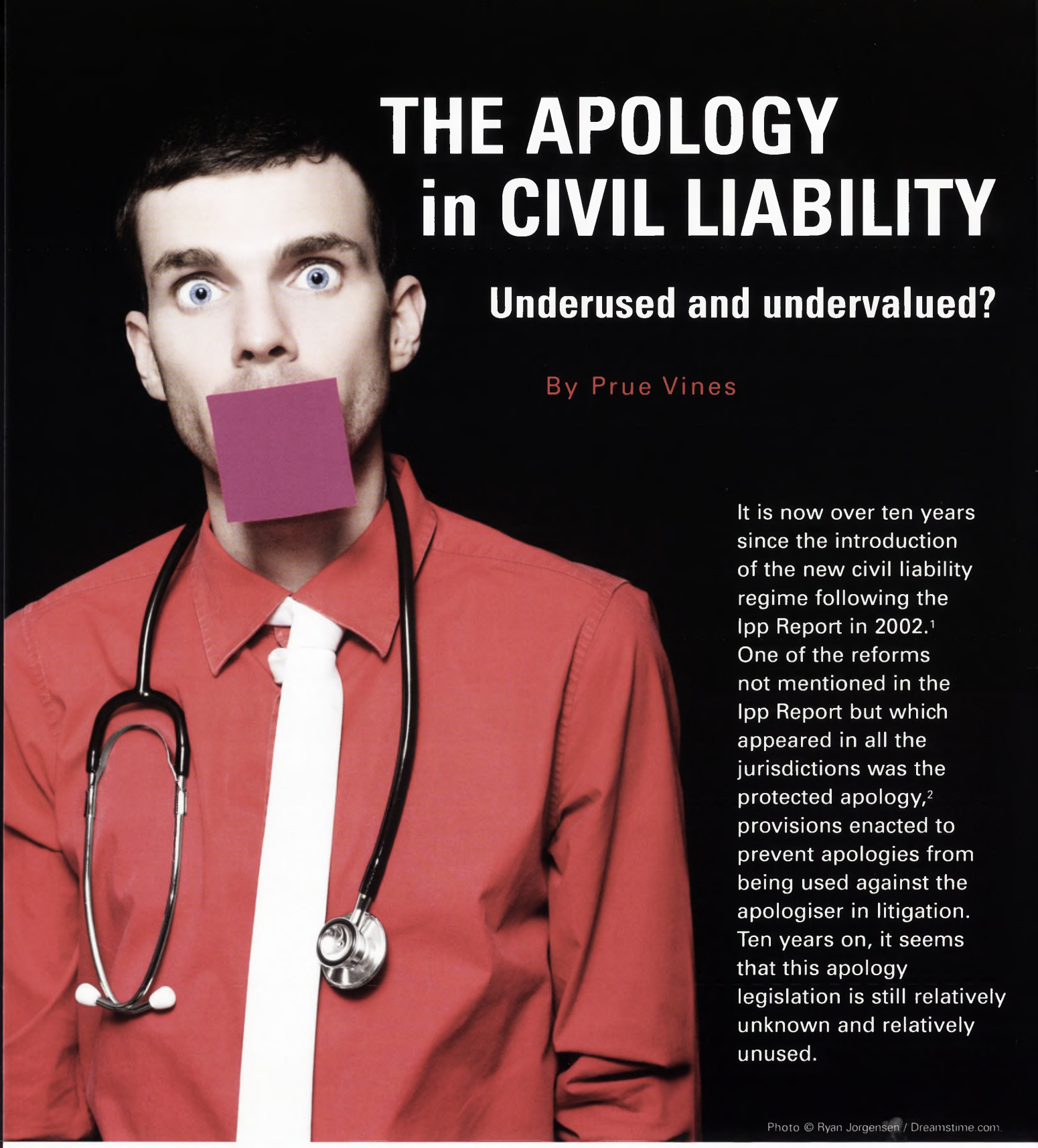

THE APOLOGY in CIVIL LIABILITY

Underused and undervalued?

By Prue Vines

It is now over ten years since the introduction of the new civil liability regime following the Ipp Report in 2002.[1] One of the reforms not mentioned in the Ipp Report but which appeared in all the jurisdictions was the protected apology,[2] provisions enacted to prevent apologies from being used against the apologiser in litigation. Ten years on, it seems that this apology legislation is still relatively unknown and relatively unused.

