JUSTICE 1 COMMITTEE

Wednesday 12 November 2003
(*Morning*)

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2003.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

CONTENTS

Wednesday 12 November 2003

JUSTICE 1 COMMITTEE
12th Meeting 2003, Session 2

CONVENER

*Ms Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Mr Stewart Maxwell (West of Scotland) (SNP)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
*Marlyn Glen (North East Scotland) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Margaret Smith (Edinburgh West) (LD)

*attended

COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

THE FOLLOWING GAVE EVIDENCE:

Henrik Nielsen (European Commission)
Professor John Sturrock QC (Core Consulting and Core Mediation)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 1 and Committee Room 3

Scottish Parliament

Justice 1 Committee

Wednesday 12 November 2003

(*Morning*)

[THE CONVENER *opened the meeting at 10:01*]

Alternative Dispute Resolution

The Convener (Ms Pauline McNeill): Good morning. I welcome everyone to the 12th meeting in this session of the Justice 1 Committee. I ask members to do the usual and turn off their mobile phones and pagers. It is important to turn them off and not just put them on silent or vibrate, particularly for the first item.

I remind members that the purpose of this item is to gather information to assist us when we consider the European Commission's green paper on alternative dispute resolution in civil and commercial law. Members will note that the committee has already received five submissions on the green paper: a joint submission from the Scottish Mediation Network and Safeguarding Communities-Reducing Offending; and further submissions from the Law Society of Scotland, the Scottish Executive, Family Mediation Scotland and the Chartered Institute of Arbitrators.

I welcome Professor John Sturrock QC, who is a director of Core Consulting and Core Mediation. John will make a presentation of approximately 10 to 15 minutes, after which there will be time for questions.

For the information of the public, the agenda is fairly straightforward but the logistics of the meeting are going to be slightly different from usual. We must finish this item by 10.45 so that we can convene a videoconference at 11 o'clock. At noon we will go to committee room 3 for the remainder of our business, so that the European and External Relations Committee can have its videoconference with Finland.

Professor John Sturrock QC (Core Consulting and Core Mediation): Thank you for inviting me to join you. I hope that everyone can see the screen. If not, I ask you to make the appropriate adjustment so that you can see it. I know that I have to talk through some of the slides for the *Official Report*.

I begin with a short story, as my task is very much to set the scene about ADR and mediation. The story is about a lady who was an employee of a major public organisation and to whom, for two years, a whole chapter of unfortunate events occurred. It started off with a small incident at work, which led to claims by her that she had been sexually discriminated against, harassed and bullied. Ultimately, the situation led to her being medically unfit to work. Her employers would say that they were a caring organisation, but that things had simply gone wrong. The employee's claims were all set to go to the employment tribunal. There were all sorts of issues to be addressed as well as stress, anxiety, anger and passion.

Someone suggested that the matter should be dealt with by mediation, and it came to mediation not that long ago in a small town in the west of Scotland. The mediation took many hours; a lot was said and heard during those hours. Towards the end there was a remarkable moment that captures the power of the mediation process. The parties had moved together gradually during the day but there was still a significant gap between them over money. The money was really symbolic of the issues between them. At the end of the day, after some hard work, that gap was bridged.

As the mediator, I suggested that the employer's representative should go to the—now former—employee and tell her what he could do for her. He went into the room in which she had been sitting for many hours and said that he wanted to acknowledge all that she had been through. He expressed the company's regret for what had happened to her, reassured her that steps would be taken to try to make sure that it did not happen again, acknowledged all that she had done for the company and told her that he was able to give her the payment that she was seeking. She looked up and thanked him. She said that he had changed her view about the organisation, that he had made a difference to her life and that she could now get on and start a new chapter in her life. Thus, the mediation ended, or so it seemed.

Last week, I happened to meet the solicitor who acted for that lady. He told me that she had telephoned him the week before and asked him to shred all the papers in the case. She had been able to move on, leave all that behind her and start a new chapter in her life. We also heard from the solicitor acting for the employer, who said that the mediation had saved the company £75,000 in legal expenses, management costs, travel time and accommodation. That all happened in one day, and it illustrates how much the mediation process can achieve.

There are many similar examples but I will just leave you with that one. My role today is to set the scene about ADR and mediation, to talk through the context in which they arise, to tell you a little bit about the process and to talk about what is happening in Scotland and elsewhere. I will

confine myself to non-family mediation; there are others who are better versed in family mediation than I. I will speak specifically about the civil and commercial areas.

It is appropriate that I declare the interest that the convener mentioned. I am a director of Core Mediation and Core Consulting. My real interest is in seeing mediation work more effectively for as many people as possible in Scotland.

I will start by talking about nomenclature. We hear about alternative dispute resolution, or ADR. Many of us think that that description is now a bit passé and that the appropriate term should be at least additional dispute resolution or appropriate dispute resolution. Just last night, I read that people in New Jersey call it complementary dispute resolution, and there is a notion in England that effective dispute resolution might be a better description of what we are talking about.

However, in a world of WMDs, I have come up with a rather different acronym: EMD, or the effective management of differences. What this discussion should really be about is how we can help people to resolve their differences more effectively.

When people have differences, what do most of them want? Research and our instincts tell us that they want to find solutions. "Paths to Justice", which was published by Professor Hazel Genn of University College London and Professor Alan Paterson, showed that the majority of people who have disputes want to resolve them by agreement. Indeed, even people who are successful in court are still unsatisfied and would rather have resolved the dispute by reaching agreement. The underlying principle for us to examine—and perhaps subscribe to—is that people would rather reach agreement than go into battle, although that is what often happens. Too often, we operate in a confrontational or adversarial mode.

The resolution of differences involves a substantial passage of time. We incur delay and a lot of expense—legal expenses and experts' costs, among other things. There are direct and indirect costs. Recent research by the accountants BDO Stoy Hayward has shown the extent of the indirect costs that businesses incur as a result of disputes. Management time is lost, profitability and staff morale go down, and managers suffer from stress, anxiety and loss of sleep. Such indirect costs arise because, when things go wrong, we tend to focus on the past and seek to blame people. In an adversarial setting, possible solutions are limited to winning or losing. Procedural formalities tend to dominate and many people find it difficult to accept the sheer loss of control that they experience when their disputes are handed over to others.

We know that many people would like to have access to some form of resolution, but do not have that opportunity because the system is too expensive or because the courts are so bogged down with other proceedings that cases cannot be heard quickly and efficiently. We also know that disputes often lead to stress and can cause irreparable damage to contractual, professional and personal relationships.

I am sure that the committee is interested in the burden on the justice system in relation to the weight and cost of cases going through the courts. The evidence shows fairly squarely that around 95 per cent—and in some examples, 97 per cent—of the cases that enter the civil judicial system are settled; therefore, judges adjudicate on less than 5 per cent of those cases. Those statistics raise issues about resources, the cost-benefit analysis, the burden on the courts and the situation of people who cannot get access to the courts or to other solutions. Even in the 95 per cent of cases where a settlement is reached, the outcome is often unsatisfactory, because cases are settled at the last minute, sometimes in an unprincipled way.

The solution that I offer the committee is that we change our orientation in relation to the resolution of difference and—in the narrow sense—the resolution of disputes in the legal system. We should focus first on helping people to reach agreement. That should be the first principle. The adversarial system—the court—should be regarded as a last resort. It can be a super and appropriate last resort in some cases, but perhaps in only 5 per cent of those that enter the system, as the statistics show.

A significant lead has been taken down south. Recent statistics from the former Lord Chancellor's Department, which is now the Department for Constitutional Affairs, show that in the past year the use of ADR, and of mediation in particular, has saved Government departments about £6 million. Indeed, the figures showed a 1,200 per cent increase in the use of ADR in the past year. The NHS Litigation Authority's statistics show that the time taken for medical negligence cases to be resolved has been reduced from 5.5 years to 1.98 years and that there has apparently been a 74 per cent increase in the number of cases dealt with by mediation.

The use of mediation is increasing because it has many tangible benefits. Mediation encourages people to resolve their differences by consensual means wherever possible; it produces results more quickly; and it is more cost-effective—I have given an example of that. It is much less stressful, as it eliminates, or at least diminishes, the prolonged agony of negotiation followed by litigation. The time of managers, witnesses, experts and others can be deployed more

meaningfully. In the commercial setting, that means that the business can make more profit.

