

Parts of the industry are cautious, but alternative dispute resolution practices which cut court time are finding favour. By **Rosemary Gallagher**

For a variety of reasons, Scotland lags behind many other nations when it comes to the use of mediation to resolve disputes, despite the substantial cost and time that often comes with litigation.

In Scotland, rather than seeing litigation as a last resort to resolving disputes, it is the route many people decide to take from the outset. But many commentators believe that more consideration should be given to mediation and its benefits.

It allows parties with a dispute to conduct negotiations with the help of an independent third party. The mediator facilitates conversations and meetings between everyone involved, including clients and lawyers. The aim is to help all parties explore and understand what the real issues are, and to identify ways forward which everyone can agree to. If successful, mediation removes the need for litigation.

An expert in the area, John Sturrock QC, the founder of and senior mediator at Core Solutions, the founder of Collaborative Scotland and visiting professor at the University of Edinburgh, explains the benefits of taking this approach before resorting to litigation.

"Mediation is very flexible, is conducted in private, enables discussion of non-legal as well as legal issues, is reasonably quick – most mediations are set up within days or weeks and are usually completed in one day – helps restore business and other relationships, allows creativity and is usually much less costly than ongoing litigation or unresolved negotiations," he says.

"Above all, perhaps, it gives the people who have a dispute the control over decision-making in resolving matters, rather than placing it in the hands of a third party such as a judge. Litigation can then be used as a last resort if that is necessary."

He adds that mediation is suit-

able for nearly all situations in which parties want to resolve matters without the expense and time of going to court.

Despite such advantages, mediation is still used less in Scotland than in many areas of the world, including parts of Europe. This was highlighted in the Bringing Mediation into the Mainstream in Civil Justice in Scotland Report published by Scottish Mediation, an expert group chaired by Sturrock and solicitor Alun Thomas, a partner with Anderson Strathern, in June this year.

The Scottish Government chose to work with the group to explore how the greater use of mediation might be encouraged in the civil justice system.

The report examined the experience of other jurisdictions in using mediation, including the US, England, Canada and Ireland, where the Irish Mediation Act 2017 set out a framework for mediation as an alternative to civil court proceedings. An international evidence review was carried out by Scottish Government justice researchers to inform the expert group's work.

Based on findings of this research, the preface to the report stated: "The lessons learned from their experience has led to us taking a more progressive and directive approach than many of us would have had anticipated as we commenced our work."

Sturrock says some feel that, at least until recently, judicial support in Scotland for mediation has been less than in many other jurisdictions. That may now be changing.

The report made a number of recommendations on how to break down barriers to the use of mediation, with Sturrock explaining: "We need Scottish Government support, probably with legislation, judicial encouragement, a well-structured programme in the courts and edu-



Many people shy away from mediation but it can be very effective. Picture: Shutterstock

Moving towards conciliation

cation of the general public about how it works and its benefits."

He added that he would like to see teaching about mediation become mandatory for lawyers and others so they are in a position to advise knowledgeable about it.

And it seems now could be the ideal time for mediation to be increasingly used ahead of litigation, with

more research having been carried out in on the issue and greater political support for it.

In May this year, Margaret Mitchell, a Conservative MSP and convener of the Scottish Parliament's justice committee, launched her consultation on the Mediation (Scotland) Bill. This followed the publication last autumn of a justice committee report on the issue, entitled I Won't See You In Court.

According to law firm CMS, the crux of the proposed Member's Bill is the introduction of a new process which would stop well short of

mandatory mediation, but would involve parties attending a court action meeting with a mediator for a Mediation Information Session. CMS has said the Bill can be seen as a "meaningful step in Scotland's alternative dispute resolution journey" and could ultimately "introduce significant change".

Mitchell has said she hopes her proposals would have a "positive impact on the use and consistency of mediation services across Scotland; improve awareness; modernise and speed up the settlement of disputes; and reduce costs".

Sturrock says: "Everything which assists in building understanding about mediation is helpful. I do hope that there will be cross-party support and wide acceptance by other interested bodies."

