

## YOU CAN'T ORDER SORRINESS, SO IS THERE ANY VALUE IN AN ORDERED APOLOGY? AN ANALYSIS OF ORDERED APOLOGIES IN ANTI-DISCRIMINATION CASES

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‘Prima facie, the idea of ordering someone to make an apology is a contradiction in terms.’<sup>1</sup>

### I INTRODUCTION

People wanting an apology for a legal wrong do not typically look to the law to achieve this.<sup>2</sup> The law has traditionally regarded apologies as a social and moral act that is outside the realm of enforceable legal remedies. Although the common law recognises that apologies may be appropriate and may mitigate the loss resulting from wrongdoing, there is a clear and understandable reluctance to exercise judicial power to compel wrongdoers to apologise if they are unwilling to do so voluntarily.<sup>3</sup> A multitude of concerns surround ordering someone to apologise. How can we know if a person is sorry if he or she does not offer an apology voluntarily? Is there any value in an apology if you can't order

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1 *Jones v Scully* (2002) 120 FCR 243, 308 [245] (Hely J).

2 This is true for most civil wrongs, although apologies are frequently sought in defamation proceedings and for intentional torts. A successful legal action based on these torts will only allow for an order for damages, although an apology may well be offered in the process of settling a legal action. As well, recent years have seen an increasing number of calls from individuals, groups and governments for apologies from governments for unjust decisions in the past (sometimes called ‘collective apologies’): see, eg, Prime Minister Kevin Rudd, ‘Apology to Australia’s Indigenous People’ (Speech delivered at the House of Representatives, Parliament House, Canberra, 13 February 2008); Prime Minister Kevin Rudd, ‘National Apology to the Forgotten Australians and Former Child Migrants’ (Speech delivered at the Great Hall, Parliament House, Canberra, 16 November 2009); see also Melissa Nobles, *The Politics of Official Apologies* (Cambridge University Press, 2008); Elazar Barkan and Alexander Karn (eds), *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press, 2006); Mark Gibney et al (eds), *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, 2008).

3 See, eg, *Ma Bik Yung v Ko Chuen* [2002] 2 HKLRD 1 (‘*Ma Bik Yung*’), a disability discrimination case in which the Hong Kong Court of Final Appeal concluded that it will be ‘rare cases [in which] enforcement [of an apology order] could not be said to be futile or disproportionate and contrary to the interests of the administration of justice’: at 20 [52] (emphasis in original).

sorriness? Is an apology that is not given freely and willingly an apology at all? There are also concerns stemming from the coercive nature of the order, which is enforceable by contempt proceedings, and about interference with the defendant's freedom of expression.<sup>4</sup>

Notwithstanding these concerns and the general law approach, parliaments have shown a greater willingness in recent decades to legislate both to encourage apologies by parties to civil disputes<sup>5</sup> and in some instances to order an apology as a remedy.<sup>6</sup> This is evidence of a growing awareness of the potential for

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4 See, eg, *Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd* (1998) 45 NSWLR 291, in which the Court refused to grant an order for specific performance of an agreement to broadcast an apology pursuant to a compromise of a defamation action, principally on the ground that it would unduly interfere with the defendant's freedom of expression. In the USA, the First Amendment, which constitutionally guarantees freedom of speech, precludes orders of this nature as an anti-discrimination remedy or for any other civil wrongdoing: see Brent T White, 'Say You're Sorry: Court Ordered Apologies as a Civil Rights Remedy' (2006) 91 *Cornell Law Review* 1261. White advocates for court-ordered apologies to be available against governmental defendants as a remedy for civil rights plaintiffs. In Australia, orders to apologise have been upheld on the basis that it is the intention of Parliament to restrict freedom of expression to the extent necessary to further the purposes of anti-discrimination legislation. See, eg, *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC ¶92-701 where the NSW Equal Opportunity Tribunal noted that the right to free expression 'has never been an absolute or unequivocal right'. Likewise, more recently in *Jones v Toben* (2002) 71 ALD 629 Branson J rejected an argument that the orders made by the Human Rights and Equal Opportunity Commission ('HREOC') in the case under review raised issues about freedom of speech in Australia. Justice Branson stated that 'the debate as to whether the RDA [*Racial Discrimination Act 1975* (Cth)] should proscribe offensive behaviour motivated by race, colour or national or ethnic origin, and the extent to which it should do so' was settled by the enactment by Parliament of the applicable provisions of the *Racial Discrimination Act 1975* (Cth): at 654.

5 Most notable in Australia is that the legislation that provides that apologies are inadmissible as admissions in civil liability proceedings: see *Civil Liability Act 2002* (NSW) s 69, *Civil Liability Act 2002* (Tas) s 7, *Civil Liability Act 1936* (SA) s 75, *Civil Liability Act 2003* (QLD) s 72, *Civil Law (Wrongs) Act 2002* (ACT) s 14, *Civil Liability Act 2002* (WA) s 5AH. The scope and operation of this legislation differs between jurisdictions. Enactments to this effect have become popular in the USA and Canada. See, eg, Jonathan R Cohen, 'Advising Clients to Apologize' (1999) 72 *Southern California Law Review* 1009; Jonathan R Cohen, 'Legislating Apology: The Pros and Cons' (2002) 70 *University of Cincinnati Law Review* 819; John C Kleefeld, 'Thinking Like a Human: British Columbia's *Apology Act*' (2007) 40 *University of British Columbia Law Review* 769. The most significant distinction is between laws providing that an apology that does not contain an admission of liability (a 'partial apology') is inadmissible in subsequent legal proceedings, and laws that make an apology inadmissible even if it is an admission of liability (a 'full apology'). For analysis of the Australian legislative models and commentary, see Prue Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27 *Sydney Law Review* 483.

6 Apology orders are available in some Australian jurisdictions pursuant to privacy legislation: see, eg, *Privacy and Personal Information Protection Act 1998* (NSW) s 55(2)(e). Recently, the Australian Law Reform Commission and the NSW Law Reform Commission proposed that a broad range of remedial powers be conferred on courts where there has been an invasion of the statutory right to privacy, including 'an order requiring the respondent to apologise to the claimant': Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 3 [74.177], [74.179]; NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) [7.25]–[7.26]. For analysis of the power to order apologies as a common law and as a statutory remedy, see Robyn Carroll, 'Beyond Compensation: Apology as a Private Law Remedy' in Jeffrey Berryman and Rick Bigwood (eds), *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2010) ch 10.

apology orders to provide redress in civil cases where the wrongdoing caused harm to personality interests through injury to feelings, dignity and public standing in the community. In Australia and a number of other jurisdictions apology orders are available as a statutory remedy in anti-discrimination cases.<sup>7</sup>

This article examines the circumstances in which courts and tribunals have concluded that an apology should or should not be ordered as a remedy and the factors that have guided their decisions.<sup>8</sup> It will be evident that in appropriate cases the law regards both private and public apologies as capable of achieving remedial and other legislative goals including compensation, vindication, deterrence and education. It is in this sense that it can be argued that the law attributes value to an ordered apology.<sup>9</sup> This article identifies the different views that have been expressed about the value of an apology that is not offered voluntarily. On one view, exemplified by the statement at the beginning of this article that ‘prima facie, the idea of ordering someone to make an apology is a contradiction in terms,’<sup>10</sup> an apology that is not given freely is not an apology at all. In contrast, an apology has been ordered in numerous cases with no reference being made to the need for it to be made voluntarily. In a more recent line of cases the distinction has been made between personal apologies, which cannot be

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- 7 A comprehensive list of federal and state anti-discrimination legislation in force is set out in CCH Employment Law (eds), *Australian and New Zealand Equal Opportunity Commentary* (at 15 October 2009) ¶2-720 and a summary table of legislation ¶2-780. For commentary on the range of remedies awarded under the legislation, see Australian Human Rights Commission, *Federal Discrimination Law* (31 December 2009), ch 7 <<http://www.hreoc.gov.au/legal/FDL>>. The power to order apologies is conferred on courts and tribunals exercising anti-discrimination jurisdiction: see Pt II below; see, eg, *Disability Discrimination Ordinance* (Hong Kong) cap 487, s 72(4)(b). See also s 21(2) of the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa), which confers power on the Equality Court to make a wide range of remedies orders, including ‘an order that an unconditional apology be made’: at s 21(2)(j).
- 8 Currently in Australia, state and Australian Capital Territory judicial decisions relating to anti-discrimination matters are made by tribunals. Matters arising under federal legislation are heard by the Federal Magistrates Court or the Federal Court of Australia. In the Northern Territory hearings are conducted by the Anti-Discrimination Commissioner. For convenience, the decisions of courts and tribunals are referred to collectively in this article as ‘the case law’ and the word ‘court’ is used to refer to both courts, tribunals and Commissioners unless otherwise indicated. Although the reasons given for the decisions of tribunals have limited and varying weight as legal precedents, they provide insight into the views attributed by the law to the value of ordered apologies.
- 9 The inquiry in this article is directed at the apology order as a civil remedy. This inquiry is also significant to the criminal justice system where many considerations will be the same or similar. See, eg, Elizabeth Latif, ‘Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions’ (2001) 81 *Boston University Law Review* 289; Carrie J Petrucci, ‘Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System’ (2002) 20 *Behavioral Sciences & the Law* 337.
- 10 *Jones v Scully* (2002) 120 FCR 243, 308 [245] (Hely J).