The aim of the legislation in all the jurisdictions was to reduce litigation. It was felt that if people apologised it was less likely that there would be litigation; and there is indeed some evidence for this proposition. However, the evidence was not considered before the legislation was drafted, and it shows. Further, the treatment of apologies differs around Australia.

This lack of uniformity is a significant problem. It causes confusion in general and where federal programs are trying to regulate across the state and territory jurisdictions with a one-size-fits-all program, as with the Open Disclosure program in hospitals,[3] it may lead to the minimum threshold being prescribed rather than the best available process being carried out.

EXCLUSIONS

To what sort of civil liability does the apology legislation apply? This depends on the exclusion provisions of the civil liability legislation in which the apology provision appears and it differs across the jurisdictions. In New South Wales (NSW), Queensland (QLD) and Tasmania (TAS), the civil liability legislation (and therefore the protection of apology) does not apply to actions that involve intentional physical harm or death, or acts that amount to sexual assault or misconduct. Nor does it apply to tobacco-related harm.[4] NSW, Northern Territory (NT) and TAS exclude motor accidents – surely one of the most problematic exclusions in this legislation. (Ironically, one of the second reading speeches putting this legislation forward involved apologising in motor accidents.)[5] Matters involving dust diseases are excluded by NSW, NT, QLD and TAS. [6] All jurisdictions except Victoria (VIC) and Western Australia (WA)[7] exclude workers' compensation matters. Curiously, defamation is excluded generally in NSW, Australian Capital Territory (ACT), QLD and Tasmania,[8] but all the Defamation Acts have an apology-protecting provision which is very similar.[9] To add to the complexity, the ACT also excludes matters under criminal injuries compensation and the various Discrimination Acts, the latter also being excluded by NSW. The NT excludes matters concerning personal injury under ss106,107,118, 127 or 136 of Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) (the Australian Consumer Law) applying as a law of the Commonwealth, or state or territory.[10] NSW has the most comprehensive set of exclusions; VIC and WA the least exclusions.

So what's left? The apology provisions apply to all other types of personal injury and civil liability that remain after the exclusions. Thus people can apologise for motor accidents everywhere except NSW, NT and TAS, and this apology will be protected as long as it fits within the definition of apology. One major area where *all* states protect apologies is medical injury, liability for which was, of course, one of the driving factors behind the tort reforms.

It is puzzling to see why many of the exclusions are necessary. In NSW, the discussion in parliament clearly contemplated apologies being protected for motor accidents, but the provisions of the Act do not reflect that. Why should apologies not be protected in relation to dust diseases or workers' compensation, when it is already clear that they do not determine liability? Why exclude defamation and then put exactly the same provision into the *Defamation Act* 2005 (NSW)? One is forced to conclude that the drafters forgot to take the apology section out of the exclusions. In NSW, the legislation (CLA 2002) looks muddled:

> 's67(1) This part applies to civil liability of any kind.
> s67(2) This part does not apply to civil liability that is excluded from the operation of this Part by s3B or civil liability for defamation.
> **Note:** Section 20 of the *Defamation Act* 2005 makes similar provision to this part about the effect of apologies in defamation proceedings.'

When one looks at the exclusion of motor accidents in s3B(2) and to the sub-section which decides what aspects of the Act *should* apply to motor accidents, the list includes negligence, some damages provisions, structured settlements, mental harm, intoxication, self-defence and recovery by criminals and Good Samaritans. It is very hard to see why s10 apologies do not fit into that list. The *Motor Accidents Act* 1988 s77 may be the stumbling block. However, despite the fact that it says one cannot make an admission or other offer, etc, without the insurer's written permission, for the purposes of our concerns about apology there is no problem here, because s77(2) provides that any admission made contrary to s77(1) is of no effect. NSW has the widest set of exclusions, but it is not clear why they have been made so wide. The other jurisdictions' exclusions similarly seem somewhat arbitrary.

THE DEFINITION OF APOLOGY

Originally in only two jurisdictions, but now in three (since QLD has joined NSW and the ACT), the apology is defined to include an acknowledgement of fault. That is, it includes a statement such as 'I'm sorry, it was all my fault.' In the other jurisdictions, only a partial apology is protected – that is, only an expression of regret such as 'I am sorry this happened to you'. The definition of apology in NSW is:

> '... an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter' (s68).

