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# **Implementing the Australian Open Disclosure Standard: The legal situation in Western Australia**

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## Executive summary

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### Scope

In 2008 industry partners from the health, insurance and legal industries in Western Australia commissioned Edith Cowan University to investigate the legal situation in Western Australia (WA) around implementing the Australian Open Disclosure Standard. The full list of industry partners is listed in Appendix A.

This paper was funded by a grant received from the Val Lishman Health Research Foundation and aims to:

- review the civil liability law in Western Australia, and in particular examine how the *Civil Liability Act 2002 (WA)* has been interpreted by the courts, legal scholars, and health professionals;
- compare the *Civil Liability Act 2002 (WA)* to similar laws in other jurisdictions in Australia and around the world (such as in the United States and Canada), and
- make suggestions for further research.

### Background

In April 2008 the Health Ministers in Australia agreed to work towards implementing the Open Disclosure Standard (the Standard) in all health care facilities. Open disclosure is a framework that requires health care professionals (professionals) to inform patients in an open and timely way following an adverse event, and may include an expression of regret. The word *apology* is not mentioned in the Standard, but is used in related documents without defining it. This results in confusing messages about the possible legal and insurance consequences for professionals who make apologetic statements whilst disclosing adverse incidents. This uncertainty is further compounded by the legislation within different States and Territories that diverge around the legal definition of an apology. This uncertainty may restrain professionals from disclosing adverse incidents because they fear that apologies they express whilst doing so may be used against them in later litigation and may void their indemnity insurance contracts.

### Findings

The provisions of the *Civil Liability Act 2002* in WA make it possible for professionals to offer apologies to patients and their families whilst they disclose adverse incidents to them, provided that the apology is an expression of regret and not an admission of fault. This fails to allay the fear of professionals that an apologetic statement made by them whilst disclosing an adverse event to a patient may be used to prove liability against them in later

negligence lawsuits. WA professionals' concerns about the potential legal and insurance implications of apologies may therefore restrain them from offering apologies to patients, or worse, from disclosing adverse incidents.<sup>1</sup> Such behaviour might, ironically, make patients more likely to sue.<sup>2</sup>

The definition of an apology in the WA Civil Liability Act is in stark contrast with those in New South Wales (NSW),<sup>3</sup> Australian Commonwealth Territory (ACT),<sup>4</sup> some States in the United States (US), and Provinces in Canada. In these jurisdictions apologies can include an admission of fault.

Whilst it appears as if the WA Parliament is in principle prepared to protect apologies, the narrow definition used in the *Civil Liability Act 2002 (WA)* restricts the ambit of this privilege. Given that a large number of jurisdictions have introduced legislation that protects apologies that include admissions of fault or liability, it appears sensible for the WA Parliament to define an apology as an apologetic statement that includes an admission of fault. Such a privilege will allow professionals to act in an ethical manner; express their feelings of moral responsibility; may have general and mental health benefits for both patients and professionals; encourage the improvement in the quality of health services; and ensure that the relevant statement does not void their indemnity insurance contracts. It may also contribute to the effectiveness of the justice system in that it may restrict litigation and encourage the settlement of claims out of court.

### **Suggestions for further research**

The following questions require further investigation:

1. How significant is the current legislation in preventing health professionals entering into a meaningful dialogue with patients following an adverse event?
2. What changes to the Civil Liability Act 2002 (WA) would assist health professionals, insurers and health consumers to implement open disclosure?
3. Is there a case to amend the Civil Liability Act 2002 (WA) to protect apologies that include admissions of fault or liability?

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<sup>1</sup> Iedema, R., N Mallock, R Sorensen, A Tuckett, A Williams, et al. (2008). *The National Open Disclosure Pilot: Evaluation of a policy implementation initiative*. Medical Journal of Australia, 188(7), 398.

<sup>2</sup> D Trimble (2007). *Middle ground on tort reform*. Retrieved 1 March 2008 from [www.sorryworks.net/KYapology.phtml](http://www.sorryworks.net/KYapology.phtml)

<sup>3</sup> *Civil Liability Act 2002* (NSW).

<sup>4</sup> *Civil Law (Wrongs) Act 2002* (ACT).

## 1 Introduction

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### 1.1 Background

In April 2008 the Australian Health Ministers<sup>5</sup> agreed to work towards the implementation of a national Open Disclosure Standard (Standard)<sup>6</sup> in all health care facilities in the country. The Standard requires health care professionals (professionals) to provide patients with accurate information about adverse incidents, the immediate consequences thereof, and about options to remedy the harm suffered by patients. It is expected that professionals will provide patients with an expression of regret; a succinct summary of actions that will be taken to avoid future reoccurrences of similar incidents; and ongoing support to them and their families.

