

Different way of thinking isn't a threat to courts

JOHN STURROCK

ON THESE pages recently, Sheriffs Pyle and MacFadyen explained the benefits of the commercial court established in the Highlands.

They listed a number of changes, including mediation, which have occurred in recent years in commercial litigation and suggested that courts were being sidelined, because of the cost and delay involved. To address this, the sheriffs proposed that the legal system needed "an edge". This would come from judges "guiding parties to a resolution" and would differ from mediation because the parties would know the judge would be "the same person who will make a ruling if settlement is not achieved" - that being a "a powerful driver for early compromise".

It is good that the sheriffs are seeking to align Scottish courts with courts elsewhere to address modern business needs. However, reasserting the role of the courts may proceed upon misconceptions about the role of mediation with which it would be useful to wrestle, especially with the announcement by the justice minister of a wide-ranging review of the civil courts.

Mediation and courts can be viewed as complementary processes. Language, such as "alternative dispute resolution", and the evangelism of mediation's proponents, including myself, may have given the impression there must be a definitive choice between the two. However, mature consideration helps us see that mediation provides an opportunity, before proceeding through court, to extend the process of negotiation and enhance the prospect of an agreed, practical solution. These, and the preservation of business and personal relationships, are often just as important to people with disputes as the cost and time taken in court.

I hope the review will consider the place of courts in civil society. Most disputes are resolved by agreement, many without the intervention of lawyers at all, and many others even after a court case has begun. "Litigation should be the last resort," is a comment heard frequently from judges and others. That makes sense. The role of the court is to adjudicate when other means of resolution have failed. A fast-moving commercial court is a great asset in that situation, just as efficient courts are critical for those cases where a legal determination of rights or remedies is necessary or protection against harm is essential.

There may be an argument for taxpayers' resources to be reallocated to preventative approaches, providing encouragement to resolve claims and differences at an early stage. This is where the role of the independent mediator is an important feature in many countries, in what has been characterised as "post-litigation" culture, where the third party's role is to help people take responsibility to resolve their own disputes.

This leaves interesting questions about the judicial role and whether judges should actively promote themselves as mediators as well as adjudicators. Essential to mediation is the mediator's independence and non-judgemental role. Knowing a mediator will not express a view and is powerless to make a ruling strengthens mediation's effectiveness.

George Kerevan, writing about the costly and lengthy inquiry into the Beaulieu power line, suggested the solution lies in finding "some way of giving everyone a direct stake in the bargaining process".

We read that collaborative lawyering in family conflicts is designed to avoid courts. Today in Edinburgh, Michael Leathes, the former head of intellectual property at BAT, addresses business leaders on how to utilise mediation for creative conflict resolution.

These are all indications of a change in thinking that has prompted more than 75 leading mediators in the US to issue a statement urging community, national and global leaders to engage in effective negotiation and mediation approaches to resolve major problems in the world. This is not a challenge to the courts - rather it is a different way of doing things.