compelled, and an apology made for the purpose of fulfilling a statutory requirement, which is not dependent on voluntariness.<sup>11</sup>

The article looks beyond the views expressed by the law about the value of apologies, including ordered apologies, to the views expressed in the apology literature and social science research that provides some insight into the value that people giving and receiving apologies attribute to apologies. It explores the assumption often made within the legal and the broader community that an apology that is not offered voluntarily has no value, and questions whether this is a valid assumption in the context of legal disputes. The aim of analysing anti-discrimination legislation and cases in the light of social science research is to bring greater clarity to the debate about the value of an ordered apology, the role that an order of this nature serves in anti-discrimination law and the role it might serve in other areas of civil law as a legal remedy.<sup>12</sup>

Part II discusses the meaning of the word apology, the importance of defining apologies in the legal context and the meaning attributed to the word for the purposes of this article. Part III sets out the statutory basis and aims of apology orders in the anti-discrimination legislation. Part IV identifies the factors that have been significant to decisions whether to order an apology and what the courts have said about the value of a coerced apology. Part V looks to the research and literature on apologies for evidence and theories about the value of coerced apologies and refers to the findings of a recent qualitative study of the perceptions about the value of apologies of parties to equal opportunity complaints. Finally in Part VI a number of conclusions are presented about the attributes of ordered apologies that are said to be of value and a number of questions are identified that warrant further investigation.

## II THE MEANING OF ‘APOLOGY’

The word apology is used to convey a range of meanings in a wide variety of contexts.<sup>13</sup> As Nick Smith notes, there is a ‘temptation to apply some binary standard and declare whether something “is or is not” an apology’.<sup>14</sup> Smith argues in favour of speaking about the various ‘forms’ of apologetic meaning

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11 These divergent views are analysed from the perspective of futility as a factor in discretionary remedial decision making in Robyn Carroll, ‘Ordered “Apologies” for Discrimination, Vilification and Related Unlawful Conduct in Australia – An Analysis of the Futility Argument’ in Russell Weaver and Francois Lichere (eds), *Recognition and Enforcement of Judgements* (Presses Universitaires d’Aix-Marseille, 2010) (forthcoming). It is argued there that greater consistency in decision-making is required and can be achieved if the meaning attributed to apology is more clearly articulated.

12 Another question that warrants further investigation, which is addressed only indirectly by this article, concerns the longer term effectiveness of apologies, whether offered voluntarily or involuntarily, as a form of redress for discrimination, harassment and vilification, and in advancing the goals of anti-discrimination legislation.

13 Nick Smith, *I Was Wrong: The Meanings of Apologies* (Cambridge University Press, 2008). See also Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, 1991); Aaron Lazare, *On Apology* (Oxford University Press, 2004).

14 Smith, above n 13, 12.

rather than the 'is or is not' binary conception.<sup>15</sup> This argument is well made because it reflects the fact that what constitutes an apology in a particular situation and context is highly variable.<sup>16</sup> Smith and others<sup>17</sup> prefer to attribute meaning to apologies by reference to component parts, which in turn are important to understanding the meaning of what is variously described as a full, meaningful, authentic or categorical apology<sup>18</sup> on the one hand and what can be described as a 'good enough'<sup>19</sup> apology on the other hand. There is consensus that a full apology incorporates an expression of heartfelt regret and remorse for what has happened, sympathy for the victim and acknowledges the wrongdoer's transgression.<sup>20</sup> For some, the apology must also offer some form of recompense and a commitment to change in the future.<sup>21</sup> An empirically based theory of apology, developed by Slocum, Allan and Allan and applied in the study referred to in Part V, conceptualises apology as a process that consists of one or more of three components: affirmation, affect and action. Each of these components has two sub-categories: one that reflects a self-focus on the part of the wrongdoer and the other reflecting a self-other focus.<sup>22</sup> Slocum, Allan and Allan maintain that an apologetic response with one or more of these components may assist in the resolution of a dispute. The exact nature of the apologetic response will depend on complainants' perception of the gravity 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. The theory provides support for the view that while the components of an apology can be identified, which and how many of the components will need to be present for an apology in any particular circumstance is dependent on many factors and will vary from person to person and from one context to another. The theory therefore helps to explain

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15 Ibid.

16 This is demonstrated by reference to a range of legal contexts in Alfred Allan, 'Functional Apologies in Law' (2008) 15 *Psychiatry, Psychology and Law* 369.

17 Smith, above n 13; Lazare, above n 13; Debra Slocum, Alfred Allan and Maria Allan, 'An Emerging Theory of Apology' (2010) *Journal of Australian Psychology* (forthcoming).

18 See Alfred Allan, 'Apology in Civil Law: A Psycho-Legal Perspective' (2007) 14 *Psychiatry, Psychology and Law* 5; Slocum, Allan and Allan, above n 17. For a discussion of what constitutes a 'meaningful' apology see Susan Alter, *Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations: Final Report for the Law Commission of Canada* (May 1999). Other commentators refer to 'full' as opposed to 'partial' apologies: see, eg, Jennifer K Robbennolt, 'Apologies and Legal Settlement: An Empirical Examination' (2003) 102 *Michigan Law Review* 460; Cohen, 'Legislating Apology', above n 5; Vines, above n 5. Smith refers to the 'categorical' apology as one that achieves meaning through a number of elements and describes it in this form as 'a rare and burdensome act': Smith, above n 13, 17.

19 Slocum, Allan and Allan, above n 17.

20 Allan, above n 18.

21 Ibid. See also Petrucci, above n 9, 341.

22 Slocum, Allan and Allan postulate that these two categories reflect the position of wrongdoers' apologetic response on a 'focus continuum'. The categories at the end of these continuums are: regret and remorse for affect; admission and acknowledgment for affirmation; and restitution and reparation for action, with the first category of each pair representing an exclusive self-focus and the other a self-other focus: above n 17, 28.

how an apology can be ‘good enough’ to have some psychological value even if it is not a ‘full’ apology.

Everyday experience tells us that the word apology is often used to refer to a communication that does not necessarily comprise all of these component parts. For example, an expression of regret is sometimes referred to as an apology even though it does not include an acknowledgement of wrongdoing. Sometimes people say ‘I’m sorry’ where they intend to communicate empathy and sympathy but are not accepting any responsibility for what has happened. Similarly an acknowledgement of wrongdoing, even if not heartfelt and remorseful, is sometimes referred to as an apology. Use of the word apology to describe these varying forms of expression is problematic in the legal context because the application of legal principles is dependent on definitions to ensure that like cases are treated alike.<sup>23</sup> While defining apology for any purpose poses challenges due to the nuanced and personal nature of these communications, it is critical to have clear definitions in the legal context so that the judicial powers conferred by law are applied in a reasoned and consistent manner.

Nonetheless, and unsurprisingly, apology is a word that is not often defined by statute. Where statutory definitions do exist they are only applicable to the particular statute within which they appear.<sup>24</sup> There are no statutory definitions of apology in the Australian anti-discrimination statutes so it is judicial definitions that determine the scope and application of the power to make orders to apologise. In *Ma Bik Yung* the Final Court of Appeal of Hong Kong regarded an apology as ‘simply to say sorry’ and defined an apology, in the context of disability discrimination legislation, as ‘a regretful acknowledgement of a wrong done’ that can be made privately or publicly.<sup>25</sup> In *Burns v Radio 2UE Sydney Pty Ltd (No 2)* the NSW Anti-Discrimination Tribunal defined an apology as an ‘acknowledgement of the wrongdoing’ that is a ‘fulfilment of a legal requirement rather than as a statement of genuinely held feelings.’<sup>26</sup> Most other references to the meaning of apology in the cases are indirect. These and other cases that provide guidance on the meaning of apology are discussed further in Part IV.

### III OVERVIEW OF THE STATUTORY POWER TO ORDER AN APOLOGY

Injunctions are often sought under anti-discrimination legislation as a remedy to prohibit ongoing unlawful conduct. Orders have been made, for example, that

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23 This is not to suggest that there are not significant social and moral issues arising from the use of the word ‘apology’ to refer to varying forms of apologetic expressions including statements of regret and sympathy that do not contain an acknowledgement of wrongdoing. See, eg, Hiroshi Wagatsuma and Arthur Rosett, ‘The Implications of Apology: Law and Culture in Japan and the United States’ (1986) 20 *Law and Society Review* 461.

24 See, eg, *Civil Liability Act 2002* (NSW) s 68; *Civil Liability Act 2002* (Tas) s 7; *Civil Liability Act 2003* (Qld) s 71; *Civil Law (Wrongs) Act 2002* (ACT) s 13; *Civil Liability Act 2002* (WA) s 5AF.

25 *Ma Bik Yung* [2002] 2 HKLRD 14–15.