Neither the QLD provision (s72C) nor that of the ACT (s13) is materially different from that of NSW. However, in the other jurisdictions apology is defined in a much more limited fashion. The NT's *Personal Injuries (Liabilities and Damages) Act* s12 defines 'expression of regret' as:

> 'an oral or written statement by a person – (a) that expresses regret for an incident that is alleged to have caused a personal injury; and (b) that does not contain an acknowledgement of fault by that person'.

The TAS provision, s7(3), similarly provides that an apology:

> 'means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, which does not contain an admission of fault in connection with the matter'.

The reference to an 'admission of fault' is a technical phrase which may not be helpful in the context, since the question of what is an admission may be complicated. The WA formulation (in s5AF) is clearer: 'an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person'.

These definitions of apology are of concern because, firstly, they may mean that they make little or no difference to the law since there is no real question about whether such an expression of regret could ever amount to an admission. But the more significant issue is that the empirical evidence concerning people's response to apologies suggests that a partial apology can be effective if an injury is mild but that if an injury is serious a partial apology can actually make the victim more upset than no apology.[11] Thus, confining the apology to a mere expression of regret may possibly have the opposite effect to that intended. >>

The lack of uniformity across Australian jurisdictions causes confusion and may lead to the minimum threshold being prescribed rather than the best available process being carried out.

UNPROTECTED APOLOGIES AND PROPENSITY TO SUE

People apologise because of their cultural sense of moral blameworthiness.[12] This is very significant, and the fact that many legislatures around the world[13] have legislated to protect apologies simply emphasises this. Research shows that apologies, particularly full apologies, make people's blood pressure go down.[14] It also shows that if injury is severe, a partial apology may be worse than no apology in reducing anger. The corollary is that if injury is mild, then a partial apology may be regarded as perfectly acceptable. The literature on propensity to sue shows that the major contributing factors are, first, the culture of risk and blame within the group or community; the class of the plaintiff; whether the person has sued before and the costs rules.[15] Apologies are a part of the culture of risk and blame and because of that they do appear to have an impact on propensity to sue. Much of the literature on apologies and propensity to sue concerns medical malpractice. The best-known example is that of the Lexington Veteran Affairs Medical Centre in the USA where, in 1987 and against legal advice, doctors simply began to give apologies and information acknowledging fault to patients who had suffered adverse events. What was surprising was that the effect on the litigation budget was to reduce spending. This was apparently because there were fewer claims being made and because when claims were made there was earlier settlement.[16] The *Open Disclosure Review* refers to other examples of hospitals in the US and Australia where an open approach to apology and disclosure has been very effective.[17]

THE EFFECTIVENESS OF THE PROTECTION OF APOLOGIES

Apologies, admissions and liability

The traditional concern about apologies – and the reason people were advised not to apologise – was because it was believed that an apology would amount to an admission and that this would create legal liability. There is considerable doubt whether this is true, as particularly in negligence, the courts are very jealous of their own power to determine liability.[18] In *Dovuro Pty Ltd v Wilkins*, a statement by the defendant that he failed in his duty of care was held by Gleeson CJ to 'not be an admission of law, and ... not useful as an admission of failure to comply with a legal standard of conduct',[19] but Kirby J[20] pointed out that they might still be relevant and admissible to prove liability (in the absence of a statutory protection). The court agreed that where an admission included a matter which is a conclusion about the legal standard, it could not have any effect and did not amount to a basis for a finding of negligence.

The protection of the apology in the legislation is done by providing that an apology does not constitute an admission (ACT, NSW, QLD, TAS, VIC, WA). South Australia (SA) achieves the same purpose using different words: 'no admission of liability or fault to be inferred'. Only the NT has no equivalent provision.

