

Changing system is an exciting project

BY JOHN STURROCK

THE consultation paper issued by the Scottish Civil Courts Review group chaired by Lord Gill offers a real opportunity to examine and influence how we do things in Scotland in civil dispute resolution.

Those who are interested have until 31 March to respond to the many questions posed in this wide-reaching document.

In considering the future, what principles could serve a modern system of dispute resolution and underscore a successful repositioning of Scotland as a world-class venue for the resolution of civil disputes?

Here are some ideas:

- private resolution of disputes by the parties themselves, either using their own resources (including advisers) or with the assistance of an appropriate third party, is generally to be preferred to a decision by a third party acting in an adjudicative role;
- generally, private resolution of disputes will be a matter for the parties – where it is appropriate, state resources should be directed to encourage such resolution rather than recourse to a court or other form of adjudication;
- courts should encourage the use of negotiation by parties and their advisers as the first and preferred method of resolving – or at least narrowing – disputes that come before them;
- whenever it seems that the assistance of a third party to facilitate negotiations may be useful to the parties in a court action, courts should encourage the use of mediation – if appropriate with an incentive that recognises the resource implications of an unreasonable failure to do so;
- generally, the court system should exist as a resource for situations where parties are unable to resolve matters for themselves or where issues of public importance require to be addressed by an appointed judge;
- in certain other situations, including where there is urgency or a need for an interim remedy, the decision of a court or other adjudicator may be necessary;

the court system should be efficient and designed to meet the needs of users, including expeditious resolution of disputes;

- the role of judges should be to adjudicate in situations where adjudication is necessary, and encourage the approaches outlined above;
- and the development of other techniques, including arbitration and early neutral evaluation, to assist parties to achieve resolution based on their mutual interests is desirable in a modern dispute resolution system.

These principles would enable a really first-class, properly resourced, independent court service to be developed for those cases where that is necessary.

Complementing that, the increased use of mediation and negotiation, consistent with the way in which lawyers in Scotland have traditionally tended to work, could ensure that a greater number of disputes are resolved earlier and by the parties themselves, returning the responsibility for deciding outcomes to those who are most affected by them. The senior US judge, Wayne Brazil, has described this as "democratising" the litigation system.

All of this recognises that the court system and negotiation and mediation are complementary and acknowledges the separate, valid and useful contribution which both the courts and mediation (together with other processes) can make in helping individuals, businesses and organisations to resolve disputes. Judges are increasingly inclined to mention the benefits of mediation to parties when cases are already in court. They are being mediated at all stages, from the moment of raising an action through to appeal. Often, lawyers and clients identify mediation as an alternative to using court at all and recognise it as more than a mere settlement tool, seeing it as a way to find constructive solutions to apparently intractable problems.

In this, the last of my monthly columns on the Law & Legal Affairs pages, I acknowledge supporters of mediation, including myself, have sometimes been perceived to be overenthusiastic about its benefits. I hope, as experience and use grows, greater maturity will allow us to work together to fashion the best and most practical system for our country. It is an exciting project.