26 [2005] NSWADT 24 (16 February 2005) [29] (*Burns v Radio 2UE*).

a respondent cease publication of offensive material or desist from engaging in unlawful conduct.<sup>27</sup> At times an injunction will also mandate that the respondent do specified acts, for example, remove offensive publications from circulation and from internet websites.<sup>28</sup> In contemplating any injunction, and in particular an order that mandates specific action by a respondent, the court will be required to consider whether the order will achieve its intended purpose. This will involve the consideration of factors similar to those taken into account when deciding whether to grant specific relief in equity, including whether it will be impossible to comply with the order and whether the benefit of granting the order will be defeated by the defendant's own actions.<sup>29</sup>

While all forms of injunction ultimately are enforceable by contempt proceedings, doubts remain about the effectiveness of mandatory orders.<sup>30</sup> Despite these misgivings and notwithstanding the difficulties of enforcing injunctions in some circumstances, the courts have shown that they are prepared to make orders in anti-discrimination cases where there is some likelihood that the purpose of the order will be defeated by the actions of the respondent or by others. In *Jones v Toben*, for example, where the respondent published material on the internet that was found to incite racial hatred in contravention of section 18C of the *Racial Discrimination Act 1975* (Cth), orders were made compelling the removal of the material from internet websites.<sup>31</sup> These orders were made notwithstanding the possibility that the practical effect of the injunction could be undermined by other individuals publishing the same or similar material.<sup>32</sup> In making orders for the removal of offensive material from the web Branson J rejected the argument that the order would be futile and followed the common law approach as stated in *Vincent v Peacock*, in which the NSW Court of Appeal held:

It is not a ground for refusing an injunction that it would not have a practical effect, where its failure to have a practical effect is because the defendant disobeys it.<sup>33</sup>

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27 See, eg, *Jones v Scully* (2002) 120 FCR 243.

28 See, eg, *Jones v Toben* (2002) 71 ALD 629; *Silberberg v The Builders Collective of Australia Inc* (2007) 167 FCR 475.

29 It is a guiding principle that in granting relief a court of equity 'will not make an order in vain': *New Brunswick & Canada Railway & Land Co v Muggieridge* (1859) 4 Drew 686, 699 (Kindersley V-C). For analysis of the futility principle and its application to statutory injunctions in domestic and international law, see N Witzleb, 'Equity Does Not Act in Vain: The Effect of Futility in Claims for Injunctions' (2010) *Sydney Law Review* (forthcoming).

30 Concerns have been raised about the effectiveness of mandatory orders to address racism and vilification on race and other grounds. See, eg, Tom Calma and Conrad Gershevitch, 'Freedom of Religion and Belief in a Multicultural Democracy: An Inherent Contradiction or an Achievable Human Right?' (Paper presented at the Unity in Diversity Conference, Townsville, 12–14 August 2009) <[http://www.hreoc.gov.au/about/media/papers/freedom\\_religion20090803.html#fnB51](http://www.hreoc.gov.au/about/media/papers/freedom_religion20090803.html#fnB51)>.

31 (2002) 71 ALD 629.

32 In practical terms there was also a risk that the benefit of the orders would be defeated if the respondent did not comply with them. This risk later materialised. Subsequent proceedings for contempt of court were brought by the original applicant against the respondent for his failure to comply with Branson J's orders and a finding was made that the respondent had committed criminal contempt: see *Jones v Toben* (2009) 255 ALR 238.

33 [1973] 1 NSWLR 466, 468.

In *Jones v Toben* Branson J held that the decision whether to grant a remedy for unlawful conduct under anti-discrimination legislation takes account of the wider benefits of making the order. In doing so her Honour endorsed the approach taken by the Canadian Human Rights Tribunal in *Citron v Zündel (No 4)*, a case in which similar issues arose concerning the enforcement of the judgment.<sup>34</sup> In that case the Tribunal stated:

Any remedy awarded by this, or any Tribunal, will inevitably serve a number of purposes: prevention and elimination of discriminatory practises is only one of the outcomes flowing from an Order issued as a consequence of these proceedings. There is also a significant symbolic value in the public denunciation of the actions that are the subject of this complaint. Similarly, there is the potential educative and ultimately larger preventative benefit that can be achieved by open discussion of the principles enunciated in this or any Tribunal decision.<sup>35</sup>

Applying this approach a court looks to the practical benefit of the order to the complainant and to the potential benefits of the order to the community when deciding whether to grant injunctive relief as a remedy under anti-discrimination legislation. These benefits include the symbolic value of judgments that denounce discriminatory conduct, and the educative and deterrent value of judgments in which courts enunciate legislative principles. On this basis, a court exercising power under anti-discrimination legislation may be willing to make coercive orders even if there are factors, including the respondent's intended future conduct and refusal to obey the order, that detract from the likely benefit of the order to the complainant. As will be seen in the following Part however, the public interest is not always considered to justify an order to apologise.

Apology orders and orders to publish apologies are forms of mandatory injunction that give rise to issues similar to those referred to above as well as additional considerations, as will be seen in Part IV. The power to order apologies is conferred on courts and tribunals in Australia under federal and state anti-discrimination legislation. In each of the states and territories the power to order an apology is conferred for the purpose of redressing loss or damage caused to the complainant by the respondent's unlawful conduct. In a number of jurisdictions apology orders are made pursuant to the power to order a respondent 'to perform any reasonable act or course of conduct to redress any loss or damage

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34 (2002) 41 CHRR D/274. 'We cannot be unduly influenced in this case by what others might do once we issue our order. The Commission, or individual complainants, can elect to file other complaints, or respond in any other manner that they consider appropriate should they believe that there has been a further contravention of the *Act*': at [299].

35 Ibid [300].



suffered by the complainant.<sup>36</sup> The legislation in NSW and Queensland makes express reference to orders to apologise as a remedial order.<sup>37</sup> Apology orders are available as a remedy for unlawful conduct under federal anti-discrimination legislation pursuant to the *Federal Court Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth), where they are made as an order that ‘the Court thinks appropriate.’<sup>38</sup> These various statutory powers have been exercised on numerous occasions.<sup>39</sup>

It has been held that the unwillingness of a respondent to apologise or to comply with an order to apologise does not of itself preclude an apology order.<sup>40</sup> In *Ma Bik Yung* the plaintiff successfully brought an action in the District Court under the *Disability Discrimination Ordinance* (Hong Kong) chapter 487 (‘*Ordinance*’) against the defendant taxi driver for discrimination and harassment in the provision of services.<sup>41</sup> An order was made at first instance for damages and for the defendant to apologise to the plaintiff notwithstanding that the respondent had made clear that he was not willing to comply with an order to apologise. An appeal by the defendant to the Court of Appeal against the apology order was successful. In deciding an appeal by the plaintiff to the Court of Final Appeal, the Court concluded that the *Ordinance* confers power to make an order not only in respect of a willing defendant but also where the defendant is unwilling to apologise. In so deciding the Court recognised that it will be ‘rare

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36 *Equal Opportunity Act 1984* (WA) s 127(b)(iii). Similarly in the Northern Territory, South Australia, Tasmania and Victoria the legislation confers a general power to make orders to redress the loss or harm resulting from the unlawful conduct. The *Anti-Discrimination Act 1998* (Tas) provides for orders that will ‘redress any loss, injury or humiliation suffered by the complainant and caused by the respondent’s discrimination or prohibited conduct’: s 89(1)(b); and ‘any other order it thinks appropriate’: s 89(1)(h). The *Equal Opportunity Act 1995* (Vic) s 136(a)(iii) provides for orders that ‘the respondent do anything specified in the order with a view to redressing any loss, damage or injury suffered by the complainant as a result of the contravention’. The *Equal Opportunity Act 1984* (SA) s 96(1)(c) provides for orders ‘requiring the respondent or any other party to the proceedings to perform specified acts with a view to redressing loss or damage arising from the contravention’. The *Anti-Discrimination Act* (NT) s 88(1)(c) provides for orders ‘requiring the respondent to do specified things to redress loss or damage suffered by the complainant or any other person because of the prohibited conduct’.

37 *Anti-Discrimination Act 1997* (NSW) s 108(2); *Anti-Discrimination Act 1991* (Qld) s 209(1).

38 Section 23 of the *Federal Court of Australia Act 1976* (Cth) provides that the Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate. A power in similar terms is conferred upon the Federal Magistrates Court: *Federal Magistrates Act 1999* (Cth) s 15.

39 See, eg, *De Simone v Bevacqua* (1994) 7 VAR 246, in which the Victorian Supreme Court upheld an order for the payment of damages and an order that an employer apologise under the *Equal Opportunity Act 1984* (Vic) s 46(2)(c); *Falun Dafa Association of Victoria Inc v Melbourne City Council* [2004] VCAT 625 (7 April 2004) (‘*Falun Dafa v Melbourne*’), where Bowman J of the Victorian Civil and Administrative Tribunal ordered an apology pursuant to of the *Equal Opportunity Act 1995* (Vic) s 136(a)(iii) (in this case no damages were sought or awarded); the cases referred to in Pt IV below. For further examples of cases in which apology orders have been made under Australian equal opportunity legislation, see CCH, above n 7, ¶89-960.

40 *Ma Bik Yung* [2002] 2 HKLRD 1.

