Justice Committee

Alternative Dispute Resolution

Written submission from Core Solutions Group

1. Relevant Biography

John Sturrock QC practised at the Faculty of Advocates from 1986-2002. He had a wide-ranging and varied practice in civil cases of all sorts. He was appointed a Queen's Counsel in 1999. He served as the Faculty's first Director of Training and Education from 1994-2002. In that role he established the Faculty's advocacy training programme, at the time a world-leading initiative.

He served on Scotland's Judicial Studies Committee from 1997-2003 and conceived and delivered its practical judicial training workshops. In 1996, he trained in negotiation at Harvard (under the tuition of the author of *Getting to Yes*, Roger Fisher) and separately as a mediator. He left practice at the Scottish Bar in 2002 and established the mediation services and training provider, Core Solutions Group.

Since then, John Sturrock has acted as mediator in approximately 500 different matters, mostly in Scotland, and also in England, Ireland, mainland Europe and Africa. The subject matters range from personal injury to employment and workplace disputes, major construction and infrastructure projects to commercial contracts of all sorts, allegations of negligence in professional services (including lawyers, architects, surveyors, accountants, doctors, builders, bankers and others), financial claims, intellectual property issues, house purchases, landlord and tenant, agriculture, community land and other local issues, planning and environment, company and corporate matters, public policy, local government, national government, trades unions and management, Olympic sport and many more.

He has also consulted with and trained hundreds of professionals, senior civil servants, business leaders and managers, consultants, sports leaders and others in mediation, negotiation and conflict prevention and resolution skills. He is recognised as a world-leading practitioner, thinker and writer in the field of dispute resolution, holds the position of Visiting Professor at the University of Edinburgh and is a Distinguished Fellow of the International Academy of Mediators, whose international conference is being held in Edinburgh from 10-12 May this year under John Sturrock's chairmanship.

He leads Collaborative Scotland, an initiative to bring respectful dialogue to Scottish politics and public affairs, and is the author of its Commitment to Respectful Dialogue.

John Sturrock first gave evidence about dispute resolution to the then Justice 1 Committee in 2003.

2. The Challenge

A significant part of what is referred to as “dispute resolution” in a civil (ie not criminal) context is disproportionately costly, time-consuming and uncertain and also often destructive of business, commercial, financial, community and personal relationships. This is seen at its most pronounced in the litigation system where formal procedures and the adversarial nature of court processes inevitably produce many of these symptoms. The same may be said for some tribunals, inquiries and other adjudicative processes, as well as protracted unresolved disputes which simply get stuck through want of opportunity and resources to resolve them constructively.

This is not a criticism as such, more a recognition of the limitations of processes which require parties to assert their own positions as right and seek to show that other positions are wrong. This binary, win/lose, black/white approach is suitable for those cases in which legal certainty and a judicial decision is necessary. However, it is recognised that these cases form a very small proportion of all matters which are disputed and certainly of all cases in the court system (figures often suggest that less than 5% of cases in the court system are actually decided by a judge). And yet, very significant resources are directed to this system (a cost-benefit analysis would be worthy of exploration).

There are thus significant direct costs (monetary and non-monetary) associated with such a system. Further, the costs to the economy and to society would seem to be significant too, in lost time, profit, opportunity and morale, as well as damage to community and personal relationships and so on.

3. The Opportunity

Recognising the issues addressed above, many countries and jurisdictions are embracing different ways to help resolve disputes. It is regularly said that we live in a “post-litigation” age as people everywhere see the benefits of resolving differences early and with less time and costs involved. Although the term ***“alternative dispute resolution” (“ADR”)*** was deployed twenty or more years ago to describe this development, the term is thought to be inappropriate. “Dispute Resolution” comes in many forms and these are better viewed as a variety of options, which will include litigation and tribunals (along with arbitration) in appropriate cases.

The key is to expand our knowledge, experience and skills in the range of options available for early and constructive resolution – and indeed for the prevention and/or management of disputes and differences. Most disputes are resolved without formal proceedings, and indeed without lawyers or other professionals, by negotiation, the most commonly used form of dispute resolution.

Negotiation enables parties to work out solutions for themselves which meet their ***real interests*** (including all the non-legal factors that inevitably exist) rather than being based on the ***positions*** that an adversarial process inevitably requires them to take. It

also emphasises autonomy and choice and reduces unnecessary dependence on others. It can preserve or rebuild relationships. Thus, it should be the most effective and efficient means of resolving disputes.