People often comment about the better, more satisfying outcomes that are achieved through the consensual process. Of course, when people are involved in reaching agreement with others and do so by themselves—or, if necessary, with help from other people—they have a stake in the outcome and ownership of the result. Privacy, rather than publicity, is a benefit that people recognise. The flexibility of working together on different ways to design processes is a considerable benefit over the rather fixed rules that the litigation procedure might have.

Access to justice is a theme to which we might return in our discussions, but access to solutions also interests me. Can we help people to find ways to resolve the unresolved problems that they often have, whether those problems are commercial, professional, public, private, personal or whatever? In doing that, can we reduce pressure on the courts? That is a possible benefit, if we can take many such cases out of the court system or resolve them earlier. If money is an issue—it is for the committee—reducing the cost of the justice system and perhaps the legal aid budget might be a principal attractive benefit.

10:15

There is a bigger picture. I am anxious to encourage the committee to consider ADR as an approach that applies not only to legal situations or courtroom disputes, but possibly more widely to all fields and at all stages. In other parts of the world, equal opportunities and human rights issues are addressed using what is characterised as ADR—mediation or consensual approaches. ADR could also be used in planning and the environment. I was struck recently by the fact that even the inquiry into the Scottish Parliament building and its cost might have been conducted more collaboratively. I leave it to members to consider that further.

We look to create approaches that build rather than knock down and which emphasise collaboration, co-operation and consensus. That framework allows everyone involved in the difference of opinion, conflict or dispute to have an opportunity to gain from it and to reach a solution that works for them.

That takes me to mediation's place as the principal means of managing differences and resolving disputes by agreement. When we talk about ADR, we talk primarily about mediation. That comes through in all the paperwork that members will have seen and perhaps had the chance to read. Nobody suggests that conflicts should or can be removed; the focus of our attention is on how we help people to resolve conflict.

I will summarise what mediation offers. It offers the opportunity to approach negotiation in a structured or assisted fashion and it extends or enhances the negotiation process by—crucially—using an independent third-party facilitator who is impartial, who has or builds the parties' trust and who needs to be highly skilled in sometimes unusual and often difficult situations. The interpersonal element is prominent, which is where training and standards come in for further discussion.

The independent third-party facilitator's role is to help people to communicate when they otherwise cannot, to be a buffer for emotions such as anger and to bridge the gap that sometimes exists between parties, so that parties can reach consensus on a practical solution for them.

One great attribute of the process is that, in general, it is confidential. Anything that is said or done with the mediator in private or by those involved together is confidential. Mediation usually takes the form of a series of meetings, some of which are joint and many of which are private. That gives parties the chance to speak openly and frankly with the mediator.

As I said, mediation has the benefit of speed and cost efficiency, although it is a rigorous procedure—nobody should suggest otherwise. Mediation is hard work, but it is in many ways preferable to the alternative.

Mediations are usually conducted in a day or two and have a recorded success rate of about 80 per cent—sometimes more. The benefits are that the right people—and the right information—are at the table and that people can air the issues, express their feelings and their anger, and, sometimes, hear what they have not heard and understand what they have not understood. If one compares a court setting with meditation, one can see that meditation provides the opportunity not only for a day in court and for non-legal solutions but for legal remedies, too.

Sometimes, people cannot resolve a dispute by themselves. They need the help of a facilitator to break the logjam. It should be remembered that most people want to reach agreement. We try to find ways to enable that to happen. The bigger picture reminds us that there is nothing new about that. When Nelson Mandela left Robben island, he said:

"To make peace with an enemy, one must work with that enemy and the enemy must become one's partner."

Way back 150 years ago, Abraham Lincoln said:

"The only safe way to destroy your enemy is to make him your friend."

I make no comment on the fact that that was an American President's approach.

Let us move on to think about mediation in a wider setting. It is having a huge impact in the United States—that most litigious of settings. A statistic from 1997 shows that 98 per cent of the 1,000 largest corporations in America had used mediation. Last year I attended a conference at which the guiding principle was:

"Mediation is now part of the fabric of dispute resolution in the United States".

Issues arising from the 9/11 tragedy, tobacco and Enron are all being dealt with by mediation processes. Our Government has pledged:

"ADR will be considered and used in *all* suitable cases whenever the other party accepts it".

A very good report produced by the Department for Constitutional Affairs in August gives a number of interesting examples of where Government departments have used mediation to great effect in the past year or so. Those include foot-and-mouth disease, Alder Hey and land mines in Kenya.

Judges in England are coming forward with radical propositions. For example, they have indicated that failure to use ADR, particularly when public money is involved—think about the court system—is "indefensible" and that independent mediators should be used wherever possible if the parties cannot sort matters out for themselves.

I will skip over slide 19, which shows other comments made by English judges; perhaps those comments can be put into the record later.

The European dimension has been made fairly clear through the report that is in front of members, the response of the UK Parliament and, in particular, the response of the Committee on Legal Affairs and the Internal Market, which produced a resolution supporting the ADR initiative that has been adopted by the European Parliament.

There has also been significant growth in mediation in the commercial and civil arena in Scotland. Statistics from our own little business, Core Mediation, show that although the numbers are relatively low there has been a significant increase in the past year or two. A scheme in Edinburgh sheriff court run by the citizens advice bureaux has also contributed to the growth of mediation in Scotland.

Slide 23 breaks down mediations into the public sector—the categories shown are local authorities, public bodies and Government agencies—and the private sector. Sixty six per cent of mediations are in the private sector.

Slide 24 shows the types of industries that are involved in mediations. They include the building and construction sector, the property and land sector, the health sector, the commercial sector and the education sector. As members will know, there is quite a lot of work in the special needs area of the education sector. Legislation is now before the Parliament on that matter. Slide 25 shows the kind of disputes that are being addressed by mediation: professional negligence; employment, which is a great area for work using these techniques; special needs; information technology; management; intellectual property; and partnership disputes.

I mention that 44 per cent of the referrals come from the insurance industry. It has a real interest in the matter and deserves to be encouraged to promote mediation. A telling factor is that 45 per cent of referrals come before the disputes have reached litigation stage. The statistics show that 88 per cent of the cases that were at that stage were in the private sector.

I will give some examples of the areas in which mediation is being used. One of those is the health sector, where there is tremendous potential for the use of mediation, not only in disputes between patients and doctors but in the management of the health sector. We can think of other public sector institutions where that would also be the case. There is so much potential in Scotland for taking this approach and helping people to manage differences appropriately.

We will slide over the comments from parties, save for the last one on slide 29:

"what mediation offers is the prospect of a much quicker and much less expensive resolution with … very little risk".

Those are the words of a health trust chief executive from a couple of years ago.

In summary, it seems to me that most disputes are suitable for consensual resolution, using the various processes that come under the heading of ADR, but principally mediation. It is not a universal panacea, as some cases are not appropriate for or resolved by mediation, but it is another option that is arguably grossly underused in Scotland. There are great opportunities for us in Scotland.

Einstein said:

"Imagination is more important than knowledge".

I challenge us all to think about whether we can lead in this area. Can we build on what others have done in other countries and shape a new approach for Scotland? One of my colleagues asked me to say this to the committee about mediation—it is good for people, it is good for business and it is good for Scotland.

The challenge is something along these lines. I quote a statement made by Derek Bok, the former dean at Harvard Law School, a few years ago. He stated:

"Over the next generation … society's greatest opportunity will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. These may be the most creative social experiments of our time."

We have an opportunity to take part in a very creative social experiment that could bring great benefits to the people of Scotland. There is a great deal to be done to raise awareness about mediation in Scotland, to educate people and to ensure that the standards are appropriate. There is a lot that the courts could do to encourage mediation, there is a lot that the Executive could do to commit to it—in the way that the UK Parliament has done—and there is much that the Scottish Parliament can do to support it. Encouragement, commitment and support are the three words on which I will end. I am happy to answer questions.

The Convener: Thank you. That was an excellent presentation, which gave us an important backdrop for what we are about to do. We have at least five questions to put to you, and I would be grateful if your answers could be as concise as possible, because we have to finish the session at a quarter to 11.

Marlyn Glen (North East Scotland) (Lab): That was a very interesting and enthusiastic presentation—I am caught with it.