41 In similar terms to the remedial provisions in Australian legislation section 72(4)(b) of the *Ordinance* provides that the District Court may ‘order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant’.

cases [in which] enforcement [of an apology order] could not be said to be futile or disproportionate and contrary to the interests of the administration of justice.<sup>42</sup> The Court considered that the circumstances in such rare cases, including ‘the degree of gravity of the defendant’s unlawful conduct as well as the nature and extent of the plaintiff’s loss and damage’, would have to be ‘exceptional.’<sup>43</sup> The Court ultimately decided that this was not an appropriate case for an apology order (although no particular factor is given for this decision) and upheld the Court of Appeal’s decision to allow an appeal against that part of the trial judge’s orders.<sup>44</sup> Similarly, even though in both *Jones v Scully* and *Jones v Toben* the Court expressed the view that an ordered apology is, prima facie a contradiction in terms, the Court recognised that orders of this type have been made on other occasions, suggesting that the power to make an order is not in question.

Before turning to look at the factors that the courts consider in making orders to apologise, it is worth noting that there are other ways that the presence or absence of apologies may be relevant to remedial orders under anti-discrimination legislation. A timely, appropriate and sincere apology may be found to mitigate the hurt and humiliation resulting from the conduct with a consequent reduction in the amount of damages awarded<sup>45</sup> while a persistent and unjustified refusal to apologise may result in an increase in the amount of damages awarded.<sup>46</sup> In addition, courts have sometimes expressed in their reasons the hope that the respondent will, in light of the proceedings and of its own volition, extend a suitable apology. This has occurred in cases where the complaint has been substantiated<sup>47</sup> as well as in cases where there has clearly been hurt and humiliation but the complaint is not finally made out.<sup>48</sup> In one case a court adjourned the proceedings once it had decided that a complaint had been substantiated to provide the respondent with an opportunity to apologise without an order.<sup>49</sup>

#### IV CASE LAW INSIGHTS INTO THE VALUE OF AN ORDERED APOLOGY

The reasons given by superior courts, magistrates’ courts, equal opportunity commissioners and anti-discrimination tribunals for deciding whether or not to

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42 *Ma Bik Yung* [2002] 2 HKLRD 1, 20 [50] (emphasis in original).

43 *Ibid* 19–20 [52].

44 The Court of Appeal decision is reported as [2000] 1 HKLRD 514. See also Carole J Petersen, ‘The Failure of the Hong Kong Court of Appeal to Recognise and Remedy Disability Discrimination’ (2000) 30 *Hong Kong Law Journal* 6.

45 See, eg, *Johanson v Blackledge* (2001) 163 FLR 58.

46 See, eg, *Velagapudi v Symbion Pharmacy Services Pty Ltd (formerly Faulding HealthCare Pty Ltd)* [2006] NSWADT 329 (16 November 2006).

47 *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003).

48 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352.

49 *Daniels v Queensland Nursing Homes Pty Ltd* [1995] HREOCA 2 (24 January 1995).

make an apology order in any particular case provide insight into the value attributed by the law to an ordered apology. Sometimes the reasons given will relate specifically to the facts of the case. At other times, reasons are expressed in a way that suggest that the court is applying a general principle. An analysis of the reported decisions in Australia reveals that the value attributed to an apology order in any particular case will depend primarily on the benefit of the order to the complainant, the acknowledgement of wrongdoing that the apology provides, the willingness of the respondent to apologise and the sincerity with which the apology is given. These and other factors that are taken into account will now be examined.

### A Benefit of the Order to the Complainant

The fact that a complainant is seeking an ordered apology indicates that he or she considers it will be of benefit. In each case the court needs therefore to decide whether, in the court's view, the order will be of benefit to the complainant.<sup>50</sup> Orders to apologise have been made where the apology was sought by a complainant and the Tribunal believed the apology would be sincere.<sup>51</sup> The threshold of benefit is not necessarily high. In *Fischer v Byrnes*, the respondent was found to have sexually harassed the complainant in breach of section 119 of the *Anti-Discrimination Act 1991* (Qld).<sup>52</sup> The Queensland Anti-Discrimination Tribunal was required to decide whether the respondent should be ordered to make a written public apology for his actions. On the one hand, the Tribunal noted, very little might be achieved by such an order. Neither party still resided in the town in which the relevant conduct occurred, the complainant no longer had any apparent remaining connection with its residents, and the respondent no longer conducted the hotel business where the unlawful conduct took place. The Tribunal noted that making the order may never result in an apology. On the other hand, the complainant was seeking an apology notwithstanding these facts. The Tribunal concluded that there would be a benefit to the complainant in making the order, 'so that she might feel some mitigation of the distress she has suffered as a result of the conduct to which she was exposed.'<sup>53</sup> While accepting the view expressed in other decisions that there is questionable value in an apology directed by order, rather than one genuinely meant, the Tribunal was prepared on this occasion to order the respondent to take the necessary steps to have an apology published in the public notices section of the local newspaper.

At the same time it would be reasonable to surmise that an apology order will be of no value to a complainant who does not seek the order. In another sexual

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50 This is clearly the case under state and territory legislation that allows for this order where it is a 'reasonable act or course of conduct to *redress any loss or damage suffered by the complainant*': see, eg, *Anti-Discrimination Act 1998* (Tas) s 89(1)(h) (emphasis added). Where the order can be made, where 'appropriate', eg, under the *Federal Court of Australia Act 1976* (Cth) s 23, it can be argued that there needs to be some demonstrable benefit to the applicant in making the order.

51 See, eg, *Bishop v Gedge & Rudd* [2008] QADT 17 (5 August 2008).

52 [2006] QADT 33 (8 August 2006).

53 *Ibid* [22].

harassment case no order was made where the complainant argued that damages were the only appropriate remedy and that an apology would potentially not be sincere and would be of little real benefit to her.<sup>54</sup> There is no indication in the cases that an order for an apology will be made if not sought.

Apology orders have been refused both where an apology has already been given<sup>55</sup> and where it has been decided that one will be given without needing an order.<sup>56</sup> As well, an order was refused where the respondent was a company that was in liquidation.<sup>57</sup> Similarly, an order was refused where the administration of the hospital where the conduct took place had changed since the time of the offending conduct.<sup>58</sup> The passage of time has been held to make an order to apologise inappropriate,<sup>59</sup> in particular when combined with other factors, for example when offers of apology have previously been made but declined or the respondent has attended cultural awareness training since the offending conduct.<sup>60</sup> An order has also been refused on the basis that it might prolong rather than resolve the conflict because it is judged that it will not promote reconciliation of the parties.<sup>61</sup> These cases suggest that the courts recognise that a meaningful apology has the ability to reduce conflict and increase the chances of reconciliation, but that an ordered apology might have the reverse effect. It is clear that this assessment of benefit is undertaken on an objective basis. Courts have concluded that there would be no benefit in making an apology order where the complainant could not reasonably have suffered embarrassment in the circumstances,<sup>62</sup> where injury to feelings was not long lasting,<sup>63</sup> and where a large number of complaints were made, most of which were found not to be justified.<sup>64</sup>

One might expect that complainants would attribute some value to an ordered apology as vindication of their complaint.<sup>65</sup> No uniform view about the ability of an apology order to achieve a vindicatory purpose is evident from the cases. In some cases it has been stated that an ordered apology can serve to vindicate a complainant in the eyes of the community<sup>66</sup> or other groups, such as fellow employees.<sup>67</sup> Other decision makers apparently doubt the utility of an apology to achieve this purpose, referring instead to the vindicatory effect of the decision, an

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54 *Jackson v Ilievski* [1996] HREOCA 18 (17 July 1996).

55 *K v S and N Company* [2006] QADT 11 (5 April 2006).

56 *Evans v Lee* [1996] HREOCA 8 (3 May 1996).

57 *Skellern v Colonial Gardens Resort Townsville* [1996] QADT 4 (22 January 1996).

58 *Kimler v Lort Smith Animal Hospital* [1995] HREOCA 20 (3 August 1995).

59 *I v O'Rourke* [2001] QADT 2 (30 April 2001).

60 *Jacobs v Fardig* [1999] HREOCA 9 (7 April 1999).

61 *Lang v Nutt* [2004] QADT 37 (23 November 2004), where the parties were seeking to reconcile albeit by qualified apology; *Henderson v Miller* [1992] HREOCA 18 (11 October 1992); *Gibbs v Australian Wool Corporation* [1990] HREOCA 11 (6 November 1990).

62 *Hobbs v Anglo Coal (Moranbah North Management) Pty Ltd* [2004] QADT 28 (2 September 2004).

63 *Laher v Barry James Mobile Cranes Pty Ltd* [1994] HREOCA 5 (3 March 1994).

64 *Foran v Bloom* [2007] QADT 31 (5 December 2007).

65 See generally Carroll, above n 6, pt 4(c).

66 See, eg, *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352.

67 *De Simone v Bevacqua* (1994) 7 VAR 246.

award of damages,<sup>68</sup> and published reasons for their decision.<sup>69</sup> In one case an order was declined because a declaration on the public record was considered to be vindication enough.<sup>70</sup>

In the previous Part we saw that the courts have referred to the wider benefits of making remedial orders under anti-discrimination legislation – including advancing the symbolic, educational and deterrent aims of the legislation – when making an order in favour of an individual complainant despite the possibility that the order may not be effective to remedy the unlawful conduct. These wider aims have not been referred to specifically in the context of assessing the benefit of the order to redress the loss or damage to the complainant. They are, however, sometimes taken into account either expressly or implicitly in deciding that an apology order will have value as an acknowledgement of wrongdoing.