Whilst the term open disclosure<sup>7</sup> may be a recent invention, the notions of disclosure and honesty are well established in health practice. Ethically professionals must always communicate honestly with patients in order to allow them to make autonomous decisions about their treatment.<sup>8</sup> This is also the legal position,<sup>9</sup> even though there is not currently a legal duty to disclose medical mistakes as is the case in Canada.<sup>10</sup> Most professionals also feel an obligation to disclose adverse incidents and apologise to

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<sup>5</sup> Australian Commission for Safety and Quality in Health Care. *Supporting Open Disclosure* (2008). Retrieved 1 August, 2008, from <http://www.safetyandquality.org/internet/safety/publishing.nsf/Content/PriorityProgram-02>

<sup>6</sup> Australian Council for Safety and Quality in Health Care, *Open disclosure standard: A national standard for open communication in public and private hospitals, following an adverse event in health care*. Commonwealth of Australia (2003).

<sup>7</sup> The term open disclosure seems to be a tautology because “disclosure” and “open” express the same notion. A possible explanation for this choice of words may be that under legislation such as the *Health Services (Quality Improvement) Act 1994 (WA)* disclosures are not open to patients and families.

<sup>8</sup> See also A Allan, *An international perspective of law and ethics in psychology* (Inter-ed. 2008) (Allan, *International* hereafter).

<sup>9</sup> Australian courts have accepted the existence of a so-called therapeutic privilege, see *Rogers v Whitaker* (1992) 175 CLR 479. This privilege allows professionals to withhold or modify communications contra the law and ethics where they believe that it is in the interest of the clients’ mental or physical health to do so. However, case law suggests that courts believe that there will rarely be a justifiable basis to withhold information from clients on the basis that the disclosure may cause harm. Allan, *International*.

<sup>10</sup> Corrs Chambers Westgarth (2002). *Open disclosure project: Legal review*. Report commissioned by the Australian Commission on Safety and Quality in Health Care. (Hereafter Corrs Chambers Westgarth).

patients and their families when they feel morally responsible for an adverse incident.<sup>11</sup> Patients and their families likewise expect a statement that includes “the acknowledgement that something wrong has happened, that measures will be taken to prevent future events ... and an expression of sincere regret”.<sup>12</sup> Iedema and his colleagues similarly found that “interviewees who expressed satisfaction about the disclosure process were typically those whose expectations of a full apology... and an offer of tangible support were met”.<sup>13</sup>

There is also some empirical evidence that disclosure after adverse events reduces the likelihood of litigation, and therefore also has economic benefits.<sup>14</sup> There is indirect evidence that disclosure by professionals after an adverse event may have general health benefits to patients and their families and to professional themselves.<sup>15</sup> Openness about adverse incidents can also lead to an improvement in the quality of services if professionals and health providers examine their mistakes and take steps to prevent such errors in future. This is important as improving the quality of health services, and reducing the risk of adverse incidents to patients in the course of treatment, have become important components of the public narrative.

To improve the standard of clinical care in WA the Parliament passed the *Health Services (Quality Improvement) Act 1994*. This Act provides for the establishment of quality improvement committees who have the task of assessing and evaluating the quality of health services; reporting and making recommendations for changes; and monitoring the

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<sup>11</sup> A Allan, *Apology in civil law: A psycholegal perspective*, 14 *Psychiatry, Psychology and Law*, 5-16. (2007). (Allan, *Apology* hereafter).

<sup>12</sup> D Schwappach and C Koeck, *What makes an error unacceptable? A factorial survey on the disclosure of medical errors*. *International Journal for Quality in Health Care*, 16, 317-326. (2004), at p.323.

<sup>13</sup> R Iedema, R Sorensen, E Manias, A Tuckett, D Piper, N Mallock, et al. *Patients' and family members' experiences of open disclosure following adverse events*. *International Journal for Quality in Health Care*. (In press).

<sup>14</sup> Allan, *Apology*. K. Anderson, D Allan and P Finucane, *A 30-month study of patient complaints at a major Australian hospital*. *Journal of Quality Clinical Practice* 21, 109 (2001). But for contra views see A E Daniel, R Burn, and S Horarik. *Patients' complaints about medical practice*. *Medical Journal of Australia*, 170, 598-602 (1999); and D M Studdert, M Mello, A Gawande, T A Brennan and Y C Wang. *Disclosure of Medical Injury to Patients: An Improbable Management Strategy*, 26 *Health Affairs*, 215- 226. (2007).