Alternative dispute resolution has at times been criticised because of the lack of a uniform approach to training for those entering ADR practice. What developments have there been in the provision of training in the family, commercial, consumer and community dispute areas?

Professor Sturrock: A wide range of training is provided, a significant amount of which is of a high quality, although I suspect that some training is not quite of the necessary quality. People are concerned to achieve high standards in this growing area because they realise that mediation will be made or broken by the quality of the mediators, the performance that they bring and their level of competence. It is fair to say that there is a range of providers and a range of levels of provision.

Margaret Mitchell (Central Scotland) (Con): I am interested in regulation. If the member states adopt the Commission's civil and commercial law green paper, the United Kingdom will require to regulate dispute resolution. As a practitioner, you have touched a little on how dispute resolution is used in Scotland, but what will be the implications for Scots law?

Professor Sturrock: I am not sure that regulation will necessarily be the outcome. I have read the European Parliament's resolution and the responses to the Commission's paper, and everybody seems to be arguing that regulation is not appropriate for this activity—certainly not the kind of legal regulation that might hinder its natural growth. Mediation is an activity that requires to be nurtured, encouraged and stimulated as best as it can be. In each set of circumstances it requires a different approach, a careful design, improvisation and the agreement of all concerned. I am not sure that we should consider mediation as something that is ripe for regulation. It is something that is ripe for encouragement. Seen in that way, the implications for Scotland are that it will be considered as another opportunity to enable people to resolve their disputes in a non-legal or extra-judicial way. That is how we should consider the development and growth of mediation in Scotland.

Margaret Mitchell: So there will be no formal need to regulate, and mediation will not be bound in any way.

Professor Sturrock: There is a real danger that, in regulating mediation, we will squash it and disable it from growing in the flexible way in which it is presently growing and in which it can be encouraged to grow further.

Margaret Mitchell: So the committee should be aware of that and consider it as a possible—

Professor Sturrock: Very seriously. In fact, the UK Government's response, the Executive's response, the European Parliament's response and the European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs' response have all advised that regulation should be avoided. The Commission's approach is, arguably, overly lawyerly, legalistic and regulatory.

Margaret Mitchell: But the success of mediation lies in its voluntary nature and the willingness of people to come in without being forced in any way.

Professor Sturrock: Mediation is a voluntary process—a process that depends upon people's willingness, and the skill of the facilitators to make it work. That is the case with any approach to consensus or collaboration.

Margaret Mitchell: That is very helpful—thank you.

Michael Matheson (Central Scotland) (SNP): I was interested in your comments on the expanding use of ADR in England, particularly by the Lord Chancellor's office and the national health service, and on the training and standards that are important for those involved in this type of

work, given the unusual and difficult circumstances they can find themselves in.

That brings me to regulation. I understand your concerns about the potential dangers of regulation applying too much pressure to a developing profession, but the Chartered Institute of Arbitrators stated in its submission to us that there is a need for an umbrella body, or for legislation, to provide a framework to set standards within the profession as it develops. Do you think that there is a need for standard setting, so that people can have a quality assurance standard and know what to expect?

10:30

Professor Sturrock: Quality is important. It is important that the mediators operate to a standard with which people are comfortable and about which they are confident. Confidence is important. It is not only about the mediators' performance, but the overall service that is provided, which includes the information that is exchanged, the assurances that are given and the arrangements that are made prior to mediation taking place. That can all be done to a certain standard.

There is a tension and an interesting debate between the argument for at least minimum standards of competence below which mediators should not be allowed to practice and the aspiration that mediators should move towards best practice and that our focus should be on trying to find and examine the best practices of the most competent mediators. I subscribe to the view that we need to identify some minimum standard of competence and address it in some way. It might be that, as in many disciplines, that standard can be self-regulated.

In the United Kingdom, a number of bodies of high standing and mediators who are accredited by those bodies are known to be highly competent. The key might be to disseminate that information in the marketplace so that people can make choices between different service providers, knowing that the choices involve selecting between those who have been trained and accredited to a certain standard and those who have not.

Michael Matheson: Who should be responsible for setting those standards?

Professor Sturrock: At present, the different bodies that are involved in training and accrediting are also responsible for setting standards. Attempts to unify the approach in England have so far been unsuccessful, but the Scottish Mediation Network is attempting to draw a baseline for practice and codes of conduct. It might be possible to do that at least as a measure so that people have information by which they can assess or benchmark providers, but I am not sure that it should be done through regulation or done universally and uniformly.

Michael Matheson: If we have organisations that are responsible for accrediting certain courses and the level of competence, they too must go through some process of accreditation. Someone has to be in a position to be able to monitor that those organisations are enforcing the standards that the profession would expect across the course.

Professor Sturrock: The reality is that accreditation is not monitored other than through the accreditor's self-regulation. In Core Consulting and Core Mediation, we accredit mediators and bring in highly competent trainers and accreditors from outside bodies to audit what we do and to ensure that the standards that we seek to meet are at least as high as the highest standards of which we are aware elsewhere. That approach involves an element of self-regulation, self-auditing and aspiration to the highest standards.

Michael Matheson: Should an umbrella organisation that is responsible for pulling that together be set up?

Professor Sturrock: There is an argument that an umbrella organisation might be helpful if it set down benchmarks against which people could assess whether an organisation does or does not meet a standard, but to impose standards through regulation might, as I discussed earlier, artificially disable the growth and development of mediation, which is still at an early stage. People are learning almost daily what possibilities exist in mediation and how expansively it can be used.

Bill Butler (Glasgow Anniesland) (Lab): I found your presentation fascinating, especially your emphasis on collaboration, co-operation and consensus, which, as a Scottish Co-operative Party MSP, I found refreshing.

I will focus on resources and funding. You said in your presentation that we should focus resources on seeking agreement, that there has been a £6 million saving down south and that the benefits of mediation are that it is more cost effective and that it reduces costs to the justice system and to legal aid.

However, one of the key questions regarding the development of ADR in Scotland has been funding. Concern has been voiced that there is a lack of secure funding in the field of family, consumer and community dispute resolution, which hampers the potential for the development of ADR activities. In your opinion, are there still funding issues to be addressed to make ADR more accessible? If so, what do you believe those issues to be?

Professor Sturrock: It would be quite wrong for me to speak specifically on behalf of the family and community mediation organisations, which I know have been wrestling with that problem. It seems that there is a significant opportunity for the Executive and others to prime the pump and to take mediation from being a small area of activity to being much more widely recognised and used.

I suspect that funding would best be directed at areas such as research into the costs, benefits, savings and advantages of mediation, and significantly—perhaps critically—into education and the raising of awareness. Education starts in the schools, a number of which now have peer mediation projects. Changing the culture so that even our children think about conflict and difference will be the starting point. We must also take the business of education into the courts, to the judges, to the legal profession, to other professions and to industry and commerce. We must enable people to become much more aware of the potential that the process has and how it works, and we must build confidence in it and an understanding of the competence that is required to make it work effectively.

If I was channelling resources, I would channel my energies towards raising awareness and educating folk, because that is how the process will be enabled to work in the short, medium and longer term.

Mr Stewart Maxwell (West of Scotland) (SNP): Good morning, Professor Sturrock. I found your presentation extremely interesting. I would like to ask you specifically about ADR and how it operates at the moment. Obviously, there is some scope for using alternative dispute resolution in the courts. I am thinking specifically about the rules of court in both the sheriff courts and the Court of Session, which are empowered in matrimonial matters to refer disputing parties to a family mediation service. What would be the effect if that court-referred mediation was extended, for example, to personal injury cases?

Professor Sturrock: The effect would be significant. Evidence from around the world shows that what has enabled mediation to take off in most, if not all, jurisdictions has been significant encouragement from the courts. What the English judges have been doing in recent years has been quite profound in shaping and changing the culture. The same applies to what has been happening in America. Maryland is a good example. As members will know, the chief judge there, Robert Bell—who recently attended the Scottish Mediation Network conference—has taken the lead in transforming that state's approach to disputes and the resolution of difference.

In our courts, although some reference is made to mediation in the family sector, no reference is made explicitly to mediation in any other rules of court. Reference is made to alternative dispute resolution in the sheriff court commercial rules, and the response from the UK Government suggests that those rules have been used in Glasgow sheriff court. However, the evidence shows that few, if any, referrals to mediation have been made by judges in Scotland. There may have been one or two in the commercial setting, but there have been very few. The courts could play a significant role in encouraging mediation and in helping to relieve some of the burden that they face as well as helping to achieve the cost and time benefits to which I alluded earlier.