## B The Acknowledgement of Wrongdoing

For many complainants the benefit of an apology will depend on whether it is an acknowledgment of wrongdoing by the respondents. Respondents defending an anti-discrimination complaint (or any other civil action) may be unwilling to acknowledge wrongdoing until there has been a finding against them. If the complaint is upheld they may then be willing to apologise. Other respondents may be willing voluntarily to offer an apology that expresses regret or sympathy but unwilling to acknowledge wrongdoing in any circumstances. Still other respondents may be unwilling to voluntarily acknowledge wrongdoing but may be willing to comply with an order to apologise if one is made. Complainants might seek an ordered apology that acknowledges wrongdoing in any of these scenarios.

Ordered apologies usually contain an express acknowledgment of wrongdoing in one form or another. This function can be more easily satisfied by a judicial order than an expression of regret, sorrow or remorse. Although the courts do not make express reference to the benefit the complainant might receive from an apology as an acknowledgment of wrongdoing they apparently presume it will serve a beneficial purpose. It is not surprising therefore that there are cases concluding that there is no value in ordering an apology if it does not acknowledge wrongdoing. In *K v S and N Company* the Queensland Anti-Discrimination Tribunal decided that it was not useful to make the respondent apologise for something he maintained he did not do.<sup>71</sup> In *Borg v Commissioner, Department of Corrective Services*, a case in which sexual harassment, racial discrimination and victimisation were established, the NSW Administrative Decisions Tribunal awarded damages but declined to order an apology sought by the complainant.<sup>72</sup> The Tribunal stated that ‘there would be limited benefit in

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68 *Lynton v Maugeri* [1995] QADT 3 (4 May 1995).

69 *Dunn-Dyer v ANZ Banking Group Ltd* [1997] HREOCA 52 (29 August 1997).

70 *Ibid*; see also *Ryan v Dennis* [1998] HREOCA 36 (28 October 1998); *Ralph v Pemar Pty Ltd* [1999] HREOCA 16 (26 July 1999).

71 [2006] QADT 11 (5 April 2006).

72 [2002] NSWADT 42 (26 March 2002).

issuing an apology which is not genuine', concluding that it is not appropriate to make an order where the allegations are, as they were here, 'steadfastly denied'.<sup>73</sup> Similarly, where there has been acknowledgement of conduct without an admission of wrongdoing, it has been concluded that an ordered apology would serve no useful purpose.<sup>74</sup> An order was refused in another case where the respondent's defence was to deny the allegations and publicly state that the aim of the complaint was to obtain money. In these circumstances the court concluded that neither a public nor private apology could convey 'real substance'.<sup>75</sup>

There are a number of cases in which the courts have ordered a respondent to apologise in a form that acknowledges their wrongdoing. For example, in *Falun Dafa v Melbourne*, Bowman V-P ordered the respondent Council, which was found to have unlawfully discriminated against the Association, to publish an apology in a specified newspaper within 14 days of the judgment that they had contravened the *Equal Opportunity Act 1995* (Vic) and stating that the Council apologised to the Association for their conduct.<sup>76</sup> The ordered apology was also to contain an expression of 'regret as to any trouble, inconvenience and damage to reputation that was caused to the Association' as a result of the contravention.<sup>77</sup>

In *Russell v Commissioner of Police, New South Wales Police Service* ('*Russell*') the apology was described as an acknowledgement that the respondent had been found to have acted unlawfully.<sup>78</sup> In this case, Mr Russell, an Aboriginal man (deceased at the time of the Tribunal's decision), was found to have been the subject of racial discrimination and vilification. The NSW Administrative Decisions Tribunal ordered the Commissioner of the NSW Police Service and each of the police officers named in the orders to write individual letters to the parents of the deceased containing an apology stating that:

the Equal Opportunity Division of the Administrative Decisions Tribunal has found that the conduct of the police officers, and the language used by them, towards Mr Russell during his arrest, were in breach of the racial discrimination and the racial vilification provisions of the *Anti-Discrimination Act* [1977 (NSW)].<sup>79</sup>

The apology was also required to state that the Tribunal had found that the NSW Police Service was liable under the *Anti-Discrimination Act 1977* (NSW) for the conduct of the officers on the occasion in question, and to offer an apology on behalf of the NSW Police Service for the conduct of the police officers.

In *Russell* it was held that an 'expression of regret' that does not acknowledge the wrongdoing by the respondent is inadequate as an apology. The

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73 Ibid [236].

74 *Lang v Nutt* [2004] QADT 37 (23 November 2004) [39].

75 *Smith v Hehir* [2001] QADT 11 (26 June 2001).

76 [2004] VCAT 625 (7 April 2004).

77 Ibid [43].

78 [2001] NSWADT 32 (26 February 2001).

79 Ibid Annex A [2].

NSW Administrative Decision Tribunal referred to a previous ‘expression of regret’ offered by the Commissioner to Mr Russell’s family as an inadequate apology and ordered a ‘full apology’.<sup>80</sup> This case supports the view that an apology by definition incorporates an admission of wrongdoing and this must be included in an ordered apology. It also seems to be an underlying premise in this case that an apology order will be of little value if the apology does not incorporate an admission or refer to a finding of wrongdoing. This raises the interesting question as to whether a statement of regret is not, by definition, an apology for the purposes of anti-discrimination legislation. Cases discussed in the next Part suggest that it is not. It is arguable however that the value of any particular apologetic expression and court order still depends on what the complainant is seeking.<sup>81</sup> In any event, while these cases shed some light on the importance placed on the acknowledgment of wrongdoing, they do not resolve the question as to whether it is essential that an apology be sincere and voluntary in order to have value as a remedy.

### C Voluntariness and Sincerity

Australian case law supports the conclusion that the statutory power to order an apology includes an apology that is given neither willingly nor with sincerity.<sup>82</sup> In many cases the courts even decide the final wording of the apology.<sup>83</sup> It is not surprising, however, that an order to apologise is more likely to be made where the respondent has indicated that he or she is willing to make the apology if ordered. In this case the terms often have been or will be agreed to between the parties.<sup>84</sup> Even when the respondent is willing to comply with the order doubts may exist about the sincerity of the apology. In making an order to apologise a court must reconcile competing objectives, on the one hand between the need to exercise in full the remedial power conferred by the legislation and to give effect to the legislation, and on the other hand not to make orders that cannot be considered to have value to the complainant. Naturally, ordered apologies raise significant issues about voluntariness and sincerity.

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80 Ibid [189].

81 In the absence of an admission of wrongdoing a party may prefer an expression of regret to no apologetic gesture at all. Statements of regrets are sometimes a term on which parties will settle complaints during conciliation. See, eg, Equal Opportunity Commission of South Australia, ‘Case Study: Older Worker Sacked for Economic Viability’ in Equal Opportunity Commission of South Australia, *Annual Report* (2009) 13.

82 The Hong Kong Court of Final Appeal noted in *Ma Bik Yung* [2002] 2 HKLRD 1, 21 that the question whether an order for an apology should be made against an unwilling defendant was not expressly considered by the Supreme Court of Victoria in *De Simone v Bevacqua* (1994) 7 VAR 246, a case relied on by the appellant in *Ma Bik Yung*. Subsequent Australian decisions do not cite the decision of the Court of Final Appeal, but by implication support the conclusion that the power to order an apology includes an order against an unwilling respondent: see, eg, *Falun Dafa v Melbourne* [2004] VCAT 625 (7 April 2004); *Burns v Radio 2UE Sydney* [2005] NSWADT 24 (16 February 2005).

83 See, eg, *Falun Dafa v Melbourne* [2004] VCAT 625 (7 April 2004); *Russell* [2001] NSWADT 32 (26 February 2001); *Collier v Sunol (No 2)* [2006] NSWADT 88 (24 March 2006) [22].

84 See, eg, *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 22 (5 July 2002).

There are numerous cases in which courts have not expressed any view about the sincerity an apology.<sup>85</sup> On other occasions there is express reference to sincerity and voluntariness. An order to apologise has been made where a Tribunal considered the apology would be sincere,<sup>86</sup> and where, based on claims made during the hearings, it reflected at least to some degree the respondent's personal feelings.<sup>87</sup> In several cases a court has refused to make the order because the respondent has said they will not comply with it.<sup>88</sup> In many cases the courts are concerned not to order an apology where the respondent's demeanour leads to the conclusion that the apology would not be sincere.<sup>89</sup> In one case, even though the complainant sought an apology, the Tribunal refused to make the order because it had difficulty imagining that an apology would be sincere where there was significant animosity between the parties and stated, '[i]n those circumstances it seems to me futile to order an apology'.<sup>90</sup> In a case in which there had been a seven year dispute between the parties and the proceedings were an application for summary dismissal of the complaint on the basis that it was vexatious, the Tribunal concluded that there would be no utility or significance in an ordered apology.<sup>91</sup> In each of these cases it is apparent that the court has assessed whether based on the relationship between the parties an apology will be sincere, as well as the history of the proceedings and the respondent's attitude and demeanour throughout the proceedings.

