁸ Id.

I would say to that person, "Please, genuinely accept my most heartfelt apology. I have no idea how much and whatever, the grief that I have caused you I am dreadfully sorry". (2)

Respondents, similarly, recognised the need for an authentic apology to include demonstrated affect.

You need to show remorse and a recognition that something wrong has occurred, that ... has offended someone else ... (13)

The participants in this study agreed with Slocum and her colleagues' observation that incongruent, non-verbal affect can negate the impact of an expression of regret on perceived authenticity:

She said to me "I'm sorry, we are sorry, that you felt you were treated unjustly" ... she had a smirk on her face when she said it and she, the way that she said it, to me it felt like I had the problem and I was making the whole thing up ... and I walked away angry. (11)

Action.

Whether an apology was accompanied by action was a further influence on perceived authenticity. This theme also resonates with the apology model developed by Slocum and her colleagues²⁹. Most complainants wanted action that would restore them to their rightful position by compensating them for the tangible losses they had suffered. For example one complainant wanted:

My sick leave re-instated and turned into compo. (5)

Some complainants were also seeking reparation for non-tangible consequences of the wrong and in this regard they wanted action that demonstrated that respondents understood the effects the wrong had had on them. One of the most common forms of reparation sought by complainants in this study was to see changes that would address their fears that the behaviour they complained of would be repeated.

²⁹

Id.

Apologies were made by the respondent regularly during the process and I politely acknowledged and accepted them while persisting in my position that an outcome was needed that [gave a certain group of people access to a specific activity]. (7)

An indication... that they are going to review their policies and practices, so there's no repeat... some indication that they've actually taken it on board. (22)

Once again some respondents understood this.

... and she also wanted to make sure that other young women didn't go through the same, which is yeah, quite fair. (13)

We've got to go back and see what did we do and what could we have done better and what are the opportunities for improvement. (15)

Affirmation

A theme that was very prominent in this study was that complainants wanted respondents to at least admit that they had discriminated against them. Admission exemplifies Slocum, Allan and Allan's³⁰ self-focused level of what they term the affirmation component of an apology. The self-other focused category of affirmation is described as acknowledgment; recognition that, not only has the offender done something wrong, but also that the wrongdoing has negatively impacted on another.

Just some sort of acknowledgement from them anyway, that I was the person, they treated me incorrectly and just because I had a mental illness they shouldn't discriminate ... (3)

...to admit that the people have made a mistake. (4)

If they had just said, "oh, you know look we stuffed up, it should have been workers comp", and that's it, end of story. (5)

A complainant who did not receive an admission of wrongdoing as part of the apology that was offered indicated that this was something that had a great impact.

³⁰

Id.

... I will take this to my grave I think. Something was rightfully mine, was denied and no one acknowledged it. (5)

Some complainants also wanted acknowledgment of the effect the wrongful behaviour had had on them.

"I recognise the harm that I did to you".... (1)

I just wanted them to realise what they had put me through and umm to apologise for the way I had been treated. (3)

Some sort of acknowledgement of umm, what the other person has been through, I think that's really important. (12.

Respondents who positively valued apologies realised that complainants wanted the wrong to be acknowledged:

She felt completely aggrieved and that ... we weren't recognising that, that the event had occurred and that we're aware of it so that we cannot repeat the same thing. (13)

Confidentiality

This category has two dimensions. The first dimension is that participants regarded personal information becoming part of the public domain as affecting their confidentiality. While the public nature of proceedings in SAT does not involve the disclosure of confidential information in a legal sense it appears to be understood by some participants as a confidentiality issue. Some participants were concerned that information about their cases was available in the public domain. For example:

I was never told by the SAT that information from this case is going to be released on the internet. I was never told that it would be made public. ... if you want to read about what they did in my case and all that sort of stuff, if you Google my name and do a West Australian search on Google, I mean it's fairly straightforward ... , you can read about it, it's all there. (12)

The second dimension is the impact of agreeing that the terms of settlement will be confidential on participants' desire for vindication. Some complainants were unhappy that they had to sign confidentiality agreements regarding settlement. One commented:

I actually had to sign a gag order that I wouldn't ever speak to anyone about it... I didn't want to sign the gag order... so I feel I really lost out, lots! (21)

A corporate respondent described the way in which a confidential settlement agreement interfered with their desire for vindication:

Basically, what an apology would have meant to us is that we could have been able to express that to our staff, that it had been apologised for and the case was closed. Because as it stands, we can't discuss this with anyone, we literally have to take this to the grave, we don't want to bad mouth her or anything with the situation, but we would like people to know that [company's name deleted] wasn't at fault. ... The annoying part of it is we had a letter after settlement stating that it never happened. ... she wrote out a letter saying. "the incidents didn't occur regarding sexual harassment" ...she blatantly came out and said it was all a lie...and yet if it was discussed then she could come back and sue the company or us personally. (20)

Some complainants and respondents felt that the confidentiality clause prevented them from moving on:

.... it was horrific, emotional issues throughout for the whole family. It's just not been a pleasant experience... it affects your family and your business, effects the people around you and then you can't discuss it. (20)

When I went for a new job I couldn't give the right reasons why I left that job, haven't been able to talk about it. So whenever I go for a job, I've been unemployed ever since then, that was the last job I ever had, because I can't give a valid reason to anyone about why I left that job. (21)

Conclusion

It would appear that most participants in this study were positive about the value of apologies in the context of discrimination and harassment complaints because the apologies served some function for them. Complainants believed an apology assisted their healing and allowed them to move on. For some an apology was affirmation that they had been discriminated against. It was important to complainants that an apology validated that they had been discriminated against and vindicated their decision to complain.

Respondents who positively valued apologies can be divided into two broad groups. For one group of respondents an apology was a way of addressing the needs of complainants and they usually offered them spontaneously without consulting other people or lawyers because they considered it the right thing to do. The question of whether to order an apology or not would probably not arise in this case. For other respondents the value of an apology was instrumental that they could use it to achieve a desired outcome, usually to bring an immediate end to a costly and unpleasant dispute. Their decision to apologise was therefore well-considered and often taken in consultation with other people, often lawyers. These respondents will probably be pragmatic about ordered apologies and provide them if they think they will achieve a desired outcome.

Respondents who viewed apologies negatively were those who defined an apology as an admission of liability. They either saw an apology as something they could not do because they did not believe they had harassed or discriminated against the complainants, or they considered an apology a legal risk they would be taking. These respondents may ignore an order to apologise if it includes an admission of liability.

The legal implications of offering an apology were foremost in the mind of many participants. Whilst most participants may not have an accurate understanding of the legal implications of various types of apology,³¹ their perceptions influenced whether they will offer apologies, and the format they take if they do offer them. It is possible to draw the conclusion from these results that respondents would be more

³¹ See Ayling, T. (2006). Apology and liability for personal injury. *Brief, May*, 11-14 and Allan, A. (2008). *Implementation of the National Open Disclosure Standard in Western Australia: A literature review of the legal situation*. Retrieved from http://www.psychology.ecu.edu.au/staff/documents/allanA/86_Allan_OD_Literature_Review.pdf.

confident to offer an apology if they were certain about the legal implications of doing so.

The findings of this study provide support for Slocum and her colleagues³² theory of apology. As mentioned above, the acceptability of an apologetic response was influenced by whether it affirmed that complainants had been discriminated against or harassed and the consequences thereof on them. Affect also influenced the acceptance of a response as an apology and the participants in this study confirmed that it is important that the tone of respondents' voices and their non-verbal behaviour should be congruent with what they say. The major form of action complainants required in this study was behaviour that assured them that there would not be a repeat of the behaviour complained of.

The acceptability of an apology for complainants appears to be strongly influenced by the presence of the affirmation component. Therefore, whilst complainants would prefer an early spontaneous apology they will accept a late non-spontaneous apology because it provides affirmation of the discrimination or harassment. It appears that complainants who did not receive an apology found the notion of ordered apologies attractive because they believed that ordered apologies give powerful messages to respondents and society and thus would provide them private and public affirmation. It is therefore noteworthy that some participants believed that the potential of apologies serving a public vindictory function was limited by confidentiality agreements that prevented them from talking about apologies they received as part of a settlement.

