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Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints

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Abstract

Apologies are known to play an important role in the resolution of equal complaints brought under equal opportunity legislation. Sometimes parties agree on an apology as a term on which the complaint is settled. Occasionally, where a complaint is not settled, a respondent will be ordered to apologise. The ability to order an apology is a distinctive feature of equal opportunity law in Australia. The aim of the researchers was to gather information on the role of apologies in the equal opportunity jurisdiction in Western Australia. Twenty-four complainants and respondents took part in semi-structured interviews. Qualitative analysis of the interview transcripts revealed that participants placed a positive value on apologies in the settlement process. They believed apologies serve a number of functions and have the potential to play a valuable role in the resolution of discrimination and harassment complaints. It appears that respondents may be more inclined to offer apologies if they have their legal position clarified.

Keywords: apology, equal opportunity, discrimination, harassment, tribunals, boards

Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints

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 persons of all races and of all persons regardless of their personal attributes including gender, 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.

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

[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].

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]

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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 Judicature 180; J. Brown, 'The Role of Apology in Negotiation' (2003 – 2004) 87 Marquette Law Review 665; B. Neckers, 'The Art of the Apology' (2002) 81 Michigan Bar Journal 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, and G. Rush, *Investigation and Conciliation of Discrimination Complaints in Hong Kong: Statistical Analysis of 415 Complaint Files and Commentary*, Research Report, July 2003, Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong.

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 and is a power rarely conferred by legislation in other areas of law in Australia or similar legal systems elsewhere[9]. 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 apologies[11] and the efficacy of ordering a corporate

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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, s21(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 See *De Simone v Bevacqua* (1994) 7 VAR 246; (1994) EOC 92-630; *Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625 (Unreported, Bowman J, 7 April 2004). For discussion see 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 Allan[15]. 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 an apologetic response that is good enough in achieving this will depend on complainants' perception of the seriousness of the harm, the level of responsibility they attribute to the wrongdoer and the perceived wrongfulness of the behaviour with reference to the principle that was violated.

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

15 D. Slocum, A. Allan, A and M. M. Allan, 'An emerging theory of apology' *Australian Journal of Psychology*, (Forthcoming).

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 article 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. In particular the researchers wished to establish whether an ordered apology is an effective remedy.

Method

The research was guided by a phenomenological framework[18] 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[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". 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]

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16 Id.

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

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

19 D. E. Polkinghorne 'An agenda for second generation of qualitative studies' (2006) 1 *International Journal of Qualitative Studies on Health and Well-being*, 68-77, 72.

20 A. Strauss and J. Corbin, *Basics of qualitative research: Grounded theory procedures and techniques*. (Sage Publications: Thousand Oaks, CA., 1998).

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 invited to participate. Twenty four participants were interviewed, 10 males and 14 females. Their ages ranged from 39 to 70 years (average age 55). There were 13 complainants and 11 respondents, and nine of the respondents were corporate respondents.

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.

Procedure

The research team did not know the identity of those who had been invited to participate 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. The other interviews were recorded with a digital recorder and later transcribed verbatim.

Data Analysis

The transcriptions were analysed using a thematic analytical process based on the methods of Charmaz[21] and Strauss and Corbin, respectively[22] to identify themes and

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

[22] Strauss and Corbin (n.20).

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]

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 about here

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)

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23 QSR International. *What is Qualitative research (2007)* http://www.qsrinternational.com/what-is-qualitative-research.aspx accessed 2 January 2010.

24 H. Bromley and others, Glossary of qualitative research terms: the qualitative research and health working group, Liverpool School of Tropical Medicine (2003).

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 responses had a self-focus. These respondents' 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

[25] Slocum et al. (n.15).

complainant and made the decision to apologise without seeking legal advice. For 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 vindication[26].

> *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.

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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].

Timing.

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

> *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 et al.'s [27] model. As a prominent theme, affirmation will be discussed below as a core category.

Affect.

[27] Slocum et al. (n.15).

The affective component of Slocum et al.'s[28] 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)
>
> *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)

[28] Id.

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 colleagues[29]. 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.

> *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)

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[29] Id.

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 et al.'s[30] 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.

> *... 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)*

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30 Id.

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 in 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 are probably pragmatic about ordered apologies and would provide them if they thought they would 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 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 colleagues'[32] 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

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[31] See T. Ayling, 'Apology and liability for personal injury' 2006 *Brief, May*, 11-14 and A. Allan, *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 accessed 12 November 2008.

[32] Slocum et al. (n.15).

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 vindicatory function was limited by confidentiality agreements that prevented them from talking about apologies they received as part of a settlement.

The absence of complainants who had received an ordered apology, or respondents who had made one, is a limitation of the study. This was, nevertheless, virtually unavoidable because purposeful sampling was not possible without infringing potential 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 useful material to generate hypotheses that can be tested during a further quantitative study.

Table 1 *Core and Subordinate Categories in the Data*

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

Note: 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.