Rules of court could be amended to include specific reference to mediation and other alternatives. Pre-action protocols could be introduced, as they have been in England, to encourage people to resolve matters before they come to court. Some thought must be given to whether potential litigants should be enabled to use the court system without—at least in some cases—trying the alternative beforehand, considering all the benefits that it has. In England, the courts are now imposing cost sanctions on parties who have unreasonably refused to try mediation to resolve their disputes. So, there are many ways in which the courts could encourage the growth of mediation in Scotland.

Mr Maxwell: I presume, therefore, that you would support Scotland following the example of Maryland, which you just cited.

Professor Sturrock: There is huge potential in our relatively small country to pick this up and run with it—to bring about a transformation not just in the courts, but across a range of social, business and community activities. Although the Maryland example is unique, and would not in total be transferable to Scotland, it offers us a very good guide for shaping our approach.

Mr Maxwell: I am interested to note that mediation is in use; you mentioned in your presentation that it is beginning to take off. You mentioned the use of mediation in a variety of instances, including Enron, and I think that you also mentioned tobacco. I have an interest in that. It might be that mediation could be good for the tobacco company involved and good for the individual, as it could be used to resolve their dispute. Is that worth while for society as a whole, however? A settlement through mediation could mean the loss of what would otherwise be a legal precedent. Legal precedent in many areas of law, not just in tobacco-related cases, is important in setting down the rules that apply to others. In effect, that can sometimes make further legal action unnecessary. Legal action at the start would therefore be better than mediation.

Professor Sturrock: The starting point is that now—and perhaps since time immemorial—the vast majority of cases that come to court are resolved by settlement. They do not reach, and are not determined by, a judge. A small number of cases do reach a judge, however, and they include cases such as those to which you refer, where it is important for there to be a legal decision or ruling on a matter of importance, of public policy or precedence. The current case involving Mrs McTear and Imperial Tobacco might be an example of that here in Scotland.

There will always be the opportunity for parties, if they wish and if it is appropriate for them to do so, to take cases to judicial determination. That is fine, and a court has a powerful and important role to play. The vast majority of cases should be, and are, resolved. The questions are how we do that, when we do it and at what expense to individuals and society.

Mr Maxwell: So you would still support the idea that individuals can have their day in court if they wish to pursue their case. I was slightly concerned about some of the things that you mentioned. You said that judges might take a particular view of those who had refused to go to mediation.

Professor Sturrock: I think that that point relates to what I would call the high-water mark in England. If there has been an unreasonable refusal to take part in mediation, the English courts will regard that as significant, having regard to the cost situation. However, people have a right under article 6 of the European convention on human rights to have their case tried in court if that is what they wish. I do not think that anybody is suggesting otherwise. People are trying to encourage those cases that are ultimately going to get settled, and which people wish to have settled, to get settled more effectively and efficiently.

The Convener: Let me follow that up and focus on the relationship with the courts, given what you have said about the proportion of cases that settle. Is it fair to say that a high proportion of cases settle because the pressure of a court date forces the parties to sit down and agree a settlement? What impact will not having a court date have in mediation situations?

Professor Sturrock: It is true that many cases settle under the pressure of the court—on the steps of the court, or as people are about to go inside. That often produces very unsatisfactory outcomes. Those are highly stressful situations, where people have no option but to try to do a deal. People will often broker a deal that is a compromise without a proper basis.

Mediation offers the opportunity for people to get together in a relatively short period of time in a different sort of setting, where they are not under the compulsion to act in an adversarial setting, but where they can find a result. The evidence shows that a result is achieved in the vast majority of cases that come to mediation.

You might argue that the court is needed to achieve a result, but the evidence shows that, if people are given the appropriate setting, some encouragement and some support in working to find an answer, they will find that answer in most cases. That answer will usually be much more satisfactory to them than the results of a last-minute, cobbled-together negotiation at the doors of the court.

The Convener: I note what you say, and I think that your presentation highlighted the point that it is not just financial settlements that people look for. There is also the possibility of facing the other person across a table, which I would not dismiss. Is there evidence to suggest that settlements are lower as a result of mediation?

Professor Sturrock: I know of no such evidence. It is difficult to make comparisons: you cannot compare what might have been with what has been achieved. The best question to ask might be whether people are more satisfied with results. As you have suggested, satisfaction with a result is often not just about money—it can be about reassurance being given, about a new contract being awarded, about a continuation of some other relationship, or about some expression of regret. There can be many ancillary benefits, so to focus only on money might be to miss some of the point.

It may be that some settlements are higher, because those who pay recognise that it is preferable to pay quickly and so avoid the on-going costs in time and stress that would result from the case going all the way through the courts. Furthermore, although there is no evidence to support this—except, perhaps, anecdotal evidence—there may well be a reallocation, to the recipients of the settlements, of some of the money that might otherwise be spent on the process. Research might give us more information on that.

10:45

The Convener: What is your view on the relationship between mediation and the courts? You have refrained from commenting on family law, feeling that that is for others to comment on. However, family law is a good example of where parties have used mediation, but the courts have not necessarily recognised the agreement. Should there be a stronger relationship between mediation—which may be done voluntarily before any court arrangement—and the courts? Should the courts be obliged to consider the results of mediation?

Professor Sturrock: Again, I will be careful about family law. However, my experience of mediation in civil and commercial settings is that, if a result is achieved, the parties enter into an agreement. That agreement is just like any other contract. It becomes binding on the parties, as any other contract would, and can be enforced, as any other contract would. It is a consensual process and any agreement can be recorded, usually in writing, and signed up to. Often, lawyers will have been involved. They will have advised on the contents of the agreement; indeed, if appropriate, they may have drafted the agreement in more complex matters. It should not be necessary for the court to add a further tier of approval—because the parties themselves will have achieved all that they ought to or need to have achieved to implement what they have agreed.

The Convener: We will have to leave it there, but I can give you a further 60 seconds if you want a final word.

Professor Sturrock: We have a tremendous opportunity to be brave and bold and to find ways of achieving collaboration, consensus and co-operation. I think that that is what the Scottish Parliament is all about. This committee has an opportunity to lead. What is it that they say? All it takes to change the world is a small group of committed people. Indeed, that is the only thing that ever has changed the world. I challenge you at least to consider this particular opportunity—and then, I hope, to run with it.

The Convener: Thank you for your thought-provoking presentation, which has given us a good backdrop to our day's discussions.

We will now break for approximately 15 minutes to allow the room to be set up for videoconferencing. We will resume at 11 o'clock.

10:47

Meeting suspended.

11:02

On resuming—

The Convener: I welcome everyone to the second part of the meeting. I will begin by explaining that this is the first time this session that the Justice 1 Committee has had a videoconferencing facility. We welcome to the committee—he is here in spirit, if not in person—Henrik Nielsen, who is the administrator of the justice and home affairs directorate-general of the European Commission. I thank him for agreeing to meet us today and to answer some of our questions.

By way of background information, it is important to say that the Justice 1 Committee of the Scottish Parliament is keen to be involved in justice and home affairs matters and to track some of the issues on which the Commission is consulting. An important area of law that is being consulted on now is alternative dispute resolution. We felt that it was important to have our say on that issue, because it could affect Scotland and our work in the Scottish Parliament.

My name is Pauline McNeill and I am the convener of the committee. I invite Margaret Smith to ask the first question.

Margaret Smith (Edinburgh West) (LD): Good morning, Mr Nielsen. The green paper states that alternative dispute resolution is a shared priority across the European institutions. Will you explain why ADR has become a priority in Europe?

Henrik Nielsen (European Commission): Good morning. It is a pleasure to have the opportunity to appear before you. The issue of alternative dispute resolution forms part of the conclusions of the European Council in Tampere and the action plan adopted by the Vienna council in 1998. It is part of the overall plan to establish an area of security, freedom and justice in the European Union following the entry into force of the Treaty of Amsterdam, which expanded the competence of the Community and the Union.

Within the field of civil law, we are working towards establishing an area of justice and improving mutual recognition of decisions to give better access to justice to all citizens. We believe that ADR has its natural place within that field. It is developing quickly and is getting a lot of attention from lawyers and citizens throughout Europe. That is the background.