<sup>15</sup> A Allan, *The health benefits of open disclosure*. Paper presented at the Vario Conference, Perth, 1-2 December, 2008.

implementation of those recommendations.<sup>16</sup> These committees are only able to achieve their purpose if they have the full co-operation of professionals to disclose information about any adverse event that occurs. To encourage professionals to communicate openly these committees must be able to guarantee them a very high level of confidentiality. The *Health Services (Quality Improvement) Act* therefore provides that information provided to one of these committees may not to be disclosed other than for limited reporting purposes,<sup>17</sup> and that information given to a committee is not to be given as evidence by any committee member in any civil proceedings. Further, findings or recommendations of a committee are not admissible as evidence of carelessness or inadequacy in any proceedings.<sup>18</sup> The *Health Services (Quality Improvement) Act* therefore gives a qualified privilege to professionals who disclose information to quality committees. However, patients and families are not involved in this process and therefore information disclosed to them after an adverse incident by a professional will not be protected by the provisions of this Act.

## 1.2 The Standard in Western Australia

Given the potential advantages of disclosure it is not surprising that Iedema and his colleagues found that many professionals are well disposed towards it.<sup>19</sup> However, they also found that professionals have concerns about the possible legal consequences of open disclosure and these are hindering the introduction of the Standard in Australia.<sup>20</sup> Whilst Iedema and his colleagues did not interview WA professionals, some members of the industry partners have indicated at meetings that they believe the introduction of the Standard is problematic in WA. They are concerned that professionals are uncertain about the legal consequences of statements they make when they disclose adverse incidents to patients and their families. The key issue appears to be that apologetic statements made by professionals may be regarded at law to be admissions of liability and that this may prejudice them in ensuing litigation. A secondary concern is that an

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<sup>16</sup> *Health Services (Quality Improvement) Act, 1994* (WA) s7.

<sup>17</sup> *Ibid* s9.

<sup>18</sup> *Ibid* s11.

<sup>19</sup> Iedema (2008), see also D Brown, *Open Disclosure: morally right, but is it legally safe?* March Scientific Meeting of the Medico-Legal Society of NSW Inc, (2008) and Australian Council for Safety and Quality in Health Care (2003b).

<sup>20</sup> Similar concerns led to the review by Corrs Chambers Westgarth and Brown's paper.



apologetic statement may amount to an admission of liability in breach of a condition of their professional indemnity insurance contract.

## 2 Apology

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### 2.1 Apology and the Standard

The concerns about apologies initially appear surprising as the word is not specifically mentioned as an element of open disclosure in the Standard. It is not clear whether the absence of any reference to apology was accidental; or whether the authors of the document believe that an apology is a synonym for an expression of regret; or that they believe that the two constructs differ and deliberately wanted to restrict professionals to expressing regret in open disclosure proceedings. The confusion in the Standard and amongst professional regarding the meaning of expressions of regret and apologies is not unexpected because there is no fixed definition of an apology, and when an expression of regret becomes an apology either in everyday language or in law.<sup>21</sup> The lack of clarity about the definition of an apology also manifests in the Health Care Professionals Handbook (Handbook)<sup>22</sup> that is meant to assist professionals with the implementation of the Standard. For example, the following passage appears in the document:

**DOES AN APOLOGY OR AN EXPRESSION OF REGRET MEAN ADMITTING LIABILITY?**

The Open Disclosure Legal Review identified that an apology is not an admission of liability; there are no legal impediments to an appropriately worded expression of regret.

If you admit fault then you may be admitting liability.

Avoid statements such as:

—“I’m sorry – I appear to have made an error in judgement.”

—“I apologise for this mistake.”

—“It is my fault that this has happened.”<sup>23</sup>

This passage overlooks the fact that an acknowledgment of fault by the person offering the apology is generally regarded as a key attribute of an apology for wrongdoing.<sup>24</sup> An

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<sup>21</sup> Allan, *Apology*.

<sup>22</sup> Australian Council for Safety and Quality in Health Care, *Open disclosure: Health Care Professionals Handbook*. Commonwealth of Australia. (2003).

<sup>23</sup> *Ibid* p12.

<sup>24</sup> Allan, *Apology*.

expression of regret with no admission of fault may have value and be regarded as some form of apology, but its impact is limited.<sup>25</sup>

A similar lack of clarity regarding apology can be found in the report prepared by the Legal Process Reform Group of the Australian Health Ministers Advisory Council.<sup>26</sup> The use of the phrase “an apology or expression of regret” in paragraphs 4.28 and 4.31 suggests that the authors believe that an apology differs from an expression of regret. This impression is confirmed when the authors say in paragraph 4.31 that an apology is not an admission of liability without saying the same about expressions of regret. The wording in the paragraph appears to suggest that an apology is an expression of regret plus something that is not an admission of liability.