In other cases, the view has been expressed more generally that it is a contradiction in terms to order someone to apologise.<sup>92</sup> From this perspective, an apology not given freely is not an apology at all. In one case it was stated, 'I do not think there is any real value in an apology given under compulsion'.<sup>93</sup> A court refused to order an apology and a letter of positive reference requested by the complainant on the basis that the forced quality of these communications would

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85 See, eg, *Korda v Black and White Distribution Pty Ltd* [2006] WASAT 75 (28 March 2006); *Chew v Director-General of the Department of Education and Training* (2006) 44 SR (WA) 174.

86 *Bishop v Gedge & Rudd* [2008] QADT 17 (5 August 2008).

87 *Collier v Sunol (No 2)* [2006] NSWADT 88 (24 March 2006) [21]. Note in this case, the apology order was specifically intended as an acknowledgement that some material in past publications constituted unlawful vilification but did not purport to be a statement of 'genuinely held feelings': at [20].

88 See, eg, *Gardener v Norcott* [2004] QADT 39 (7 December 2004); *Whittle v Paulette* [1994] QADT 5 (27 December 2004).

89 *Gardener v Norcott* [2004] QADT 39 (7 December 2004); following previous decisions of the Anti-Discrimination Tribunal Queensland in *Neill v Steiler* [1994] QADT 2 (20 June 1994); *Lynton v Maugeri* [1995] QADT 3 (4 May 1995); *Sailor v Village Taxi Cabs Pty Ltd* [2004] QADT 15 (20 May 2004).

90 *Foran v Bloom* [2007] QADT 31 (5 December 2007) [80].

91 *Crewdson v Director General, Department of Community Services* [2008] NSWADT 279 (13 October 2008).

92 *Jones v Scully* (2002) 120 FCR 243, 308 [245] (Hely J).

93 *Sibley v Roche* [1996] QADT 14 (28 June 1996).



undermine their effectiveness.<sup>94</sup> In *Travers v New South Wales*, Raphael FM expressed the view that an apology must be freely given, as well as contain a genuine acknowledgement of fault:

An apology is something that should be freely given and arise out of an understanding by one party that it was at fault in relation to its actions as they affected the aggrieved party.<sup>95</sup>

Federal Magistrate Raphael later reiterated this view in *Evans v National Crime Authority*:

I do not believe there is much utility in forcing someone to apologise. An apology is intended to come from the heart. It cannot be forced out of a person.<sup>96</sup>

This view is reflected in the statement of Hely J in *Jones v Scully*, that, ‘prima facie, the idea of ordering someone to make an apology is a contradiction in terms’.<sup>97</sup> In a subsequent case, *Jones v Toben*, HREOC found a complaint about incitement to racial hatred had been substantiated and made orders not only that the respondent remove the material and restrain from further publication, but also ordered that the respondent apologise in writing to the complainant and those whom the complainant represented and for the apology to appear on the Adelaide Institute’s home page.<sup>98</sup> On review to the Federal Court, while Branson J upheld other orders made by HREOC, he agreed with the view expressed by Hely J in *Jones v Scully* and refused to make an apology order.<sup>99</sup>

There is a recent line of decisions that aim to reconcile decisions to order an apology with the view that there is no value in an ordered apology. This is achieved by expressly distinguishing between personal apologies, which cannot be compelled, and apologies made for the purpose of fulfilling a statutory requirement, which do not depend on voluntariness. These decisions conclude that the aims of anti-discrimination legislation can be served by ordering apologies even when the apology is not heartfelt. In construing the legislation in this way these cases support the view that an apology that is not given voluntarily still has some value in the eyes of the law. This was the approach taken by the NSW Administrative Decisions Tribunal in *Burns v Radio 2UE*. In this case, the second respondents, two radio presenters, made comments during a morning broadcast that were held to be unlawful vilification pursuant to section 49ZT(1) of the *Anti-Discrimination Act 1977* (NSW) because they were capable of inciting severe ridicule of gay men. The complainant proposed that both

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94 *Dunn-Dyer v ANZ Banking Group Ltd* [1997] HREOCA 52 (29 August 1997). Cf *Chew v Director General of the Department of Education and Training* (2006) 44 SR (WA) 174, where the Western Australian State Administrative Tribunal made an order that the respondent send a copy of the reasons and an ordered letter of apology to the University at which the complainant was taking a teacher training course with a request that the University place the letter and reasons on the complainant’s academic file held by the University.

95 *Travers v New South Wales* (2001) 163 FLR 99, 116 [73].

96 [2003] FMCA 375 (5 September 2003) [115]. A similar view was expressed by the Northern Territory Anti-Discrimination Commissioner in *Fornaro v Strachan* (1998) EOC ¶92-955.

97 (2002) 120 FCR 243, 308 [245].

98 71 ALD 629.

99 *Ibid* [106].

presenters ‘each read an apology, in specified terms, on air for seven consecutive days at specified times, and that Radio 2UE publish a written apology in four specified newspapers in specified terms.’<sup>100</sup>

The Tribunal in *Burns v Radio 2UE* was clearly sympathetic to the view expressed by Raphael FM in *Evans v National Crime Authority* that an ‘apology cannot be forced out of a person’<sup>101</sup> but concluded that the question turns on the meaning of apology for the purposes of the applicable legislation. The Tribunal stated:

We agree that if an apology is understood, as it is commonly understood, to be a statement that reflects a person’s own feeling of regret for conduct that has caused offence or harm, then of its nature it cannot be ordered to be made, unless the feeling is in fact held and it is only its expression that is ordered. In submissions the applicant, however, says that an apology for purposes of s 113(1)(b)(iia) should be understood as being associated with a legal requirement, rather than ‘genuine and voluntary’. The *Anti-Discrimination Act 1977* makes clear that there is power to order an apology in respect of a vilification complaint. The apology is acknowledgement of the wrongdoing and, seen as fulfilment of a legal requirement rather than as a statement of genuinely held feelings, it can properly be compelled by way of order. There would be a welcome extra dimension to the apology if it reflected that the person actually regrets the conduct.

We agree, therefore, with the respondents’ argument that to compel the publication of an apology is misguided, only to the extent that the argument refers to what we will call a personal apology, rather than an apology that is one made for the purposes of the *Anti-Discrimination Act 1977*. An apology of the type that meets the purposes of the *Anti-Discrimination Act 1977* can, and in this case will be, compelled by order.<sup>102</sup>

The Tribunal ordered the first respondent ‘to cause an apology to be published as directed’ and the second respondents ‘to cause an apology to be read and broadcast as directed’.<sup>103</sup> This reasoning has subsequently been adopted and applied in other cases by the NSW Administrative Decisions Tribunal<sup>104</sup> and by the Queensland Anti-Discrimination Tribunal.<sup>105</sup> In adopting the reasoning in *Burns v Radio 2UE* the Queensland Anti-Discrimination Tribunal in *Menzies v Owen* made express reference to the purpose of the order, namely that ‘the members of the public that have been incited to hatred, serious contempt or severe ridicule should be told by the respondent that such conduct was unlawful’.<sup>106</sup>

The apologies ordered under the legislation in *Burns v Radio 2UE* and subsequent decisions of that Tribunal<sup>107</sup> and by the Queensland Anti-Discrimination Tribunal<sup>108</sup> are intended therefore to serve a different and more

100 *Burns v Radio 2UE* [2005] NSWADT 24 (16 February 2005) [26].

101 *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003) [115].

102 *Ibid* [29]–[30].

103 See *ibid* [32]–[34].

104 *Collier v Sunol (No 2)* [2006] NSWADT 88 (24 March 2006) [9]–[10].

105 *Menzies v Owen* [2008] QADT 20 (19 September 2008) [279].

106 *Ibid*.

107 *Anti-Discrimination Act 1977* (NSW) s 108(2).

108 *Anti-Discrimination Act 1991* (Qld) s 209.

limited purpose than a personal apology. The conclusion in these cases is that Parliament intends the apology to be a legal requirement that is properly compellable by way of order. They recognise that the ordered apology, as distinct from a personal apology, lacks both voluntariness and sincerity and is not an apology as commonly understood. There is no reason to think that the same meaning cannot be applied to an apology ordered pursuant to legislation that provides for a respondent to do any reasonable act and in relation to conduct other than vilification that is unlawful under the legislation.<sup>109</sup> This line of reasoning raises for consideration whether the statutory acknowledgement of wrongdoing would be better described explicitly in that way, rather than as an apology. To date there is no empirical evidence to indicate whether an apology in these terms is regarded as satisfactory by complainants and whether any other form of order would achieve the same purposes.