I turn to the involvement of the different institutions. The invitation to produce a green paper came from the Council, which adopted conclusions on the subject in 2000 and asked the Commission to present the green paper to take stock of where we are with ADR and to launch a public debate. The European Parliament has also shown great interest in ADR in relation to other initiatives in civil law.

Mr Maxwell: Will you describe the main themes that were consulted on in the green paper and the level of response that you received from member states, as that would be helpful? Did other member states share the United Kingdom's view that ADR practice should not be the subject of regulation by Europe?

Henrik Nielsen: The first objective of the green paper was to take stock of the situation in Europe. We tried to provide an overview of initiatives being taken nationally in many member states. At European level, there have been a number of initiatives focusing on certain sectors relevant to ADR, particularly in the consumer field; two

recommendations have been adopted by the Commission, in 1998 and 2001. At international level, we have had a couple of conventions and the Council of Europe did work on ADR.

We asked a number of questions, ranging from general ones to more detailed ones. First, we tried to get input on whether action could be taken at Community level to support, stimulate or facilitate the use of ADR in Europe. We then considered whether it would be necessary to distinguish between different sectors or different types of ADR, particularly with regard to family law. We also considered that in relation to online dispute resolution, which is becoming more frequent with the expansion of the internet.

We then considered more detailed questions, such as what issues could be included in legislation and how they could be resolved. Of course each issue is complicated and would require detailed analysis. In the green paper we state the issues generally and try to highlight the problems. They include limitation periods for civil proceedings linked to ADR, enforcement of settlements reached in ADR, training standards or qualifications of mediators, and the development of ethical rules or codes of conduct in mediation in particular.

I understood your second question to be about the UK's position relative to that of other member states. We received responses from most but not all member states, and the positions taken diverged. Several member states are quite positive about a Community initiative for legislation in the field. Others, including the UK, take a more careful approach. It believes that ADR is mainly at the development stage, that it is coming on stream more and more in each member state, and that it would be somewhat premature to legislate, as that could have a negative impact on the further development of mediation in the member states. Those are all valid comments. We have tried to take them into account and to find a good way forward with the two follow-up actions that we intend to pursue following the green paper.

Mr Maxwell: What was the balance of the views that you received from those member states that responded? You said that there were views on both sides of the argument. Were most, like the UK, opposed to regulation in the area, or were most in favour?

Henrik Nielsen: I would not dare to count because, as always, when member states reply to a green paper they are a little bit careful about expressing a final position. Responses are an input to a debate. It is more a question of whether member states express openness to the idea or indicate that we should be careful. They do not give a clear yes or no. That will come only if the Commission presents a complete proposal. There was a slight weight in favour of those member states that were open and positive about having a Community initiative.

Mr Maxwell: Did you receive any submissions from individuals or organisations that were keen to give you the view from Scotland on the possible impact on Scots law of any legislation in this area?

Henrik Nielsen: We received replies from the Scottish Mediation Network and from the Law Society of Scotland, which sent a separate reply from that of the Law Society of England and Wales. Those replies were mainly in line with the replies that we got from practitioners, the vast majority of whom are positive about any kind of European initiative on mediation, partly with regard to legislation but also to draw attention to the existence of mediation, raise awareness about it and promote its further use across the Union. That was the view of most practitioners in all member states, and also in Scotland.

Marlyn Glen: Good morning, Mr Nielsen. I want to ask about the main issues of debate. The committee has collected written evidence on the green paper from organisations. Different views were expressed on, for example, the confidentiality of mediation proceedings. What main issues of debate arose in the responses that the Commission received, and has a common view on how to proceed become apparent?

Henrik Nielsen: That is one of the key issues that we have to consider in the follow-up. The matters raised in the responses can be broken down into two issues. The first is the confidentiality of mediation proceedings, and the obligation on the mediator and the parties not to disclose information to any third party. The second issue is the admissibility of evidence, and whether, for example, the mediator could be called to testify in the course of civil proceedings after the mediation.

On the solution, most responses were positive about applying the principle of confidentiality in terms of the admissibility of evidence. When it comes to the mediation proceedings, it depends a little bit on which level you want to put yourself on and the extent to which you want to give the parties the ability to waive the confidentiality of the mediator, for example. The issue is also whether compulsory exceptions should be made, for example where the mediator gets information that might be contrary to public policy or be a risk to the life or health of an individual. We have not taken a final position on that, because it relates to whether we should put that into a legislative proposal. The question of admissibility of evidence would probably fit well into a legislative proposal.

The question of the confidentiality of the mediation proceedings, as such, is more difficult to legislate on. It might be more appropriate to

pursue that through self-regulation and the codes of conduct of the mediation associations. It is also an issue that is related to the legal culture of each member state. It relates to the responsibility of the mediator towards third parties and his risk of exposing himself to law suits and so on. It is important to take into account the fact that the position is quite different in the different member states.

11:15

Margaret Mitchell: Good morning, Mr Nielsen. My question is on the draft legislation, and it comes in three parts. First, when is the draft legislation on ADR expected? Secondly, if, after gathering evidence, the committee has some comments to make on the proposals contained in the green paper, will the Commission be prepared to consider those comments? Thirdly, if so, what will be the deadline for the submission of those comments to the Commission?

Henrik Neilsen: The presentation of the proposal has been preliminarily scheduled for the beginning of next year. We will try to proceed in as open a way as possible during the spring and will possibly consult again on a draft. However, that is not something that I can promise today—it depends on internal procedures.

We would be very happy to receive any comments that you would like to send. We are still open to input on the question of ADR and the proposal is far from finalised. It would be helpful to us if we could receive any comments before Christmas. We will then see, in the follow-up, how we can further involve interested parties, authorities and so on during the spring.

Margaret Mitchell: Thank you very much.

Bill Butler: Good morning, Mr Neilsen. Has work begun on the development of a European plan for best practice in mediation? If so, will the plan be consulted on and how will it be implemented?

Henrik Neilsen: That part of the follow-up to the green paper is initially focusing on the development of a European code of conduct for mediators. That will be what we usually call a question of self-regulation. The Commission's role is to try to bring together interested parties—in particular, mediators themselves, but also users of mediation and other legal professions—and to stimulate and facilitate the development of a common European code that can be adopted by the mediators in Europe. It is not a question of legislation of any kind.

We had our first meeting to launch the process in September, at which there was a good attendance from various associations, the legal professions, consumers, small and medium-sized enterprises, and so on, from different member states. We will continue to try to develop the first draft in as open a way as possible.

It is not the Commission's code, and we will not be in a position to monitor the implementation of such a code by each mediator in Europe. It will be for the mediators to take ownership of the code and ensure that it is properly implemented and widely used. It is hoped that it will be a means of raising quality standards in mediation and of increasing trust, especially in cross-border situations. That is the first step. We hope that we will produce something towards the middle of next year. We will then have to see whether we can follow that up with further initiatives, under the general umbrella of best-practice work, and plans to promote mediation.

Bill Butler: So, it will be a continuing process.

Henrik Neilsen: Yes, we hope so. The code is a kind of pilot project to check the interest of the mediators in becoming actively involved in the work and in coming together at a European level. If there is such interest and we can achieve some kind of result within a reasonable time period, follow-ups might include the development of a more detailed code for certain sectors and a reassessment of mediation rules. However, it is mainly up to the mediators to say what they would like to co-operate on and where they would like the help of the Commission as the facilitator in the process.

Bill Butler: Thank you very much.

The Convener: Can you tell us anything about the preparatory stages for the draft legislation? Are the main issues that you will look at likely to include improving quality, trust and possibly cross-border issues? You spoke about those issues earlier. Is your thinking at this stage going as far as compulsory mediation? If not, are we trying to draft legislation that aims to raise the subject as a bigger option for members of the European Community to use?

Henrik Nielsen: Yes. The legislative proposal forms the second action that we are pursuing. It should be seen in parallel with the development of the European code of conduct. In view of the comments that we had on the green paper, we believe that we need to be somewhat prudent in our preparation of the proposal. We are more likely to look at the kind of framework directive that could lead to a possible instrument. The instrument, which is not decided as yet, would set down the main principles—a minimum standard, if you like—for mediation in Europe.

