

## Justice Committee

### Apologies (Scotland) Bill

#### Written submission from Core Solutions

1. Core Solutions is a leading provider of mediation services and training in conflict management and dispute resolution to the public and private sectors in Scotland and throughout the UK and elsewhere.

2. Over 15 years, Core has worked as mediators and facilitators with many local authorities, health authorities, government, educational institutions, sport and others in the public sector, together with businesses of all sizes from individuals to SMEs and the largest corporations, along with professionals from many diverse disciplines.

3. We have extensive experience of dealing with individuals and organisations where expressions of regret, acknowledgement and apology can and do make a significant difference in the resolution of conflict and disputes, whether in litigation or other formal process, or at an earlier or more informal stage.

4. As mediators, we have frequently experienced situations where a party is able to make an apology under the protection of the confidentiality provisions and without prejudice contractual nature of the process of mediation, and that is nearly always welcome and beneficial. To give legislative protection to this can only be a good thing.

5. Apologies can constitute, in our experience, an important element in reducing the cost, time and stress associated with prolonged or unresolved disputes or complaints. Apologies are an important part of moving from an adversarial, polarising culture to one of greater communication, frankness, learning and cooperation. The power of being heard and receiving the acknowledgment and acceptance that an apology can bring is, in our experience, often a determining factor in resolving difficult matters and/or reducing the time, stress and expense associated with them.

6. We offer some examples of where an apology (often in the form of an acknowledgment or acceptance of an error) has made a real difference to resolving a dispute that was seemingly intractable:

a. The first is a situation with a claimant who was involved in a road traffic accident in which she suffered back injuries, resulting in the need to use a wheelchair for a short period but from which she made a reasonable recovery, albeit with ongoing pain and loss of some mobility and flexibility. The accident and the physical symptoms resulted in the individual suffering a recurrence of pre-existing psychological problems. As a result of these problems she was unable to work in her business which failed about two years after the accident.

At a stage in the mediation where there appeared to be deadlock, the insurer acting on behalf of the driver of the vehicle, prior to presenting an increased offer, indicated that he was personally very sorry about the situation in which the claimant now found herself several years after the accident, with psychological injuries as well as the

loss of her restaurant business. He outlined the legal difficulties as he saw them with her case in terms of causation and quantification of loss. He then made an increased offer which she accepted. The personal apology made a significant difference to the claimant in that, up to that time, no one had apologised to her and indeed the driver had been specifically advised by the insurers not to make any apology as it might be deemed to be an admission of liability.

a) The second situation involved a claimant who suggested that a professional body had failed to grant him the necessary exemptions to enter training in the profession. He claimed that there was a concerted effort to deny him entry and that, as a result, he had suffered large loss of earnings in the future. The matter had an extensive history, involving many people and much time. Views seemed entrenched.

In the course of mediation, the insurer acting for the professional body met privately with the claimant and the mediator. The insurer had built up a good working relationship with the claimant in the course of mediation and he acknowledged that the professional body might not have handled things as well as it could, and that the claimant had been upset and affected by what had happened. He explained that he could not accept liability as a matter of law and that there was a good defence, but also reassured the claimant that he would help to resolve the matter if he could. This recognition (in effect an apology for mishandling and delay) made a real difference to the claimant after years, as he saw it, of being rebuffed, and provided the springboard for meaningful discussions about a realistic payment which would address the present needs of the claimant and the risks and costs in time and money facing the insurers.

b) The third is a dispute involving a senior employee and her employers. There had been a relatively small incident at work with her manager, in which a misunderstanding had escalated quickly into a stand-off. The employee had been off work with stress and her condition had deteriorated so much that she was unlikely to be able to come back to work. She had a large claim for loss of earnings, stress-related illness and other loss. At the heart of the matter was the incident with her manager and how he had responded. The matter had escalated, over months, with solicitors' letters which made allegations and counter-allegations. In particular, the solicitors acting for the employers had written in what the employee perceived as aggressive terms. This had further exacerbated her condition.

The turning point in the mediation (over two days) was when the solicitor acting for the employer sat in a room alongside his client's HR Manager and said to the employee: "I am sorry. This should not have happened. We should not have written in the terms we did." Following this, the employee's demeanour and approach to resolving the matter changed. The parties were able to negotiate a package which included payment to help the employee to undergo cognitive behaviour therapy to enable her to re-enter the workplace.

c) In the final situation, a party had provided initial civil engineering services on a project of some significance, payment of which was contingent on the granting of planning permission. The member of staff primarily responsible for the services left the civil engineering company and started up in competition. When planning permission was granted and further services were required, these were awarded to

the departing member of staff in his new set up. The original company had been seeking to agree their fee for the initial services for several years, though there was no contract between the parties.

At a critical point in the mediation, the project owners spoke directly with the head of the civil engineering company and acknowledged that the initial work that the company had carried out had been creative and had taken the project in a particular direction which had then been followed by the company which secured the work. He also acknowledged the difficult place that the original civil engineering service found themselves in and agreed to a form of joint announcement acknowledging their contribution to the project. This operated effectively as an apology for the way things had turned out.

7. In response to the Committee's particular interest in views on the following areas, we comment as follows:

a) *Is there merit in providing legal protection to an expression of apology as set out in the Bill?* Very much so, as a means to secure the changes identified in the Policy Memorandum.

b) *Do you agree with the legal proceedings covered under section 2 of the Bill, and the exceptions for fatal accident inquiries and defamation proceedings?* Yes.

c) *Do you agree with the definition of apology in section 3 of the Bill?* Yes, we are aware that this has been the subject of much consideration and feel that the correct balance has been achieved.

d) *Do you agree that the Bill will facilitate wider cultural and social change as far as perceptions of apologies are concerned, as suggested in the Policy Memorandum on the Bill?* Very much so. As mentioned above, this has potential to be part of a more constructive and open approach to relationships, business, governance, service provision and workplaces in Scotland, in which a more forward-looking and learning-based culture can be encouraged. This can help to build a more sustainable future, reducing unnecessary financial expenditure, opportunity, cost and personal distress and enhancing more effective use of human and other resources and energies. It can also help to build a more tolerant and understanding society where the first response to something going wrong is not defensiveness or blame but acceptance that things do go sometimes go wrong, and that these can present learning opportunities. Ironically, perhaps, such an approach is more likely than a finding of fault or allocation of blame to bring about constructive change in a timely and cost-effective way.

e) *Are there any lessons that can be learned from how apologies legislation works in practice in other legislatures?* We believe that the evidence from elsewhere reinforces the view that this Bill is both important and valuable.

8. We welcome these proposals and believe that they will achieve the purposes mentioned in the policy Memorandum, both as legal protection to an expression of apology in certain circumstances, and for the broader purpose of encouraging a cultural and social change in attitudes towards apologising. This could and should be

of significant benefit to Scottish society.

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