In recent years, it is certainly the case that many professionals have enhanced their negotiation competence to the benefit of many clients. This should, and will, lead to a reduction in court cases in the civil courts, among many other benefits. We need to continue to enhance the teaching, encouragement and use of “interest-based” negotiation in Scotland.

Mediation is an enhanced form of negotiation. Often, for a number of reasons now well understood in negotiation theory, behavioural psychology and economic analysis, it is not easy for parties (and their advisers acting on their behalf) to reach an agreed outcome based on mutual interests. This is just in the nature of things, who we are and our culture.

Mediation involves a trained and skilled third party enabling the disputing parties (with their legal or other advisers if appropriate) to work out a solution among themselves. A mediator provides a valuable and independent input into negotiations which, in the vast majority of instances, does help (and indeed empowers) parties to find a solution for themselves. Often this is achieved in one day, even in complex and long-standing disputes in court.

The overall success rate of mediation is frequently cited to be in the region of 80-90%, a striking statistic in any event and more so when research in Scotland has shown that the figure for successfully implementing court decrees is less. This is explicable by the consensual nature of agreements reached in mediation.

4. Some Questions

This submission argues for much greater use of interest-based negotiation and mediation in Scotland. In 2003, when John Sturrock last appeared before this Committee’s predecessor, mediation was much less known and tested in Scotland. We are well past that stage now. The growth in use of mediation invites the following questions:

- What kind of dispute resolution system do we wish to encourage in Scotland?
- What are the criteria which should be applied in reaching a decision on this?
- How should public money and resources be deployed to achieve dispute resolution?
- What changes do we wish to make or encourage in furtherance of these objectives?
- What would be the specific benefits of doing so?
- What role should mediation play in dispute resolution in Scotland?
- How can mediation be further encouraged?
- What are the first steps to improve the system?

5. Some Recommendations

1. Recognition that encouraging earlier, more effective and more efficient resolution of disputes in Scotland will be good for the economy, society and communities;

2. The setting of interest-based negotiation and skilled mediation in the wider context of useful social and economic benefits in Scotland;

3. Much greater emphasis on education in interest-based negotiation and mediation in schools, colleges and other educational institutions in Scotland in order to encourage earlier, more effective and more efficient resolution of disputes;

4. A significant programme to raise awareness among users of courts, and more generally through public bodies and institutions, of the benefits and availability of skilled mediation in Scotland;

5. Encouragement to business associations and trades unions to embrace the use of skilled mediation for matters of importance to business and the workforce;

6. The continuation of the incorporation of mediation and other interest-based processes into appropriate legislation emanating from the Scottish Parliament;

7. Encouragement to Audit Scotland to examine the costs and benefits of the civil justice system in Scotland from the point of view of early, effective and efficient dispute resolution;

8. Encouragement to the courts in Scotland to follow those in many other jurisdictions and actively encourage the use of early negotiation and mediation to promote earlier settlement of cases, with recognition of the impact on limited resources of a court users' refusal to do so;

9. The re-allocation of a small proportion of the justice budget in Scotland (say one senior judicial post and one sheriff's post per sheriffdom) to fund "*Early Dispute Resolution" programmes* in the Supreme and Sheriff Courts;

10. Rejuvenation, extension and better resourcing of the successful in-court mediation schemes in Edinburgh, Glasgow and Aberdeen Sheriff Courts;

11. Encouragement to the Justice Department of the Scottish Government to research and adapt where appropriate the many excellent schemes in other jurisdictions for the earlier, effective and efficient resolution of disputes arising from the provision of public services;

12. Commitment by the Scottish Government and local government to endeavour to resolve disputes in which they are involved by skilled mediation wherever possible.

6. An End Note

Mediation and associated concepts are sometimes viewed as “touchy feely” by professionals and parties inexperienced in their use. Nothing could be further from the truth.

Nearly all disputes have a human dimension which is very often ignored, and recognition of which is often a key to unlock a problem. Addressing this and the multitude of factors which are present in all disputes is in fact a very serious matter requiring a broad set of skills including but not limited to the legal, monetary or analytical.

That is (and should be) hard work, but the benefits for individuals, professionals, businesses and communities of a shift in culture have already been shown to be significant. We should build on this in Scotland.

Core Solutions Group
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