#### **D Other Factors Relevant to the Decision Whether to Order an Apology**

Other reasons have been given by the courts for refusing to order respondents to apologise for their unlawful conduct. These do not bear directly on the value of the apology as a remedy but are concerned with the question of whether the apology sought would be inappropriate on other grounds. For example, doubts have been expressed about the power to make an order of this nature against an entity that is not a natural person, including government authorities.<sup>110</sup> In other cases, however, an order has been made against government respondents.<sup>111</sup> Even assuming the power does exist, it has been considered inappropriate on some occasions to make an order against a government authority,<sup>112</sup> even though the hope has been expressed that an appropriate apology will be forthcoming.<sup>113</sup>

Sometimes the court's attention is focussed on the conduct of the respondent, rather than the complainant. For example, in *Wilson v Lawson* a full apology was considered necessary because 'an essential characteristic of the conduct in question was that it was designed and intended to be hurtful'.<sup>114</sup> In other cases the respondent's conduct has been held to not warrant an ordered apology. In a case where sex discrimination in employment was substantiated, it was considered inappropriate to order an apology where the offending conduct arose out of the respondent's ignorance of the law and the complainant was aware of the difficulties that the respondent faced in keeping her employed.<sup>115</sup> In other cases the court has declined to make an apology order on the basis that there was no

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109 See Carroll, above n 11, pt 8.

110 *Gulke v KC Canvas Pty Ltd* [2000] FCA 1415 (29 September 2000) [3]–[4], (corporation); *Forbes v Australian Federal Police (Commonwealth of Australia)* [2004] FCAFC 95 (5 May 2004) [7] (statutory authority); *Chaisty v City of Perth* [2004] WAEO 3 [104] (statutory authority).

111 *Russell* [2001] NSWADT 32 (26 February 2001); *Chew v Director-General of the Department of Education and Training* (2006) 44 SR (WA) 174.

112 *Byrne v Queensland* [1998] QADT 20 (27 November 2008).

113 *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003).

114 [2008] QADT 27 (6 November 2008), [104].

115 *Westwood v Parkinson Wholesale Foods Pty Ltd* [1996] HREOCA 27 (29 August 1996).

malice or ill will on the part of the respondent in declining to make an apology order,<sup>116</sup> where the court concluded that it was unlikely that there would be a subsequent infringement of the statute,<sup>117</sup> and where the respondents were found to have acted on genuinely held beliefs about the requirements of their organisation.<sup>118</sup>

The cases referred to in this Part reveal the conflicting views that have been expressed about the need for voluntariness and sincerity for an apology to be meaningful. They also show that opinions are divided on whether an order to apologise is a more effective form of vindication than a judgment made in a complainant's favour and whether government respondents can be ordered to apologise. The latter is a legal question that needs to be addressed by reference to the particular respondent and the relevant applicable legislation. As to the former issues, while the statutory intent behind the conferral of power to order apologies is to be ascertained as a matter of law, some of the judicial opinions that have been expressed also involve assumptions about the meaning and value of apologies to individuals. As we will see in the next Part, some of these assumptions are not necessarily supported by the social science research on apologies.

## V INSIGHTS INTO THE VALUE OF AN ORDERED APOLOGY FROM THE APOLOGY LITERATURE AND SOCIAL SCIENCE RESEARCH

Insights into the value attributed to apologies generally and in equal opportunity cases more specifically are provided by (a) theories and research on apologies, (b) data as to the frequency with which apologies are agreed to as terms of settlement of equal opportunity complaints or sought as a form of legal redress, and (c) empirical research. This Part examines each of these before discussing in Part VI of the article the extent to which this supports the approach taken by the law to ordered apologies and the conclusion that parties to complaints do attribute some value to ordered apologies.

### A Theories and Research on Apologies

Much of the debate about the value of apologies in a civil law context has concerned the introduction of legislation that protects those who apologise by rendering apologies inadmissible as admissions for the purpose of civil

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116 *JM v QFG* [1997] QADT 5 (31 January 1997).

117 *Ibid.*

118 *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 (12 December 2008).

proceedings.<sup>119</sup> Various arguments have been advanced in support of encouraging apologies in this way.<sup>120</sup> These encompass moral, remedial, economic, efficacious and therapeutic considerations.<sup>121</sup> We saw in Part II that although the word apology conveys a range of meanings there is consensus that a full apology incorporates an expression of heartfelt regret and remorse for what has happened, sympathy for the victim (affect) and acknowledges the wrongdoers transgression (affirmation). For some people it also requires that there be an offer of some form of recompense and a commitment to change in the future (action).

Allan concludes that both psychological theory and research support the idea that an apology, if it leads to forgiving, can enhance the wellbeing of victims.<sup>122</sup> There is also tentative and indirect evidence that an apology that is comprised of both an admission of wrongdoing and an expression of regret can influence the decision to litigate.<sup>123</sup> An apology that expresses regret or remorse but does not acknowledge fault is sometimes referred to as a 'partial' apology. There is evidence that a partial apology will be preferred by the victim of wrongdoing in some circumstances to no apology at all, and it can be argued therefore that a partial apology has value in some circumstances.<sup>124</sup> There are also anecdotal accounts that there are times when a victim will prefer to receive an unwilling or insincere apology than no apology at all.<sup>125</sup>

These differing views as to the meaning of apology and the value of partial apologies are reflected in the views that have emerged about the role that law plays with regard to apologies. One view supports laws that increase the potential for legal disputes to be resolved and for parties to achieve psychological and

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119 See *Civil Liability Act 2002* (NSW) s 69; *Civil Liability Act 2002* (Tas) s 7; *Civil Liability Act 1936* (SA) s 75; *Civil Liability Act 2003* (Qld) s 72; *Civil Law (Wrongs) Act 2002* (ACT) s 14; *Civil Liability Act 2002* (WA) s 5AH. In some jurisdictions an apology is defined to include an admission of fault while in others it is defined to *not* include an admission of fault. For analysis of the Australian legislative models and commentary, see Vines, above n 5. Enactments to this effect have become popular in the USA, Australia and Canada: see, eg, Cohen, 'Legislating Apology', above n 5; Vines, above n 5; Kleefeld, above n 5.

120 For analysis of the arguments for and against legislating to limit the use of full and partial apologies as evidence as admissions in civil proceedings, see Cohen, 'Legislating Apology', above n 5.

121 Allan, above n 18, 5–16.

122 Ibid, 16. See also Alfred Allan and Dianne McKillop, 'The Health Implications of Apologising after an Adverse Event' (2010) 22 *International Journal for Quality in Health Care* 126.

123 Allan, above n 18, 16.

124 Steven J Scher and John M Darley, 'How Effective Are the Things People Say to Apologise? Effects of the Realization of the Apology Speech Act' (1997) 26(1) *Journal of Psycholinguistic Research* 127, 138. In this article the authors cite a simulation study they conducted and conclude that the greatest improvement in perception about a transgressor came from the offering of an apology, as compared to no apology at all. Other support for the view that an apology serves a function even when it is not an expression of true remorse or sorrow is found in the work of Lazare, above n 13, 15–8; White, above n 4, 129–36.

125 See, eg, Lee Taft, 'On Bended Knee (with Fingers Crossed)' (2006) 55 *DePaul Law Review* 601. Lee recounts the remark of Sachs J of the Constitutional Court of South Africa at a forum that 'he would rather have his enemy "on bended knee" than not at all': at 603.

other benefits by apologies being given and received.<sup>126</sup> Despite the fact that forced apologies may not change individual behaviour, they are seen to have a role to play when a public apology is necessary to 'set the public record straight or restore the dignity of the injured party or group'.<sup>127</sup> These benefits aside, it must be acknowledged that coerced apologies raise many philosophical issues of debate.<sup>128</sup> For some, the moral quality of apology is undermined by any strategic,<sup>129</sup> let alone coercive,<sup>130</sup> use of apologies. There is little evidence of debate about the moral defensibility of coerced apologies as a remedy within the civil law, most likely because it is so uncommon.<sup>131</sup> Although debate about the value of an ordered apology in general is not taken up in this article there is no doubt that further debate is warranted about the morality of ordered apologies as a civil remedy, both in anti-discrimination cases and more generally.

## B Apologies as Term of Settlement or Form of Legal Redress

There is ample anecdotal evidence that apologies are a common and significant term of settlement agreements involving civil disputes.<sup>132</sup> There is also data from the equal opportunity jurisdiction showing 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 per cent of the conciliated complaints in their study.<sup>133</sup> A research report prepared in 2003 analysing 451 files relating

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- 126 See, eg, Cohen, 'Advising Clients to Apologize', above n 5; Latif, above n 9; Prue Vines, 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?' (2007) 1 *Public Space: Journal of Law and Social Justice* <<http://epress.lib.uts.edu.au/ojs/index.php/publicspace>>; White, above n 4, 1261.
- 127 Brent T White, 'Saving Face: The Benefits of Not Saying I'm Sorry', (2009) 72(2) *Law & Contemporary Problems* 261, 269. Other functions attributed to coerced apologies include demonstration of the power of the coercing party, commitment of the coercing party to the breached value, establishing the record, assigning blame, identifying harms, affirming values, acknowledging victims as worthy of moral recognition, creating a spectacle of apologetic performance, and redress: see Smith, above n 13, 151. Smith also refers to the capacity of coerced apologies to serve punitive, retributive, vengeful and humiliating ends 'for example by requiring the accused to publicly renounce her deepest value or accept blame for a crime of which she is innocent': at 151. In this passage Smith is clearly contemplating the use of coerced apologies for criminal offences but his discussion of the use of coercion is not confined to criminal justice.
- 128 Smith, above n 13, 150.
- 129 See especially Lee Taft, 'Apology Subverted: The Commodification of Apology' (2000) 109 *Yale Law Journal* 1135.
- 130 Kleefeld, above n 5.
- 131 Overall there is 'a paucity' of academic discussion of the appropriateness of court-ordered apologies as a civil remedy: White, above n 4, 1270.
- 132 See, eg, Daniel W Shuman, 'The Role of Apology in Tort Law' (2000) 83 *Judicature* 180, 180; Jennifer Gerarda Brown, 'Apology: The Role of Apology in Negotiation' (2004) 87 *Marquette Law Review* 665; Bruce W Neckers, 'The Art of the Apology' (2002) 81(6) *The Michigan Bar Journal* 10.
- 133 Rosemary Hunter and Alice Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases* (Working Paper No 8, Centre for Employment and Labour Relations Law, August 1995); see also Rocky Clifford, *A Review of Outcomes of Complaints under the Sex Discrimination Act 1984*, Australian Human Rights and Equal Opportunities Commission <[http://www.hreoc.gov.au/complaints\\_information/publications/sda\\_outcomes.html](http://www.hreoc.gov.au/complaints_information/publications/sda_outcomes.html)>.