Consultation on the Bill closed in August and the process highlighted some concerns about its proposals. For example, law firm Pinsent Masons, stated "we fully support and encourage all forms of Alternative Dispute Resolution in appropriate cases" but "would urge caution in going down a route which may lead to unintended consequences". Potential issues it refers to include access to justice and cost.

And Zurich Insurance's response said it does "not believe that mediation is suitable for all types of cases.

We do not believe that mediation is suitable for personal injury cases which includes accidents arising from a motor accident, an accident in the workplace and accidents in a public setting". It added: "A mediation process could cause delays and result in additional costs."

Sturrock comments that many personal injury and workplace accident cases are already mediated successfully. He believes there is a fear of change and a lack of knowledge and experience of its benefits.

Supporters of mediation are hopeful that increased awareness of its advantages will help drive change.

The Bringing Mediation into the Mainstream in Civil Justice in Scotland Report made a number of recommendations. One proposed innovation is the creation of an Early Dispute Resolution Office. Its function would be to review all cases received by the relevant court or tribunal, identify and direct appropriate cases towards mediation, or other more appropriate form of dispute resolution, and to co-ordinate the mediation process.

Sturrock concludes: "Mediation has a significant role to play in Scottish civil justice, and indeed more widely. I hope the report will achieve a real breakthrough in the availability of mediation to those with disputes in Scotland."

BRIEFING Mainstream for mediation



John Sturrock
Core Solutions
FOUNDER AND SENIOR MEDIATOR

2019 may be the year that history will note as the moment when mediation in civil disputes in Scotland finally came of age, achieving recognition as a viable and sensible route for many matters which might otherwise remain unresolved or get absorbed into litigation.

As mentioned elsewhere, an expert group produced a report entitled "Bringing Mediation into the

Mainstream" whose findings fit in with work that is being done across Scottish civil society to make Scotland a better place in which to live and work.

The report notes that mediation is consistent with the aspirations of the Scottish Government's National Performance Framework and, more generally, with a society in which people are valued, relationships are enhanced, choices are made by those most affected, constructive solutions are sought for difficult problems, and financial and other resources are wisely deployed.

Mediation has a part to play in creating a culture in which difficult issues are addressed constructively

and with dignity and respect for all concerned. It sits in the wider context of encouraging more skilled negotiation, good communication and consensual resolution of disputes.

At a time when, sadly, many of our political leaders in the UK parliament seem unable to demonstrate a grasp of good communication skills and effective negotiation competence, this initiative sits well with a forward-looking approach.

More pragmatically, there are many disputes in the workplace, in families, in communities, in commerce and in policy areas which will benefit from the increased use of mediation. Its time has come.

BRIEFING Scottish courts are open for international business



Euan Duthie QC
Axiom Advocates

In a speech opening this new legal year, the Lord President noted that, following recent reforms, the Court of Session is becoming a much more dynamic, focused and forward-looking court than it might previously have been perceived to be.

Cherry, Petitioner – the recent challenge to the lawfulness of the UK Government's prorogation

of Parliament – illustrates the point. Lord Doherty heard submissions on a Tuesday, issuing his opinion the following morning.

The Inner House heard the reclaiming motion (appeal) on the Thursday, issuing its decision the following Wednesday. To facilitate a swift appeal to the Supreme Court, the Inner House issued its judgment to parties in draft

in advance of publication. That is a blistering pace for the resolution of matters of such constitutional importance.

In commercial actions, robust case management and early exchange of expert reports ensure that parties place their cards on the table at an early stage. In appropriate cases this facilitates early resolution. Verbosity and the taking of

technical pleading points are discouraged. Evidence in chief by way of witness statements, exchanged in advance, is the norm. This speeds up evidential hearings, as does the use of electronic documents, for which detailed protocols exist. "Hot-tubbing" – expert witnesses giving evidence and being cross-examined concurrently – can also be accommodated.

Such measures are helping ensure the Lord President's stated objective – that Scottish Courts be an attractive place, not only for the resolution of Scottish disputes, but also in those cases where international parties seek a cost-effective, recognisably neutral, English-speaking jurisdiction for the settling of their differences.

"Mediation has a significant role to play in Scottish civil justice, and indeed more widely"

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