Given the difficulty the authors of the documents that support the Standard have of making a clear distinction between expressions of regret and apologies and a statement of fact and an admission of liability, it is not surprising that professionals are uncertain about what they should say when they disclose an adverse incident. Corrs Chambers Westgarth points out that:

The real challenge often lies in ‘finding the right words’. Recognising that there is a distinction between a statement of fact and an expression of regret on the one hand and an admission of liability on the other is one thing. Being able to demonstrably maintain that distinction through the course of what may often be a highly charged encounter and ensuring that a recipient of the information is similarly sensitive to the maintenance of the distinction, are entirely separate matters.<sup>27</sup>

The rest of this paper will examine whether the concerns of WA professionals regarding the legal consequences of apologetic statements made when they disclose adverse incidents are rational and in the process also examines the different statutory definitions of an apology found in Australian law and other jurisdictions. As expressions of regret appear to be generally accepted to have a narrower meaning than apologies, the word

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<sup>25</sup> J K Robbenolt, *Apologies and legal settlement: An empirical examination*. Michigan Law Review, 102, 460-517. (2003).

<sup>26</sup> The Australian Health Ministers’ Advisory Council, *Responding to the medical indemnity crisis: An integrated reform package* (2002).

<sup>27</sup> Corrs Chambers Westgarth, p33.

apology will be used for the sake of brevity, unless a distinction is made between expressions of regret and apologies.

## 2.2 Apology and liability

Common wisdom is that professionals should not offer an apology after an adverse incident because a court may admit evidence about the apology in later litigation and construe it as an admission of liability. The basis for this belief is the common law rule that evidence about extra-judicial statements made by people that are against their interest can be admitted as evidence during later litigation regarding the issue about which the statement was made.<sup>28</sup>

Until 2003 there were four exceptions to the rule that evidence about extra-judicial statements are admissible which are relevant for this discussion. Firstly, communications between people whilst obtaining legal advice from their lawyers are protected by the *legal practitioner privilege*. Secondly, *without prejudice communications* made during negotiations by people are generally non-admissible in later litigation about the issue in question. Thirdly, communications made during *mediation* can be made confidential and therefore may not be admissible evidence.<sup>29</sup> Finally, professionals have a *qualified privilege* in respect of communications made by them to quality improvement committees duly established under the provisions of the *Health Services (Quality Improvement) Act 1994 (WA)*.

The rationale underlying the first three of these exceptions is that effective administration of justice is only possible if people can be sure that statements they make in certain circumstances will not be used against them in later litigation. In the fourth case the purpose is to encourage professionals to engage in a process that will lead to the improvement of the health system.

Ideally adverse incidents should be disclosed and apologies offered as early as possible after discovery thereof. This is before lawyers are involved, without prejudice communications<sup>30</sup> are made, or mediation takes place. Patients and their families are

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<sup>28</sup> *Lustre Hosiery v York (1935) 54 CLR 134*.

<sup>29</sup> R Carroll *Apologising 'safely' in mediation*. *Alternative Dispute Resolution Journal*, 16, 40-53 (2005). Carroll points out parties to mediation and mediators can be compellable witnesses in certain circumstances and may therefore have to testify about what occurred during mediation.

<sup>30</sup> An apology made as part of without prejudice communication is likely to inflame the situation if it is made immediately after the occurrence of an adverse incident.

further not involved in the activities of the quality improvement committees under the *Health Services (Quality Improvement) Act 1994*. Evidence about what a professional said while disclosing an adverse incident, including an apology made, is therefore usually not covered by these four exceptions and as a rule<sup>31</sup> admissible in later litigation.

The fact that evidence about an apology is admissible does not mean that the court will necessarily find that the apology constitutes an admission of liability. In deciding whether plaintiffs had proved the legal liability of defendants on a balance of probabilities, courts must consider all the other relevant evidence, including evidence about an apology if it is deemed relevant. In doing this courts will consider the intention of the parties in making the apology. Courts appreciate that people who apologise normally do so because they feel morally responsible, but that does not mean that they are legally responsible.<sup>32</sup> Few laypeople have the knowledge to judge whether their behavior has met all the elements for legal liability, or to formulate an apology that will constitute an admission of liability of each of these elements. American,<sup>33</sup> Australian<sup>34</sup> and Canadian<sup>35</sup> courts have therefore in the past indicated that they do not consider apologies, even those that incorporate admissions of liability, as compelling when deciding whether defendants are in fact liable. This is confirmed by an Australian lawyer with vast experience in the medical malpractice area who stated that he has “not actually encountered a case where, in court, a decision on liability turned in any significant way on an apology or even on words which stated or implied an admission after the event”.<sup>36</sup>

### 2.3 Apology in common law

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<sup>31</sup> There may be exceptions where the fact that communications are confidential will not necessarily prevent the relevant fact being proved and relied on in later litigation, see *AWA Ltd v Daniels (1992) 7 ACSR 463*.