Voidability of insurance

It is very common for insurance contracts to contain a voidability clause providing that making an admission will render the policy void. This is particularly significant in relation to the law of medical injury because of the vital role of medical indemnity insurers in this area. It has already been suggested that apologies are not necessarily admissions anyway, not having the legal quality of an admission. However, making it clear that an apology is not an admission is vital here because if an apology is not an admission then it cannot void the insurance policy. Of course, if the apology is defined in the legislation so that only words of regret are protected, then the other words accompanying the expression of regret may be used by the court, and may be admitted and *may*[21] therefore be regarded as an admission which might lead to liability that therefore voids the contract. Thus, in order to ensure that the apology does not have this effect, it needs to be defined to include an acknowledgement of fault.

Admissibility

One of the most difficult issues with apologies, as with confessions of criminal guilt, is the fact that apologies are highly prejudicial, in that juries and judges who hear them may feel much more comfortable about finding liability or guilt if they know an apology or confession has been made. As with confessions, people apologise for reasons that do not necessarily link to legal liability.[22] This is the major reason for excluding them from admissibility as evidence. All the Australian jurisdictions, except SA, exclude the apology (as they define it) from admissibility.[23] SA has no equivalent provision, relying instead on its provision preventing liability from being inferred from the apology. The SA provision does not deal with the prejudicial nature of the apology, relying on the judge to discount that possibility.

Again, if the apology which is protected is defined to exclude acknowledgements of fault, as it is in most jurisdictions, then the other words will be admitted and may have a prejudicial effect on the judge or jury. In that situation, paradoxically, the defendant may have the worst of both worlds – the words acknowledging fault being admitted, but not the words of regret which are the ones that are supposed to be the civilising part of the exercise.

OVERALL ASSESSMENT AND SUGGESTED REFORMS

The major problem with the legislation is that because it is different across jurisdictions, any national initiative is made extremely difficult – this has proved to be a very big problem with respect to the Open Disclosure program in hospitals across Australia.

A major issue, first, is the number of jurisdictions that protect only expressions of regret. For the Open Disclosure program, this has led to advice to apologise confined to expressions of regret. This appears to have led to confusion and concern on the part of health professionals about what exactly they should say, because the exactness of the advice they are given simply exacerbates the fear of litigation, which already undermines their willingness to apologise.[24]

There is also evidence that, at least in the medical profession, there is little knowledge about the existence of apology laws.[25] Anecdotal evidence suggests that many other people do not know about them, and that lawyers continue to advise clients, even in situations where the protection is complete, not to apologise.[26] This is not so surprising when, for any apology, one has to consider first whether the apology applies to the particular aspect of legal liability being considered, and then whether the apology includes an acknowledgement of fault or not. If it does not, then difficulties with choices of words comes up, and the danger arises that the limited apology will sound stilted and insincere and in fact make matters worse.

What should be done? First, we should put our apology laws into a stand-alone statute as has been done in British Columbia and other Canadian[27]provinces. This has the advantage that both lawyers and the public are likely to find it. Secondly, we should protect full rather than partial apologies, so that the appropriate apology for the particular situation – full apology including acknowledgement of fault where the apologiser has responsibility for doing some wrong and expression of regret when the harm is entirely independent of any wrongdoing, as at a funeral – can be used. Thirdly, we should make the protection of apologies cover all areas of civil liability. The examination of the exclusions produces no convincing reason to exclude the protection of apologies in these areas, particularly since some jurisdictions protect the same areas that others do not protect.

If we can do these three things, the apology protecting legislation in Australia will come of age and, perhaps, finally fulfil the aims that the legislatures had in mind when they enacted this legislation. It will not stop all litigation. Ultimately, when people are severely injured they must sue until social security is comparable with personal injury compensation. At the same time, such actions might be brought faster and settled earlier if apologising as a normal human member of society is not prevented by lawyers' fears of automatic liability. ■

This article has been peer reviewed in line with standard academic practice.