Given that one aim of this study was to investigate ordered apologies, the absence of complainants who had received one, or respondents who had made one, from the group of participants is a limitation. This was, nevertheless, virtually unavoidable because purposeful sampling was not possible without infringing participants' right to privacy. A quantitative study with a larger sample may have captured settlements that included ordered apologies. Such a study should perhaps be the next step but it was necessary to firstly conduct the smaller, qualitative investigation reported here in view of the lack of research in the area. This study did, nevertheless, generate very useful findings and whilst they should be interpreted with caution given the qualitative nature of the study they do provide

Slocum, D., Allan, A., & Allan, M. M. (Submitted). An Emerging Theory of Apology, *Australian Journal of Psychology*.

useful material to generate hypotheses that can be tested during a further quantitative study.

Appendix A

Information Letter and Invitation to Participate



THE UNIVERSITY OF
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Information Letter

Research Project on Equal Opportunity Complaints

Did you seek, want or give an apology during the complaint resolution process?

Are you willing to talk about your experience?

Dear Sir/Madam,

We are a group of researchers from the University of Western Australia and Edith Cowan University who wish to interview people who have been involved in Equal Opportunity complaints where an apology was important to resolving the complaint. Our project has the approval of the Equal Opportunity Commission. You have been identified by the Commission as a complainant or respondent to an Equal Opportunity complaint within the last two years. The Commission is sending this letter to you on our behalf as we do not have access to your name or contact details. Our project has also been approved by the Ethics Committees at both ECU and UWA.

Aims of the Research

The aim of the research is to study the role that apologies play in the resolution of Equal Opportunity complaints. We are interested to hear examples of where apologies were exchanged and to learn whether they are valued by the people involved in these cases. The study will ask people to describe the dispute they were involved in, how the apology arose, and whether they found it valuable in resolving the case. The results of the study will contribute to a deeper understanding of the role apologies play in the resolution of complaints and will provide valuable information for people involved in resolving future equal opportunity complaints, staff training and policy development.

Are you willing to participate in our research?

Participation in this research is entirely voluntary and all data collected will be kept confidential. Please note: If you settled your complaint and agreed to keep the terms of your settlement confidential, then you will not be able to discuss the terms with us unless you obtain the consent of all parties to the settlement agreement.

If you agree to participate in the study you will invited to arrange an interview with a Project Researcher at a time and place that is convenient to you. The interview can be conducted in person or by telephone, depending on what is most convenient to you. The interviewer will ask you questions about your case. It is expected that interviews will take approximately 1 hour. The interview will be recorded on audio-tape and transcribed and you will be given the opportunity to review the content of the transcripts. Some of your comments, which will be anonymous, may be included in the final report.

If you have been a party to a complaint and you are willing to take part in the study, please telephone _____, School of Psychology and Social Science, ECU, to arrange an appointment. Her number is _____ and you will be able to leave a message if the phone is unattended.

Participating in this research will give you an opportunity to share your experience of the complaint resolution process. It is possible that the subject matter of these interviews will require you to recount stressful experiences and alert you to unresolved issues. If appropriate, the interviewer will be able to refer you to further counselling.

You can direct any questions concerning this research project to the Principal Investigator, _____, School of Psychology and Social Science, ECU, on _____.

Your assistance with this project will be much appreciated.