<sup>32</sup> Allan, *International*.

<sup>33</sup> P H Rehm & D R Beatty, *Legal consequences of apologizing*, *Journal of Dispute Resolution*, 115-130. (1996).

<sup>34</sup> *Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317*

<sup>35</sup> C Morris, *Legal consequences of apologies in Canada*. Paper presented at the Apologies, Non-apologies, and Conflict Resolution Workshop, Dunsmuir Lodge, University of Victoria, Canada (2003).

<sup>36</sup> Brown (2008).

The approach of courts is very well demonstrated by the leading Australian case in the area, *Dovuro Pty Ltd v Wilkins*.<sup>37</sup> Dovuro (the appellant) had distributed canola seed contaminated with weed seeds to growers in 1996. Subsequently the appellant issued a media release which stated that “we apologise to canola growers ... This situation should not have occurred”.<sup>38</sup> In a letter to growers the appellant further referred to its “failing in its duty of care to inform growers as to the presence of these weed seeds”.<sup>39</sup> The trial judge held Dovuro to be liable and this finding was confirmed on appeal by the Federal Court of Australia. However, on further appeal the High Court did not consider these statements to be a basis for a finding of negligence. Gleeson CJ, commented that fact-finders should approach statements such as these with caution and must determine precisely what, if anything was admitted.<sup>40</sup>

The common law position in Australia as articulated in the *Dovuro* case is therefore that although evidence about apologies can be introduced in court, such evidence on itself does not necessarily provide a basis for a finding of liability. Nevertheless, at common law, professionals can never be absolutely certain that plaintiffs will not assert that an apology they made is an admission of liability. Sustaining this assertion may be difficult, if not impossible for the plaintiff. However, even where professionals are successful in rebutting the assertion, they will still have to deal with the stress of prolonged litigation, possible damage to their reputation, and, in some cases, suffer personal financial loss.

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<sup>37</sup> *Dovuro*-case hereafter.

<sup>38</sup> *Ibid* p325.

<sup>39</sup> *Ibid* pp325-6.

<sup>40</sup> *Ibid* p327.

### 3 Apology provisions in Australian law and insurance contracts

As mentioned earlier two concerns make professionals reluctant to offer apologies when they disclose adverse incidents to patients and their families.

#### 3.1 Australian law

The first is apologetic statements made by them may trigger litigation; be used as evidence of liability against them; or be construed as an admission of liability by a court. As the legal consequences of an apology is uncertain under common law the Australian Health Ministers Advisory Council (AHMAC)<sup>41</sup> recommended in 2002<sup>42</sup> that legislators should amend the civil liability legislation in the various jurisdictions to include “provision that an apology made as part of an open disclosure process is inadmissible in an action for medical negligence”.

The Review of the Law of Negligence chaired by the Honourable Mr Justice David Ipp<sup>43</sup> did not refer to apologies, but since 2002 all the States and Territories have amended their civil liability legislation to introduce key aspects of the Ipp report and whilst doing so made provisions for so-called protected apologies. However, the legislation varies greatly in respect of the degree of protection it provides and how it defines an apology, particularly whether it defines apology to include an admission of fault (see Table 1).

**Table 1: Apology provisions in Australian States and Territories**

State/Territory	Fault included	Legislation
Australian Capital Territory	Yes	<i>Civil Law (Wrongs) Act 2002</i>
New South Wales	Yes	<i>Civil Liability Act 2002</i>
Northern Territory	No	<i>Personal Injuries (Liabilities and Damages) Act 2003</i>
Queensland	No	<i>Civil Liability Act 2002</i>
South Australia	No	<i>Civil Liability Act 1936</i>

<sup>41</sup> Australian Council for Safety and Quality in Health Care (2003b) p34.

<sup>42</sup> This preceded the handing down of the *Dovuro* judgment. However, it is unlikely that the relevant recommendations of the AHMAC Group would have been different had they know of the judgment.

<sup>43</sup> D. A Ipp. *Review of the law of negligence: Final report*. Canberra, Australia: Commonwealth of Australia. (2002) (hereafter the Ipp-report).