You asked about the issues that might come up. That remains to be decided, but some of the core issues that we have in mind relate to the limitation

periods that I mentioned earlier. For example, the limitation periods would be interrupted when mediation is started. The second issue relates to a subject that we touched on earlier, which is the admissibility of evidence in subsequent civil proceedings.

As the convener rightly mentioned, the third issue is the question whether mediation should be compulsory. We have not taken a final position on that question as yet, but it might be said that we were going a little too far if we made mediation compulsory across the board. What we might consider is some kind of obligation that encourages or draws the attention of parties to the existence of mediation and the possibility of using it.

Various pilot projects have been carried out in the member states on how to encourage mediation, whether to make it compulsory, whether to have sanctions and so on. As the pilots are not fully evaluated as yet, we feel a little sceptical about launching something at European level at this stage that goes in that more regulatory, compulsory direction.

The fourth issue, which is one of the most difficult, has received a lot of attention. It is the question of enforcement of settlements that are reached in mediation in cross-border cases. As the committee might know, we have the so-called Brussels I regulation, which allows for the more or less automatic recognition and enforcement of judgments in civil cases between member states. Arbitration awards are covered by an international convention. However, settlements that are reached in mediation fall outside those instruments.

The European Parliament has drawn attention to that issue and asked whether a mediation settlement in a cross-border case should not also be easily recognised and enforced in the member state other than the one in which it was delivered. That question raises a number of quite tricky technical and legal issues. We are not sure how we will be able to solve them. As we are considering and analysing the replies at the moment, I cannot say whether that area will be included in the proposal.

To summarise, the issues relate in the main to the link between mediation and civil proceedings. One of the prime objectives of the proposal would be to facilitate or improve the articulation between mediation and civil proceedings so that one does not complicate the life of the other. It should be easy to have access to mediation and to the courts and, at the same time, to preserve and retain the full contractual freedom of the parties, which is another important element.

The Convener: Thank you. I think that it is fair to say that the Justice 1 Committee's interest lies in part in what you said about the admissibility of mediation in civil cases. At the moment, parties are able to enter voluntarily into family mediation, for instance. Contract law presides in those cases, but the outcome of the mediation is not binding in the courts. The very detailed area of law that you talked about would probably be of great interest to the committee in terms of the impact on Scottish law.

Michael Matheson: I want to pick up on an issue that has arisen in your responses. There is a tension between the idea of having unified regulation for the professional group involved in ADR and the idea of self-regulation. I welcome the idea of a European code, but I am concerned that, although those who work in the profession should adhere to the code, there will be no enforcement provisions. Some who work in the profession may seek to adhere strictly to the European code, while others might choose not to do so.

I am also concerned that if we try to establish a common agenda throughout member states, there may be great variances across borders in how professional groups in member states choose to adhere to the code. How can we overcome that problem? The area of work is growing and requires the establishment of a quality standard. People should have faith that the field will expand professionally and that those who work in it will be accredited.

Henrik Nielsen: That question goes right to the core issue that is at stake. With any self-regulation initiative, enforcement is always a difficulty. Self-regulation will always be weaker than legislation because it is not really in the public authorities' hands to enforce such a code. We will try to put a lot of emphasis on that issue when we meet the various associations. One way forward is to find out whether existing national associations could take on responsibility for monitoring individual mediators' or mediator firms' compliance with the code. A second way is to ensure publicity for those who adhere to the code but, at the same time, to check that they actually do so before they benefit from the publicity. That would provide enforcement, but also an incentive for mediators to adhere to the details of the code.

There are limits to how far we can go. Obviously, it would be difficult for the Commission to check the compliance of every mediator in Europe. As I said, the initiative is self-regulatory, so public authorities in member states might feel that they could play only a limited role. That is a clear weakness of that type of instrument, but, on the other hand, the code will cover issues that we feel that we cannot regulate, at least at a European level. A certain amount of flexibility and differences between member states—such as on training criteria, standards, ethical rules or

information on procedures—are required. The self-regulatory issue is probably the most important and difficult one and we will do what we can to reach a good result on it.

Michael Matheson: Some member states might be keen to have an umbrella body that would be responsible for enforcing a European code. Would any new legislation be undermined if the various mediation organisations in other member states were unable to come to an agreement on which umbrella organisation should be responsible for enforcing the code? Without such an organisation, there could be considerable differences in how member states make progress on the issue.

Henrik Nielsen: That is true and the situation that you describe is a likely outcome in the short term. Some member states lack an umbrella organisation. We need to see the issue from the starting point, which is that no European code exists today and that very few member states have national codes. If we take things little by little and gradually introduce the European code in member states, we will make progress. Indeed, we are making progress. In the medium term, if a few member states set an example by being at the forefront, introducing the code and showing the ways in which it can be used and the value of adopting and adhering to it, the code will reach all the other member states.

11:30

Mr Maxwell: I will follow on from Michael Matheson's question by highlighting the fact that a different type of tension exists. Although I am concerned about the possibility of compulsion, which we have already asked you about, I also have concerns about the tension between the desirability of using ADR and the desirability of establishing a legal precedent. For example, a tobacco company might be keen to use ADR if that prevents a legal precedent from being set in the courts. However, setting such a precedent might be highly desirable for society as a whole and for many people who are waiting to take similar cases to court. From your thinking on the matter and perhaps from responses that you have received, are you concerned that companies might use ADR as a way of exerting pressure on individuals to settle out of court, instead of allowing those people to get into court and giving them the chance to set a legal precedent that many other people could use to establish their rights in a particular area?

Henrik Nielsen: What you have said is true and it is why mediation and arbitration are commonly used in business relationships. Companies are attracted by the fact that the outcome is confidential, which, as you have rightly pointed out, also means that legal precedents are not set in the case law of the member state in question.

That said, I am not sure that we are so heavily concerned about that matter with regard to encouraging mediation, because we feel that mediation is a quicker and better way of resolving conflict. Indeed, most of the respondents to the green paper focused on the issue of conflict rather than on any detrimental effect on further legal developments. After all, any such effect probably exists already by the very fact that the standard contract—indeed, most business contracts—contains a clause on conflict resolution methods. Personally, I feel that any impact of encouraging further mediation is probably quite limited, although that situation will vary among the member states.

The Convener: This morning, we received an excellent presentation on the value of mediation. Although we found the presentation encouraging, an issue of concern that emerged was that of financial settlements obtained in mediation. I accept that other factors that do not necessarily apply in court encourage people to use mediation, such as the prospect of having a less damaging relationship with the other party and having a chance to face the other party on the other side of the table. However, I am concerned that a financial settlement as a result of mediation might be lower than it would be if the case had gone to court. In Scotland, 95 per cent or so of civil cases are settled before they reach court. Although that might seem to be a factor in favour of mediation, I suggest that a settlement has been reached in such cases because of an impending court date. If we remove that focus, will it be as easy to achieve through mediation the type of settlements that have been achieved through the court system?

Henrik Nielsen: That largely depends on the mediator's responsibility to explain to the parties the alternative that mediation represents and the potential differences between a mediation settlement and a court settlement. It also relates to the substance of any potential outcomes. The parties should be aware of those factors, as that will allow them to balance the pros and cons and the risks and possibilities of both approaches and to make a conscious choice about whether to proceed with mediation. Of course, that raises the argument that mediation should not be strictly compulsory, because parties should have the freedom to choose and to take all the issues into account.

The Convener: Could you summarise the European Parliament's view of ADR?

Henrik Nielsen: The Parliament adopted quite a careful approach. It thinks that the subject merits further study and there is an idea that the Commission should present yet another green paper to analyse the question further, to look into each issue in even more detail and to evaluate the

effects or impacts of various pilot projects in the member states.

We took note of that view, but we felt that the responses and the level of detail that we had received from the ADR green paper was sufficient to allow us to make an assessment. The overall issue is about whether to regulate, and what to regulate, and that is a matter of political choice. We do not think that a second green paper or further consultations will take us much further.

The details and detailed solutions remain to be seen, but we hope that we have sufficient information to make an assessment of what we could do at the European level and what solutions could be workable in the member states.