Notes: **1** The Negligence Review Panel, chaired by Ipp, JA Commonwealth of Australia, *Review of the Law of Negligence*, Final Report, Commonwealth of Australia, Canberra, 2002. **2** *Civil Law (Wrongs) Act* (CL(W)A) 2002 (ACT) ss12-14; *Civil Liability Act* (CLA) 2002 (NSW) ss67-69; *Personal Injuries (Liabilities and Damages) Act* (PILDA) (NT) ss12-14; CLA 2003 (QLD) ss72A-72D; CLA 2002 (TAS) ss6A-7; CLA 1936 (SA) s75; *Wrongs Act* (WrA)1958 (VIC) ss14I-14L; CLA 2002 (WA) ss5AF-5AH. **3** The Open Disclosure program was rolled out from 2003 in Australia. Open Disclosure Standards now form part of hospital accreditation standards, requiring health professionals to acknowledge adverse incidents, to apologise to patients, investigate incidents, support the patients and carry out whatever is necessary to prevent recurrence. A major review of the program has just been completed: Australian Council for Safety and Quality in Healthcare, *Open Disclosure Standard Review Report* (2012). **4** NSW CLA 2002 s3B; QLD CLA 2003 s72A(2) (only excluded for apology provisions); TAS CLA s3B. **5** Brown, *Hansard*, NSW Legislative Assembly, 23rd October 2002. **6** NSW: CLA s3B; NT PILDA s4; QLD CLA s5; TAS CLA s3B. **7** NSW CLA s3B; NT PILDA s4; QLD CLA s5; ACT CL(W)A ss12; SA CLA s4. **8** NSW, CLA s3B; ACT CL(W)A s12; QLD CLA , s5; TAS CLA s3B. **9** *Defamation Act* (DA) 2005 (NSW) s20; DA 2006 (NT) s19; *Civil Law (Wrongs) Act* 2002 (ACT), s132; *DA* 2005 (QLD) s20; DA 2005 (VIC) s20; DA 2005 (SA) s20; DA 2005 (TAS) s20; DA 2005 (WA) s20. **10** *Personal Injuries (Liabilities and Damages) Act* (NT) s4. **11** Jennifer Robbenault, 'Apologies and Medical Error', (2009) 467 *J Clinical Orthopaedics & Related Research* 376-82; Jennifer Robbenault, 'Apologies and Legal Settlement' (2003) 102 *Michigan Law Review* 460-516; see also Bruce Barbour, NSW Ombudsman *Apologies, A Practical Guide*, 2nd edn, (2009). **12** In re culture, see the literature comparing the American view of apology with the apology in Japan: For example, J Haley, 'Apology and Pardon: Learning from Japan', (1998) 41(6) *American Behavioural Scientist* 842; H Wagatsuma and A Rosett, 'The Implications of apology: law and culture in Japan and the United States', (1986) 20 *Law & Society Review* 641. Generally, see Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation*, Stanford University Press, 1991. **13** Including Australia, the US, the UK and Canada. **14** M Whited, A Wheat, K Larkin 'The influence of forgiveness and apology on cardiovascular reactivity and recovery in response to mental stress' (2010) 33 *J Behav Med* 293-304. **15** H Kritzer, 'The antecedents of disputes: complaining and claiming' (2011) 1(6) *Onati Socio-Legal Series* 1-3. **16** S Kraman and G Hamm, 'Risk management: extreme honesty may be the best policy' (1999) 13112) *Annals of Internal Medicine* 963-7 and J R Cohen 'Apology and Organisations: exploring an example from medical practice' (2000) 27 *Fordham Law Journal* 1447. **17** Australian Council for Safety and Quality in Healthcare, *Open Disclosure Standard Review Report* (2012). **18** *Wilkins* (2003) 215 CLR 317. See also *Muir v Glasgow Corporation* [1943] AC 448. **19** *Dovuro* at [25]. **20** *Ibid* at [116]. **21** That is, if the court does not accept the view that an acknowledgement of fault, even if it is an admission, cannot constitute determination of liability. **22** Tavuchis, see note 12 above. **23** NSW: CLA s69(2); NT: PI (L and D) Act, s13; ACT: CL (W)A s14(2); QLD: CLA ss72, 72(D); VIC: Wrongs Act s14; SA: CLA s75. **24** D Studdert, D Piper, and R Iedema, 'Legal aspects of open disclosure II: attitudes of health professionals' (2010) 193 (6) *Medical Journal of Australia* 351. **25** *Ibid.* **26** The author recently discussed with a doctor his wish to apologise for an incident of medical negligence and suggested to him that he consult his lawyers about the protected nature of apologies, but the lawyers (from a large medical defence firm) refused to allow him to apologise. **27** *Apology Act* 2006 (British Columbia); *Apology Act* 2009 (Ontario); *Apology Act* (Manitoba); Alberta and Saskatchewan have incorporated their apology legislation into their Evidence Acts.

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