Tasmania	No	<i>Civil Liability Act 2002</i>
Victoria	No	<i>Wrongs Act 1958</i>
Western Australia	No	<i>Civil Liability Act 2002</i>

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### 3.1.1 Western Australia

When the WA Parliament amended the *Civil Liability Act 2002* in 2003<sup>44</sup> to give effect to key recommendations of the Ipp report it also introduced Part 1E entitled Apologies into the *Civil Liability Act*<sup>45</sup> to permit people “to give an apology without thereby exposing them self to personal civil liability”.<sup>46</sup> This part of the Act is applicable to civil claims arising out of incidents happening on or after the commencement day of the amended Act. Section 5AH(1) provides that an apology:

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

The Act further provides that “evidence of an apology ... is not admissible in any civil proceeding as evidence of the fault...”.<sup>47</sup> However, an apology is narrowly defined as “an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person”.<sup>48</sup> Section 5AH(1) therefore, literally, provides that an expression that does not contain an acknowledgement of fault does not constitute an admission of fault. So, whilst the legislator provides a privilege for an apology, it is only if such apology does not include an admission of fault. Section 5AH(2) similarly provides that evidence regarding an expression that does not contain an acknowledgment of fault is not admissible in any civil proceeding as evidence of the fault. Ayling concluded that s5AH makes no sense.<sup>49</sup>

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<sup>44</sup> *Civil Liability Amendment Bill: Introduction and first reading of 2003* (WA), p1.

<sup>45</sup> *Civil Liability Act, 2002* (WA).

<sup>46</sup> Legislative Assembly of Western Australia. (2003). *Civil Liability Amendment Bill: Explanatory memorandum*.

<sup>47</sup> *Ibid* s5AH(2).

<sup>48</sup> *Ibid* s5AF.

<sup>49</sup> T Ayling, *Apology and liability for personal injury*. Brief, May, 11 (2006).

The practical implications of part 1E is that an expression of regret is not admissible in any civil proceeding as evidence of the fault as long as it does not include an admission of fault. The common law, as confirmed in the *Dovoru* case, applies in respect of any apologetic statement that implies an admission of fault. Parliament has therefore not removed the uncertainty of the common law regarding apologies that incorporate an admission of fault. Ayling concludes that “the most that could be said of s5AH(1) is that where, under the common law, an expression of sorrow, regret or sympathy *might* have been construed as an admission of fault, under the statute it is expressly not permitted to be construed as such” (emphasis in the original).<sup>50</sup>

### 3.1.2 New South Wales and the Australian Capital Territory

The situation in WA is in sharp contrast to that in New South Wales (NSW)<sup>51</sup> and the Australian Capital Territory (ACT)<sup>52</sup> that provide a privilege for all apologies. For instance, part 10 of the NSW *Civil Liability Act* is applicable to personal injuries as a result of medical injury. The legislator defines an apology as an “expression of sympathy or regret ... *whether or not the apology* admits or implies an admission of *fault* in connection with the matter” (italics added).<sup>53</sup>

Section 69 of the NSW Act provides that evidence about an apology is not admissible as evidence of liability; is not relevant in the determination of liability; and that an apology does not constitute a legal admission of liability. This provision addresses professionals’ fear that an apology may be construed as an admission of liability, and goes further to restrict the admissibility of evidence about apologies thus alleviating a possible concern that a court will be subconsciously influenced by evidence that the defendant had apologised.

The NSW Act, like all the relevant Australian Acts, deals with *apologies*, not with the disclosure of adverse incidents by professionals to patients and their families as such. This mean that statements professionals make whilst disclosing adverse incidents is

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<sup>50</sup> Ibid, p14.

<sup>51</sup> *Civil Liability Act, 2002* (NSW).

<sup>52</sup> *Civil Law (Wrongs) Act 2002* (ACT).

<sup>53</sup> Ibid s68.



admissible in evidence during litigation, *except* if they meet the definition of an apology under the relevant legislation.

### 3.2 Apology and medical indemnity contracts

The second concern of professionals in WA is that they will void their indemnity insurance contracts if they offer apologies whilst disclosing an adverse incident because such apologies could be interpreted as admissions of liability. Most, if not all, such insurance contracts contain conditions that forbid professionals from making any admission of liability, and provide that the contract will be void if an admission of liability is made by an insured without prior written consent of the insurer. The Terms and Conditions of the government approved medical indemnity in WA,<sup>54</sup> for example, provides:

#### 4.4 No Settlement or Admissions

(a) Subject to Clause 4.2 you or the Minister must not:

(i) make any admission of liability in respect of any Claim or Potential Claim or part thereof but you may make a statement of regret or sorrow;

....