The Convener: I thank you for your time today and for inviting the committee to respond. You have suggested Christmas as a deadline. We might get an opportunity to meet you in the near future because our Parliamentary Bureau has agreed that the committee can have its requested visit to Brussels—this is the first time that committee members have heard that news. It is good news, because we would like to be a bit more involved in following the European Union's decision-making process. Perhaps we will let you know when we are about to come over so that we can meet. On behalf of the committee, I thank you very much for the valuable information that you have shared with us this morning.

Henrik Nielsen: It was my pleasure and I look forward to being in contact with you again.

The Convener: We have had two interesting sessions this morning on ADR. For the next few minutes, the committee should talk through some of the issues that we have heard about this morning and consider what our next steps might be.

I thought that the session with Mr Nielsen was very useful. From what he said, we can take it that there is no real view on mandatory regulation, but I think that the draft legislation will be quite strong on the admissibility of agreements in civil cases. There might also be some form of regulation on training, quality and the code of practice.

I invite members to comment and to consider what steps we should take after hearing this morning's evidence.

Margaret Mitchell: At the very least we should take up Mr Nielsen's invitation to respond to the proposals and go into the various points that we have raised about how far regulation goes and how the code of conduct will work. We should bring all that together and present it at Christmas. That might be simply a matter of picking up on the issues that we highlighted in our questions.

Margaret Smith: I have a point to make about the Executive's response, which is obviously part of the United Kingdom's response. The focus has been on family mediation. As someone who has used family mediation, I certainly support that system as a way forward for lots of people. However, the Scottish Executive does not seem to be saying anything specific about civil and commercial law. From what I can gather, there does not seem to be a great appetite for taking the legislative route, so we might have to find ways of encouraging that.

Professor Sturrock talked about the situation down south in the health service and in other Government departments and I would like to question the Executive about whether it is has plans to do anything similar in that respect. That would not require any legislation or anybody else to tell it what to do; it just seems to be common sense. I would like to question the Executive a little more on what it intends to do, irrespective of what anybody else might tell it to do.

Mr Maxwell: I support both those proposals. It would be good to question the Executive on its plans and I certainly think that we should make a submission about the concerns that have been raised and the questions that we have asked today, both to Professor Sturrock and to Mr Nielsen. I would like to express my concern, which I raised today with both those individuals, about the danger to legal precedent. A number of matters have to be addressed.

Although it seems clear that there is no great appetite among member states for mandatory regulation and legislation, I still have the impression that it has not been completely ruled out. We should therefore at the very least make our points to the Commission about that subject. It might also be interesting to get some broader information from other areas. In the light of Professor Sturrock's comments on England, it is important that we get more information on what is happening down south; we do not have enough information at the moment.

I would certainly be interested in getting a short briefing paper on some of the information that is coming out of the USA and Maryland in particular. I know that the judge in question was over in Scotland either earlier this year or late last year. I remember him being interviewed on the radio; he had some interesting comments to make at that time. Perhaps we could get some information on what people are doing there, because they are certainly at the cutting edge.

The Convener: John Sturrock has offered us the opportunity to go back and get more information, so we can certainly take up that offer.

Margaret, is there specific information that you want from the Executive, or are you just making

the general point that you want it to be more proactive?

Margaret Smith: I was just picking up on the fact that, from what we have heard this morning, there seems to be greater movement down south, where it seems that a more positive approach to the matter is being taken, not only by judges but by the Government and Government departments. In the health service alone, the amount of money and management time that is taken up with litigation and dealing with disputes is phenomenal. Anything that can improve that situation would be welcome, not only in terms of saving money, but in relation to improving people's relationships with the health service.

I have dealt with individuals, as I am sure most members have, who have had bad experiences of dealing with the health service when something has gone wrong. Not only is it difficult for people to know how to deal with that, but the process goes on for a prolonged period. We should encourage anything that can reduce that time and give people a sense that they have been able to address their problems, regardless of whether a financial settlement is involved. I wonder whether the Executive is looking at what is happening in the rest of the UK and deciding whether it will go down the route that we have heard is being pursued in England.

I have one other point about the submission relating to the pilot scheme at Edinburgh sheriff court. I would like to get some more information about that as well. I concur with the view that we should make a submission on the issue.

Michael Matheson: I think that we should make some kind of submission, although I am conscious that we have had very limited time to consider the matter in detail. There are two sides to the issue. Margaret Smith has highlighted a couple of issues about what the Scottish Executive is doing as things stand and about what we should be submitting in response to the green paper. To some degree, the question of being proactive with the Executive about how it is addressing the issue and the question of what we want to submit are slightly separate.

Given the expansion of mediation services, particularly in England, there must be some type of accreditation to give the public confidence that benchmarks are being established, so that people can have faith and trust in the system.

11:45

People also need some kind of recourse if they find themselves in difficulty and have been let down by someone who has engaged in some type of mediation service. However, I am conscious that heavy-handed regulation may not necessarily be the best way to go, given that the professional group involved is growing. Self-regulation may be the most appropriate route to follow.

It is interesting that there will be a common European code. It would be helpful to find out whether the Executive or the UK Government plans to bring together the profession in Scotland under an umbrella body that can take on the role of establishing benchmarks for the profession.

There are two aspects that I would mention. First, we should make a submission on the green paper, although in my view we have had limited time to consider the matter in great detail. Secondly, given that legislation will be introduced in some fashion, we should take up the issue with the Executive, which needs to consider what it will do here in Scotland. The Executive also needs to consider what other aspects of the Scottish justice system could be improved. For example, ADR seems to have been used only in a limited fashion in Glasgow sheriff court. We should ask what action is being taken to improve that.

The Convener: We will need to wind up our discussion, as we are due to leave the room.

Let me try to summarise what people have said. I take Michael Matheson's point about the shortness of the time scale. We are only beginning to formulate ideas, as opposed to coming to conclusions, but I do not see why we cannot at least present a paper on our initial thoughts and concerns. There is a consensus at least on issues such as the need for regulation—and that it should be of a mandatory nature—accreditation and training and on the need for an umbrella body. We could certainly put something together on that.

We could ask the Executive to comment on the point that Margaret Smith raised. A separate point about mediation is that, as John Sturrock said in his presentation, regardless of whether the European Union legislates, alternative dispute resolution seems like an exercise that is worth promoting. If we were to suggest that to the Executive, that would pick up Margaret Smith's point.

We also need information about family mediation and the legal position. I think that we know what the legal position is, but it would be useful if the Law Society of Scotland or the Faculty of Advocates could confirm it for us. It would also be useful to have the legal position on personal injury confirmed.

Mr Nielsen mentioned the Brussels I regulation. Up till now, most of what we have been dealing with in respect of that regulation relates to the cross-border enforcement of family law matters. I took what Mr Nielsen said as a bit of a hint about what might be happening because, from our previous discussions on parental responsibility, we

know that other member states have big concerns about the level of cross-border arrangements. Mr Nielsen specifically mentioned that. If we got the legal position, that would at least give us something to start from.

Margaret Mitchell: We have not had much time, but I think that there is a general feeling that we should promote education as opposed to heavy regulation. Starting in the schools and moving on into the courts, we need to increase awareness of the benefits of the system. Perhaps that could be one of the general thrusts of our submission.

The Convener: Okay. I am afraid that we have to leave matters there. Members can have a cup of tea or coffee now, after which we will reconvene in committee room 3.

11:48

Meeting suspended.

11:57

On resuming—

Parental Responsibility

The Convener: I convene what feels like part 3 of the Justice 1 Committee meeting, in committee room 3. We have three other items to complete this morning, and we come to item 2, which concerns a European regulation on parental responsibility. Committee members have in their papers a note that sets out the background to the regulation and will recall that we asked the Executive for a note on where we have ended up with it, consideration of which has now concluded.

I invite the committee to consider whether we wish to monitor the regulation's implementation. The only thing that struck me was that I am not sure where we stand in relation to the Hague convention, which was one of our concerns. However, no more change can take place because the regulation has been passed, although it might be worth while keeping a monitoring brief on the issue. Does anyone dissent from that?

Members: No.

The Convener: Michael Matheson has given me notice that he wants to mention a related matter on European scrutiny.

Michael Matheson: I was informed last week that the European Commission intends to publish early next year a green paper on justice and home affairs issues, which will probably have some domestic relevance to our justice system. There will be a six-month consultation on the green paper. I highlight the matter because it might be an opportunity for the committee to become involved in the process at the point of publication. My understanding is that, if we make a submission on a green paper, there is a possibility that the Commission might later seek further evidence if, in our response, we have highlighted issues on which it thinks that further evidence is needed.