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.<sup>134</sup> Two Annual Reports for 2008–09 of Equal Opportunity and Anti-Discrimination bodies in Australia refer to similarly high recordings of apologies as a term of settlement agreed to in conciliation.<sup>135</sup>

The cases discussed in this article are all instances where complainants have sought orders that the respondents provide them with an apology. Sometimes a private apology is sought, at other times a public apology is sought as well as orders that the respondent publish the apology in a stipulated manner. There is no indication from a review of these cases that an order to apologise has been made if not sought by the complainant. This leads one to the conclusion that, from the complainant's perspective at least, one or more of the functions typically attributed to coerced apologies will be achieved by an order of this kind. This may be the case notwithstanding indications that the apology will be given unwillingly and insincerely, if at all. Some understanding of the motivation for pursuing a 'remedy' that might be thought to be a contradiction in terms can be gained from empirical studies.

### C Empirical Studies

At a broad level, there is support in the psychology literature for the proposition that apologies can play an important role in the resolution of differences and psychological healing after wrongdoing.<sup>136</sup> There has been little research to establish whether these benefits follow where the apology is offered in the context of a legal dispute and, until now, there has been no empirical data as to the value of an ordered apology. A recently completed study has investigated the perceptions of parties involved in complaints about discrimination and harassment in the equal opportunity jurisdiction in Western Australia ('EO study').<sup>137</sup>

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134 Carole J Petersen, Janice Fong and Gabrielle Rush, 'Investigation and Conciliation of Discrimination Complaints in Hong Kong: Statistical Analysis of 415 Complaint Files and Commentary' (Research Report, Centre for Comparative and Public Law, The University of Hong Kong, July 2003) <<http://www.hku.hk/ccpl/documents/10072003-rgcreport.doc>>.

135 The South Australian Equal Opportunity Commissioner reports for the year 2008–09 that 52 per cent of the complaints received by the Commission were resolved through conciliation and that 73 per cent of the conciliated outcomes involved the respondent making an apology or providing an undertaking to the complainant: Equal Opportunity Commission of South Australia, *Annual Report* (2009) 24. The Western Australian Commissioner of Equal Opportunity reports for the year 2008–09 that 231 (over 37.7 per cent) of the complaints received were resolved through conciliation and the most common types of outcomes negotiated during the conciliation of complaints included monetary settlement (89), apology (70), respondent's explanation satisfactory to complainant (41), equal opportunity law program/education (36), private settlement between parties (26), and policy change within the organisation (13): Equal Opportunity Commission of Western Australia, *Annual Report* (2009) 39.

136 Slocum, Allan and Allan, above n 17.

137 A Allan, D McKillop and R Carroll, 'Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints' (2010) *Journal of Psychiatry, Psychology and Law* (forthcoming).

The theory of apology developed by Slocum, Allan and Allan and referred to in Part II conceptualises apology as a process that consists of one or more of three components: affirmation, affect and action. This provided the conceptual framework for the EO study, which investigated the parties' perceptions of the value of apologies in a legal context. In the study, 24 people who had been involved in matters instituted under the *Equal Opportunity Act 1984* (WA) that had been dealt with in either or both the Western Australian Equal Opportunity Commission or State Administration Tribunal were interviewed. There were 13 complainants and 11 respondents. Nine of the respondents were corporate bodies. The data reveals that complainants found an apology valuable because it served some function for them. Some complainants believed that an apology assisted their healing and allowed them to move on. For some an apology vindicated them both privately by restoring their dignity and publicly by setting the record straight. The acceptability of an apology for complainants was found to be strongly influenced by the presence of the affirmation component. This is evident from the finding that although complainants would prefer an early and spontaneous apology they will accept a late and non-spontaneous apology because it provides affirmation of their experience of the discrimination or harassment. A prominent theme in the data was that complainants wanted respondents to at least admit that they had discriminated against them. Some also wanted acknowledgement of the effect of the wrongful conduct on them. Respondents too found apologies valuable. Some because it provided them an opportunity to acknowledge that there had been wrongful behaviour, and in others, from a pragmatic perspective, because they saw it as a way of disposing of a matter expediently and inexpensively.

None of the participants in the study had received ordered apologies, so their responses to questions about the voluntariness of the apology and how they would have felt had the apology been ordered have to be understood with this in mind. Complainants regarded authenticity of apologies as very important. For most complainants spontaneous apologies that were offered voluntarily were more acceptable because they believed them to be more authentic. They did however recognise that even spontaneous apologies might not be truly voluntary. Some participants considered non-voluntary apologies as insincere, meaningless and therefore unacceptable. Others saw non-spontaneous apologies as sufficient because they served as public and personal vindication. These participants felt that an ordered apology would send a clear message to the community about the wrongful conduct of the respondent.

The findings of the EO study support the theory of apology developed by Slocum, Allan and Allan. The data indicates that parties to equal opportunity complaints are mostly positive about the value of apologies in this legal context and this could include an ordered apology.<sup>138</sup> The study is by nature small and

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138 The authors note that the absence of complainants who had received an ordered apology, or respondents who had made one, is a limitation of the study. However, this was unavoidable because purposeful sampling of parties whose matters were conciliated within the Equal Opportunity Commission would not have been possible without breaching confidentiality requirements: see *ibid*.



whilst the findings should be interpreted with caution given the qualitative nature of the study they do shed some light on the value of ordered apologies to parties. The findings also generate a number of hypotheses that could be tested in a quantitative study.

## VI TOWARDS A CLEARER UNDERSTANDING OF THE VALUE OF ORDERED APOLOGIES – SOME CONCLUSIONS AND SUGGESTIONS FOR FURTHER RESEARCH

The cases indicate that in deciding whether to make an apology order the courts take into account the benefits it will provide, the respondent's reasons for not apologising voluntarily and whether or not in all the circumstances of the case an apology order is appropriate. The absence of willingness to apologise may be a significant factor but is not determinative of a court's decision. A distinction is drawn between personal apologies, which must by definition be sincere, and apologies made for a statutory purpose. In this way sincerity is regarded as a hoped for but not essential component of the apology.

The courts do not appear to be under any illusion that they can order *sorriness* even where they have been conferred with statutory power to order an apology. On the contrary, there have been a number of strong judicial statements to the effect that a personal apology will not have value if it is forced out of a person. In recent cases, however, some courts have construed the statutory meaning of apology more narrowly and have ordered a respondent to apologise as an acknowledgment of their wrongful conduct and an expression of regret for the harm caused to the complainant. Often but not always the apology is to be made publicly. In this way the differing views as to the meaning of apology are reconciled by recognising that a less than sincere apology, while not a personal apology, may be 'good enough' to have value to a complainant and go some way to achieving the statutory aims of the anti-discrimination legislation.

The divergent views expressed in the cases are also reflected in the apology literature. Some writers believe, in effect, that 'ordered apology' is a contradiction in terms. On this view the coercive nature of the order is antithetical to the meaning of apology. Others accept that there can be meaning in an apology that is given grudgingly, incompletely and even insincerely. This article has referred to a recent study of the psychological value of apologies that provides support for the view that an ordered apology is perceived by the parties to have potential benefit in the resolution of anti-discrimination complaints. This provides some empirical data (albeit limited) to support the statutory remedy and the approach taken by the courts in many cases.

In conclusion, it is possible to attribute some value to ordered apologies both from a legal and a psychological perspective and this supports the intention and aims of Australian anti-discrimination legislation. Evidently, this conclusion challenges the assumption that an ordered apology has no value. The empirical basis for claiming that there is value in such an order from the parties' perspectives is very limited, however, and further research is needed. Further

consideration is also warranted into possible ways that the value attributed to an ordered apology could be achieved by an alternative form of statutory order that makes clear that the respondent has acted wrongfully but that is not described as an apology. This might go some way to addressing concerns about the morality and efficacy of ordering an 'apology' and the dissonance that remains between the meaning of a personal apology as commonly understood and the narrower and qualified meaning attributed to it by the law.