(c) If you do not comply with paragraphs (a) or (b), subject to clause 22, the Indemnity may be withdrawn by the Minister by notice in writing to you and then will cease to have any force and effect in respect of the Claim or Potential Claim.

It is unlikely that insurers will in fact deny insurance coverage<sup>55</sup> and even if they did the *Insurance Contracts Act*<sup>56</sup> provides that if a policy condition is breached the insurer will not be entitled to deny all liability, but will merely be allowed to reduce its liability to the extent of any prejudice suffered. An insurer will arguably not be prejudiced by an apology a professional makes in NSW because even if the apology incorporated an admission of liability it would still be protected by the provisions of the NSW *Civil Liability Act* (2002). However, in WA an insurer may, theoretically, be prejudiced by a professional's expression of regret or apology if it incorporates an admission of liability.

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<sup>54</sup> Department of Health, *Terms and conditions of the medical indemnity*. Retrieved 15 October, 2008, from [www.health.wa.gov.au/indemnity/](http://www.health.wa.gov.au/indemnity/) (2004).

<sup>55</sup> Brown (2008).

<sup>56</sup> *Insurance Contracts Act 1984 (Cth)* s54.

## 4 Apology provisions internationally

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### 4.1 The United States of America (USA)

The USA state Massachusetts was the first jurisdiction to introduce legislation to protect apologetic statements in 1986.<sup>57</sup> This legislation only gave a privilege in respect of statements of sympathy after accidents. Other legislators in the US were slow to follow, but by 2008 another 35 States have introduced legislation that gives some type of privilege for apologetic statements in civil liability context.<sup>58</sup> At least four States protect apologetic statements that include an admission of fault.<sup>59</sup>

**Table 2: USA states with some form of apology legislation**

Provision	State
Regret (fault explicitly excluded)	California, Delaware, Florida, Hawaii, Indiana, Louisiana, Maine, Maryland, New Hampshire, Texas, Virginia, Washington
<b>Regret and fault</b>	<b>Arizona, Colorado, Connecticut, Georgia</b>
Regret	Idaho, Illinois, Indiana, Iowa, Massachusetts, Missouri, Montana, Nebraska, North Carolina, North Dakota, South Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Vermont, West Virginia, Wyoming

In 26 of these States the legislation is limited to health care. Different definitions of apology are used, ranging from wide definitions (e.g., statements that admit fault); to narrow definitions that only cover oral statements made within 30 days of the professional becoming aware of the adverse incident; or apologetic statements made at designated meetings.<sup>60</sup>

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<sup>57</sup> *Massachusetts General Laws* (1986) s23D of chapter 233.

<sup>58</sup> Brown p4.

<sup>59</sup> J. C Kleefeld, *Thinking like a human: British Columbia's Apology Act*. *University of British Columbia Law Review*, 40 769-808, (2007).

<sup>60</sup> *Ibid* pp 779-781.

## 4.2 Canada

Canada lagged behind Australia and the USA in introducing legislation to protect apologies but at present British Columbia and Manitoba have passed Apology Acts<sup>61</sup> and the parliaments of Ontario and Yukon are considering similar legislation.<sup>62</sup> Saskatchewan and Alberta incorporated apology provisions in their Evidence Acts, whilst a working group of the Civil Section of the Uniform Law Conference of Canada is considering the introduction of a Uniform Apology Act.<sup>63</sup>

**Table 3: Legislation in Canada**

Province	Act	Since
British Columbia	<i>Apology Act</i>	2006
Saskatchewan	<i>Evidence Act</i>	2007
Manitoba	<i>Apology Act</i>	2007
Alberta	<i>Evidence Act</i>	2008
Ontario	<i>Apology Act</i>	Under consideration
Yukon	<i>Apology Act</i>	Under consideration

Two features of the Canadian Apology Acts are worth noting.<sup>64</sup> First, by introducing an Act that specifically deals with apology the relevant parliaments are making important statements about the status of apologies in their jurisdictions. Second, they are adopting the broadest form of protection of apologetic statements that can be found and addresses all the concerns professionals in Australia appear to have. The British Columbia Act, for instance, provides that evidence of an apology made by a person in connection with a matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter. The British Columbia Act further makes it clear that an apology does not constitute an express or implied admission of fault or liability by a person and may not be taken into account in any determination of fault or liability in connection with that matter. Importantly, an apology is defined in the British Columbia Act to include expressions of sympathy or regret whether or not the words include an

<sup>61</sup> *Apology Act, 2006 (British Columbia)*.