The Edith Cowan University Human Research Ethics Committees requires that all participants are informed that if they have any complaint regarding the manner in which a research project is conducted, it may be given to the Field Researcher or, alternatively, to

The Research Ethics Officer, Edith Cowan University, 270 Joondalup Drive, Joondalup, WA 6027. Tel:

The name of the project is:

The Value and Functions of Apologies in Equal Opportunity Complaints in Western Australia

Appendix B

Participant Sample and Apology Characteristics

#	Participant	Body	Apology ¹	Form ²	Context
1	Individual complainant	Both	Yes	Spoken	Offer of written apology, verbal apology given.
2	Individual complainant	Both	No	NA	Apology desired but not offered.
3	Individual complainant	EOC	No	NA	No request for apology on lawyer's advice, no apology offered.
4	Individual complainant	EOC	No	NA	Apology desired but not offered.
5	Individual complainant	EOC	No	NA	Apology desired but not offered.
6	Corporate respondent	EOC	Yes	Written	Complainant requested an apology. Respondent was advised by the EOC and lawyers to give an apology.
7	Individual complainant	EOC	Yes	Both	Apology not desired, but complainant accepted unsolicited apology.
8	Individual complainant	EOC	Yes	Spoken	Apology on advice of EOC was accepted.
9	Corporate respondent	Both	No	Both	No apology. Respondent denied responsibility.
10	Individual complainant	EOC	Yes	Written	Conditional apology accepted after amendments made.
11	Individual complainant	EOC	Yes	Spoken	Apology requested, but was perceived as insincere and insufficient.
12	Individual complainant	Both	No	NA	Apology desired but not offered.
13	Corporate respondent	EOC	Yes	Spoken	Accepted apology voluntarily offered by corporation rather than individual wrong-doer who had left the company.
14	Corporate respondent	EOC	No	NA	Denied responsibility but apologised for "any ill feelings".

15	Corporate respondent	Both	Yes	Spoken	Apologised for ill feelings without admission of responsibility.
16	Corporate respondent	Both	Yes	Spoken	Apology requested, given without admission of responsibility.
17	Individual complainant	EOC	No	NA	Apology requested. None offered but acknowledgment of the situation given.
18	Individual respondent	Both	Yes	Spoken	Apologised for ill feelings without admitting responsibility.
19	Individual respondent	Both	No	NA	Apology desired. Written expression of regret for any ill feelings given without admitting responsibility.
20	Corporate respondent	EOC	No	NA	Respondent sought apology from complainant who admitted false allegations. Received admission of responsibility but no apology.
21	Individual complainant	EOC	No	NA	Apology desired but not offered.
22	Individual complainant	EOC	Yes	Written	Apology received after request. Amended apology was accepted.
23	Corporate respondent	EOC	Yes	Both	Apology voluntarily given and accepted by complainant
24	Corporate respondent	EOC	Yes	Spoken	Apology voluntarily given and accepted.

Notes ¹ Based on participants' definitions of what was offered.

² The form in which the apology was presented.

Appendix C

Interview Schedule

The Value and Functions of Apologies in Equal Opportunity Complaints in Western Australia	
Orientation	
Question	Can I confirm you did NOT agree to keep the terms of your settlement confidential?
Question	Can you briefly tell me about the dispute you were involved in? <ul style="list-style-type: none"> • discrimination or harassment? • other victimisation? • on what grounds. • was it settled in the EOC or SAT?
Question	Am I right that you responded to our invitation because an apology was given during the resolution of the dispute?
Domain	Voluntariness
Question	Please tell me how it happened that the apology was given? <ul style="list-style-type: none"> • (If voluntary) sometimes people are ordered to apologise by the Tribunal. How do you think you would have felt if it was an ordered apology? • (If ordered) did this affect the way you felt about the apology (or, about apologising). • Also explore the possibility that a respondent's lawyer might advise him/her to apologise. What impact might that have?
Domain	Form
Question	What form did the apology take? <ul style="list-style-type: none"> • written/spoken? • Affirmation (admission or acknowledgement)? • Affect (regret or remorse)? • Action (restitution or reparation)?
Domain	Value
Question	What was the value to you of the apology?
Domain	Timing
Question	At what stage of the proceedings was the apology offered? <ul style="list-style-type: none"> • What are your thoughts about the timing of the apology? • Would you describe the apology as spontaneous?
Domain	Dynamics
Question	What factors led you to offer/accept the apology?

Domain	Function
Question	What role do you think the apology played in the eventual outcome of the dispute?
Question	Could anything have made the apology more effective? What is necessary in an apology for it to be acceptable?
Domain Question	Demographics gender What is your age? What is your country of birth?