

## Holyrood sees the court alternatives

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LAST Thursday was a historic day in the Scottish Parliament. For the first time, MSPs devoted time to a debate on alternative dispute resolution, and, in particular, to arbitration and mediation.

Initially there was occasional hilarity and comment about the lack of interest which the subject matter of the debate might stimulate. However, by the end of the two-and-a-half-hour session, there seemed to be a real sense that members had identified a topic of value and potential. It was said by one speaker that the occasion had led to an unprecedented level of consensual discussion in the Parliament.

The Cabinet Minister for Justice, Kenny MacAskill, proposed the motion and set out plans for consultation on arbitration legislation and for an ADR Centre in Scotland. Although it had been conceived that the centre might focus on arbitration, it became clear that thinking has changed and that the plans will now include other forms of alternatives to court. It was pointed out that Scotland is a jurisdiction with a proud heritage and excellent legal system which could be attractive to others and that, if it became a jurisdiction of choice, that would bring economic benefits as well.

Speaker after speaker reiterated the importance of seeing court as a remedy of last resort, and of enabling people to resolve disputes themselves, in a time and cost effective way, by agreement wherever possible. Of course there would be occasions where parties should seek, and would need, a court decision. The government was asked if it would commit to using alternatives to court. In response, MacAskill recognised that, while there would be situations where court was necessary, wherever possible it was better for the government to discuss and negotiate.

Arbitration's privacy and greater informality were mentioned in its support. There seemed occasionally to be confusion in some MSPs' minds between arbitration and mediation, and the two expressions were used interchangeably at times. However, the point was expressed that the former involves a decision in an adversarial process and the latter an agreement in a consensual setting. Mention was also made of the role of statutory adjudication in construction matters.

Discussion ranged to counselling and the ombudsman, and there was much interest in family disputes and the need for social justice. Some members expanded the discussion to include alternatives to court in the criminal justice system. Reference was also made to Lord Gill's civil justice review, due to report in May 2009, and to the need for a system which is fit for purpose in the 21st century. MacAskill referred to the proposals for changes in the Sheriff Court Rules, made in 2006.

It was pointed out that the English civil justice system had undergone radical overhaul with the Woolf reforms some years ago, introducing pre-action protocols, judicial encouragement of mediation and financial sanctions if a party unreasonably refused to engage in mediation. MacAskill indicated a willingness to look south of the Border, and he was encouraged to look over the Atlantic to Maryland where a wide-ranging

state-wide adoption of mediation has been led by a prominent Chief Justice of the state.

This was a most encouraging debate. It might be useful for the Scottish Government now to examine trends elsewhere. It is said that we have entered a "post-litigation" era. Arbitration has been criticised in some jurisdictions because of its length and cost. Adjudication has lost some credibility among practitioners owing to the quality of some decision-making. The government may now wish to consider introducing a Mediation Act to support and encourage the use of this alternative in a structured and principled way.