<sup>62</sup> Ontario Ministry of the Attorney General, *Bill 108, the Apology Act*, [Electronic Version], from [www.ontla.on.ca/bills/bills-files/39\\_Parliament/Session1/b108.pdf](http://www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b108.pdf) (2008).

<sup>63</sup> R. J. Getz, *Uniform Apology Act*. Paper presented at the Uniform Law Conference of Canada (Civil Law Section), Charlottetown, Prince Edward Island. (2007).

<sup>64</sup> Kleefeld (2007).

admission of fault. The Act also provides that an apology does not void, impair or otherwise affect any insurance coverage. This is not possible in Australia where the States and Territories lack constitutional power to legislate with respect to the effect of an apology on insurance policies.<sup>65</sup>

#### **4.3 Other countries**

In England and Wales the *Compensation Act 2006* provides that “an apology ... shall not in itself amount to an admission of negligence”.<sup>66</sup> The Act does not define an apology. Scotland does not appear to be considering adopting this provision or introducing apology legislation of this stage<sup>67</sup>. New Zealand’s no-fault Accident Compensation Scheme to a large degree negates the need of an apology privilege in respect of adverse incidents.

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<sup>65</sup> *Commonwealth of Australia Constitution Act of 1900* (Cth), s 51(xiv).

<sup>66</sup> *Ibid* s2.

<sup>67</sup> P Vines, Apologies and civil liability in England, Wales and Scotland: The view from elsewhere [Electronic Version]. *University of South Wales Faculty of Law Research Series* 61 P. (2007). Retrieved 9 January 2008, from <http://law.bepress.com/unswwps/flrps/art61>.

## 5 Findings

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Although there is no empirical data to support it, there is anecdotal evidence that professionals are reluctant to disclose adverse incidents to patients and families because they fear that apologetic statements they make may be used against them in later litigation. They further fear that apologetic statements will void their indemnity contracts.

Under common law evidence about what a professional said while disclosing an adverse incident, including any apologetic statement made, is admissible as evidence in later litigation. Such evidence is not conclusive but must be weighed up by courts with other evidence in deciding the liability of defendants. This means that there is a level of uncertainty about the legal effect of any particular apology under the common law.

The Parliament of Western Australia amended the *Civil Liability Act 2002* to make evidence of an apology made by a person about an incident non admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident.<sup>68</sup> The effect of this is that the legislator created an apology privilege. This appears justified as there is evidence that an apology after an adverse event can limit the likelihood of litigation; may have economic benefits and can lead to improvements in the quality of health services. Encouraging apologies in the course of the disclosure of adverse events furthermore allows professionals to act in an ethical manner, to express their feelings of moral responsibility and may have health and mental health benefits for both patients and professionals.

In contrast to NSW and the ACT, and in some jurisdictions in the US and in Canada, where the definition of an apology includes an admission of fault made explicitly or by implication, the WA legislator narrowly defined an apology as an expression of regret that does not include an acknowledgment of fault<sup>69</sup>. The *Civil Liability Act 2002* (WA) has therefore altered the common law position, but this has not served to remove the underlying uncertainty in respect of apologetic statements that implicitly or explicitly admits fault.

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<sup>68</sup> *Civil Liability Act 2002* (WA) s5AH(2).

<sup>69</sup> *Ibid* s5AF.

It appears sensible for the WA legislator to adopt legislation that is similar to that of NSW and the ACT. For WA professionals, this will reduce their concern that any apologies they make whilst disclosing an adverse may be used against them in later litigation if it can be construed as an admission of fault, or void their indemnity contracts.

Ideally Australia should consider the incentives in Canada and work towards a uniform approach across all the States and Territories, but this may not be easy to achieve unless governments see a compelling reason to do so.

## **6      Suggestions for further research**

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The following research questions require further examination through either qualitative or quantitative investigation:

- How significant is the current WA legislation in preventing health professionals entering into a meaningful dialogue with patients following an adverse event?
- What changes to the Civil Liability Act 2002 (WA) would assist health professionals, insurers and health consumers to implement open disclosure?
- Is there a case to amend the Civil Liability Act 2002 (WA) to protect apologies that include admissions of fault or liability?

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## Appendix A

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### Industry partners

The following industry partners have either been involved in the Western Australian open disclosure collaboration or have contributed to the funding:

- Australian Commission on Safety and Quality in Health Care;
- Australian Medical Association (WA);
- Avant Mutual;
- Edith Cowan University;
- Health Consumers' Council;
- MDA National;
- Office of Health Review;
- Ramsay Health Care;
- RiskCover;
- St John of God Health Care;
- Val Lishman Foundation for Health Research; and
- WA Department of Health.