Under item 1, we discussed a green paper that is already under consideration, and, under this item, we have discussed a regulation that has been passed and agreed by member states, but the green paper on justice and home affairs issues might give us an opportunity to get in right at the start of the process. Perhaps the clerks could look into what the green paper is about and the committee could then decide whether it would be worth while getting involved.

The Convener: Is the committee content at this stage to get a note on the paper to which Michael Matheson refers so that we know exactly what it is and what its contents are? We could make a separate decision once we have seen the note

about whether it would be useful to be involved at an earlier stage, which would give us more to do.

Bill Butler: That is reasonable. Perhaps we can then proceed in the way that Michael Matheson outlined. If we were able to do that, it would be fruitful for the committee. It seems to be the best first step.

Michael Matheson: I am sorry that I cannot give more details about what the paper is about. It was explained to me in a technical fashion that went over my head, but I was told that it affected Scots domestic law in some way.

The Convener: It was some paper somewhere—something to do with justice and home affairs. I am sure that the clerks will cope.

Michael Matheson: I have the name of the individual who will be dealing with the paper so I can pass that to the clerks if that would be helpful.

Bill Butler: I am sure that the clerks will be grateful for that.

The Convener: We receive a list of such papers, so perhaps we will be able to identify the paper from that.

Mainstreaming Equality

12:01

The Convener: We have a paper from the convener of the Equal Opportunities Committee about mainstreaming equalities in committees. The Equal Opportunities Committee has made a number of recommendations. Two members of that committee sit on our committee; we are grateful for that continuity. Does Margaret Smith or Marlyn Glen want to say something specific on the matter?

Margaret Smith: The matter has gone through Parliament and it has also been accepted by the Conveners Group. The paper proposes that we put some mainstreaming best practice into the on-going work of the committees. We do not want to add on equalities issues at the end of the process; they should be an integral part of the process. One of the things that we are asked to do in the guidelines from the previous Equal Opportunities Committee is to take equal opportunities into account in primary legislation and to ask whether bill sponsors—Executive or otherwise—have assessed the implications.

We must also consider the on-going work of the committee and how we work. We have to think about equal opportunities when we discuss whom we should take evidence from and how we should set up consultation events to ensure accessibility for various groups. The paper is intended to make us stop and ask ourselves those questions. People might immediately think that, in policy terms, equality is fundamentally about gender issues, but there are other areas to consider, particularly in relation to disabilities, age, sexual orientation, religious beliefs and race. We are dealing with a wide area.

No one on the Equal Opportunities Committee is expecting everyone on all of the committees to get this absolutely right from day one, but we hope that all the committees acknowledge that they will have to do their best to ensure that such issues are taken on board in their legislative scrutiny and working practices.

Marlyn Glen: Margaret Smith and I, as members of the Equal Opportunities Committee, are tuned into the issue, but that does not preclude other people from being tuned into it as well and I am sure that they are. It is important that responsibility for the issue is not left to members of the Equal Opportunities Committee but is mainstreamed into the work of both of the justice committees. I should say that I think that that is the case and I am quite impressed by that.

I hope that we can agree to the recommendations and ensure that they are taken on board.

The Convener: I have no difficulty with the recommendations, which seem simply to emphasise our role. It occurred to me that when most of us examine legislation, we genuinely try to do so with the various equality issues in mind. Similarly, we have always tried to ensure balance when calling witnesses to give evidence. However, the proposal takes that a stage further and asks us to analyse the steps that we have taken.

Are members happy with the recommendations from the Equal Opportunities Committee?

Members *indicated agreement.*

High Court of Justiciary

12:06

The Convener: The final item today concerns our visit to the High Court in Glasgow. A report will be produced, so those who could not manage to come on the visit will be able to find out what we learned. We picked up some useful information, particularly in relation to the Criminal Procedure (Amendment) (Scotland) Bill, which we will be scrutinising in the next few months.

Do members have any comments on the visit?

Marlyn Glen: I found it useful, especially as I am one of the members of the committee who does not have a background in law. There is a lot of information to take on board and seeing what happens in the High Court makes a difference. As on the previous visit, it was good to be able to talk to the judges. I was quite reassured by our discussions, particularly when the judges said that they agonise over decisions. Some people said that everyone knows that, but I am not sure that that is true. Our discussions made the situation seem much more personal and real.

In relation to what the convener was saying about the work that we will have to do on the subject of managing courts, I wondered whether our visit might have given us a false sense of security, because everyone seemed to be up front and was already doing what we were supposed to be asking them to do. At one point, I felt very reassured, and then I thought, "Hang on, perhaps I shouldn't be so reassured. Perhaps we should look at this more carefully". I think that there should be on-going monitoring of any issue, whether it relates to the European Union or equal opportunities. The monitoring of the management of the courts is important.

Michael Matheson: My initial understanding was that the purpose of the visit was to familiarise ourselves with the High Court. I know that I had to leave early, unfortunately, but I thought that the initial discussion got too bogged down in the Bonomy report. I felt that I was not as prepared for the discussion as I would have liked to have been and that having the discussion was possibly a little unfair to members of our committee who will be involved in the scrutiny of the relevant legislation and who would have benefited from the discussion but who were not there.

Although the visit was somewhat helpful, I think that we should have spent more time dealing with what happens in the court on a day-to-day basis and where the pressures are in the process. That would have given us more of an insight into the reasons for the changes that are recommended in the Bonomy report.

The Convener: That is a fair point in the sense that we found the visit interesting because we will consider the Criminal Procedure (Amendment) (Scotland) Bill, but I am sure that the Justice 2 Committee also found the visit interesting. It was clear that the people at the High Court are spending all their time considering the proposed changes. What struck me about the visit was the impressive level of detail that has been gone into in preparing for the legislation. However, as I commented during the visit, although we have been charged with considering the bill, there is still the small matter of the bill having to go through stages 1, 2 and 3 before any of the proposals can be implemented. I suppose that the people at the High Court are still engrossed in doing the hard work to see what is possible.

The visit was useful to our consideration of the bill, but I take the point about the day-to-day running of the court. The people at the High Court are not focused on how things are running at the moment, because they are assuming that everything will change.

I was struck by the disparity in the information that we were given. When we talked to officials about additional work for judges, they said that they have bid for two additional judges—which I presume would be temporary—in the first two years. Although there was some recognition of the additional work for judges, when we talked to Lord Abernethy later on, it became clear that judges might have a different view on the additional work load. That gives us food for thought. When we come to consider the bill, we should press a bit further on the extent of the additional work load for judges.

We got excellent figures on the number of cases, including the astonishing fact that, if certain categories of business were to be shifted from the High Court to the sheriff court—the categories of business that it is planned to move have already been worked out—six trials would be scheduled for the five courts that the High Court can use. I thought that that was astonishing, because it would mean that the likelihood of a trial proceeding would be greatly enhanced. Members will have the chance to see those figures in the written report, which I am sure we will be able to use in our consideration of the bill.

Our visit to the High Court was worthwhile. We have done very well in doing what we planned to do, which was to make a number of visits that related to different aspects of the criminal justice system. We have got much further than I thought we would be able to get by this stage, before having the legislation in front of us. We have a wee bit of reading to do. I appreciate that visits take up members' constituency time on Mondays and Fridays. I hope that members have found the process worthwhile.

Margaret Mitchell: My overall impression of the initial discussion was that the Scottish Court Service and the prosecution service are working together very closely, but I did not get the impression that the defence is in the loop, and that is a matter of concern. Many things were attributed to the defence not delivering on time, and although it was said that a three-way process is necessary, I did not see any evidence of the defence being represented.

The Convener: That is a valid point to note; it confirms that our decision to have two advisers was the right one. The briefing that we had the other day showed us the contrast in the advice that we will get from Christopher Gane and the advice that we will get from Paul Burns. Paul Burns has a lot of experience in the area of defence, so we will at least have the opportunity to press him on those points.

Members will get the written report in due course. If there are no further issues, I will close the meeting, but I ask members for 60 seconds of their time, to deal with an informal matter.

Meeting closed at 12:13.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Friday 21 November 2003

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75
Special issue price: £5
Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0870 606 5566 Fax 0870 606 5588

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0131 348 3415

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178